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

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

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

11 June 2024

Before:

MR JUSTICE LEECH

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B E T W E E N:

(1) ANTHONY JOHN WRIGHT AND GEOFFREY PAUL ROWLEY (LIQUIDATORS OF BHS GROUP LIMITED, SHB REALISATIONS LIMITED, DAVENBUSH LIMITED AND LOWLAND HOMES LIMITED (ALL IN LIQUIDATION)	**Applicants**
(2) BHS GROUP LIMITED (IN LIQUIDATION)	
(3) SHB REALISATIONS LIMITED (FORMERLY BHS LIMITED) (IN LIQUIDATION)	
(4) DAVENBUSH LIMITED (IN LIQUIDATION)	
(5) LOWLAND HOMES LIMITED (IN LIQUIDATION)	

– and –

(1) DOMINIC JOSEPH ANDREW CHAPPELL	**Respondents**
(2) LENNART DAVID HENNINGSON	
(3) DOMINIC LEONARD MARK CHANDLER	

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

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

MR DANIEL LIGHTMAN KC, MS CHARLOTTE BEYNON and **MR TIM BENHAM-MIRANDO** (instructed by **Olephant Solicitors**) appeared on behalf of the Third Respondent

Hearing dates: 6-10, 15-17, 20-24, 27-29 November 2023
4-8 December 2023
Judgment circulated 15 May 2024

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APPROVED JUDGMENT

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Mr Justice Leech:

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I. Introduction

A. Preliminary Matters

1. This is my reserved judgment after the trial of the claims brought by Mr Anthony Wright and Mr Geoffrey Rowley of FRP Advisory Trading Ltd (the "**Joint Liquidators**") together with certain of the companies of which they are joint liquidators against the Mr Lennart Henningson, the Second Respondent, and Mr Dominic Chandler, the Third Respondent. Mr Dominic Chappell, the First Respondent, did not participate in the trial

and is not bound by this judgment for reasons which I will explain. Mr Keith Smith, who was originally named as the Fourth Respondent, settled the Joint Liquidators' claims and played no part in the trial either.

2. Mr Joseph Curl KC and Mr Ryan Perkins represented the Joint Liquidators at trial instructed by Jones Day. Ms Lexa Hilliard KC and Ms Rachael Earle represented Mr Henningson instructed by Bark & Co and Mr Daniel Lightman KC, Ms Charlotte Beynon and Mr Tim Benham-Mirando represented Mr Chandler instructed by Olephant Solicitors ("**Olephant**"). I am grateful for the assistance which counsel and their teams gave me and where I refer to a submission or an argument advanced by leading counsel or by leading and junior counsel in this judgment, I do so as a form of shorthand and in the knowledge that those submissions were the product of the hard work and expertise of their entire teams.

3. Mr Chappell represented himself in person. Mr Adrian Ring, who was formerly a partner in Lawrence Stephens, and who is now a consultant at New Media Law LLP, represented or assisted Mr Chappell at various stages of the proceedings. Paul Schwartfeger of counsel appeared on his behalf for the adjournment application below and Mr Chappell himself briefly appeared at the trial in person.

4. The Joint Liquidators brought the claims on behalf of four companies in the British Home Stores Group (the "**BHS Group**"): British Home Stores Group Ltd ("**BHSGL**"), the holding company of the group, British Home Stores Ltd ("**BHSL**"), a subsidiary of BHSGL and the group's principal operating company, Davenbush Ltd ("**Davenbush**"), a direct subsidiary of BHSGL and fellow subsidiary of BHSL, and Lowland Homes Ltd ("**Lowland**"), a subsidiary of BHSL. I will refer to them collectively as the "**Companies**".

5. On 25 April 2016 all four Companies went into administration. On 2 December 2016 BHSL went into creditors' voluntary liquidation and the Joint Liquidators were appointed. It was renamed "SHB Realisations Limited" but I will continue to refer to it throughout this judgment as BHSL. On 15 and 16 January 2018 BHSGL, Davenbush and Lowland also went into creditors' voluntary liquidation and on 18 January 2018 the Joint Liquidators' appointment was filed at Companies House.

6. Mr Chappell, Mr Henningson and Mr Chandler were directors of all four Companies and took office after the acquisition of the BHS Group by Retail Acquisitions Ltd ("**RAL**"). On 11 March 2015 Mr Chappell and Mr Henningson were appointed as directors of all four. On 18 and 20 March 2015 Mr Chandler was appointed as a director of BHSGL and BHSL respectively and on 17 April 2015 he was appointed a director of both Davenbush and Lowland. On 18 March 2015 Mr Smith, who was Mr Chappell's uncle, was appointed a director of BHSGL but he did not hold the same office for any of the other three Companies. On 6 July 2016 Mr Chandler resigned as a director of all four Companies and on 8 September 2016 Mr Henningson also resigned. BHSGL had a fifth director, Mr Darren Topp, who was also a director and the CEO of BHSL. He gave evidence at the trial. But he was not a Respondent to the claims.

7. By Application Notice dated 11 December 2020 (the "**Application**") the Joint Liquidators commenced proceedings against the Respondents under section 212 ("**S.212**") and section 214 ("**S.214**") of the Insolvency Act 1986 (the "**IA 1986**"). They brought three categories of claim against Mr Henningson and Mr Chandler to which I will refer as the "**Wrongful Trading Claim**", the "**Trading Misfeasance Claim**" and the "**Individual Misfeasance Claims**". I will also use the term the "**Misfeasance Claims**" to describe the Trading Misfeasance Claim and the Individual Misfeasance Claims collectively. I briefly explain their nature before moving on to address certain procedural matters.

8. The Joint Liquidators alleged that from the date of the acquisition and their appointment Mr Chappell, Mr Henningson and Mr Chandler either knew or ought to have known that there was no reasonable prospect of avoiding insolvent liquidation. This allegation formed the basis for the Wrongful Trading Claim under S.214. It also formed the factual basis for the Trading Misfeasance Claim. In summary, the Joint Liquidators alleged that even if the Respondents were not liable for wrongful trading, they failed to consider the interests of the creditors and if they had done so, they would have immediately filed for administration. Finally, they made nine individual claims in relation to individual assets or funds of the Companies. The Individual Misfeasance Claims largely (although not entirely) explain why Lowland and Davenbush are parties to the Application.

9. By Order dated 22 February 2021 ICC Judge Barber gave directions for the service of Points of Claim, Points of Defence and Points of Reply and upon service of these

statements of case Mr Chandler applied to strike out parts of the Joint Liquidators' case by Application Notice dated 25 November 2021. Deputy ICC Judge Schaffer dismissed this application and Mr Chandler appealed against that decision.

10. On 19 August 2022 Edwin Johnson J allowed the appeal in part: see [2022] Bus LR 1510. He held that it was necessary for the Joint Liquidators to plead the alternative dates at which they alleged the Wrongful Trading Claim should be tested and also to plead causation and quantum in relation to each of those dates. He gave them an opportunity to amend or the claims would be struck out. He held, however, that the Court had a degree of flexibility in relation to the date or dates on which the Joint Liquidators had to prove that the directors had the requisite knowledge for the Wrongful Trading Claim. He stated this at [101]:

> "So far as the second question is concerned, the case law demonstrates that the court has a degree of flexibility, in terms of adherence to the pleaded date or dates on which the Knowledge Condition is said to have been satisfied. There is no hard and fast rule. Essentially the question is one for the trial judge, and ultimately depends upon what is fair to the parties. As both *In re Sherborne* and *In re Continental* demonstrate, there may be problems for a liquidator in relying upon an unspecified date or an unpleaded date, if the introduction of that date as the Knowledge Date will cause prejudice to the other party. In the present case, and by reference to both 17 April 2015 and the Alternative Dates, I understood both parties to accept that the trial judge would have some flexibility, if the trial judge was to consider that the Knowledge Condition was not satisfied on any of these particular dates, but was satisfied at a time falling around one of these particular dates. I use the deliberately vague expression "falling around one of these particular dates", because the availability and extent of this flexibility will be matters for the trial judge. It seems to me that I cannot and should not, at this stage of the action and in the context of the Strike-Out Application, make any decision in this respect."

11. On 30 June 2023 I heard the PTR. By this date the Joint Liquidators had settled with Mr Smith. The principal issues which I had to decide were whether to permit Mr Henningson to give evidence in Swedish and whether to order the preparation of a second joint statement between the expert accountants. By this time the Joint Liquidators had served Re-Amended Points of Claim identifying six knowledge dates (the "**Knowledge Dates**" or **"KD1**" to "**KD6**") on which they alleged that the Respondents had the requisite knowledge to fix them with liability under S.214. Those dates were 17 April 2015 ("**KD1**"), 6 May 2015 ("**KD2**"), 26 June 2015 ("**KD3**"), 13 July 2015 ("**KD4**"), 26 August 2015 ("**KD5**") and 8 September 2015 ("**KD6**").

12. By the date of trial Mr Henningson and Mr Chandler had answered this case in their Points of Defence and interrogated it thoroughly. The Joint Liquidators had re-amended to add further particulars of certain of the Individual Misfeasance Claims and re-re-amended the Points of Claim to reflect the fact that the expert accountants had agreed the increase in net deficiency in the assets of the Companies at each of the Knowledge Dates (to which I will refer as the "**IND**").

13. The authorities show that the starting point for assessing the liability of a director for wrongful trading is the increase in the net deficiency in the assets generated by continuing to trade from the date on which the "**Knowledge Condition**" (as Edwin Johnson J described it) is satisfied until the date on which the company goes into insolvent administration or liquidation. This makes perfect sense since it is the continuing trading which causes loss to the company's creditors as a class. In the present case, the experts were agreed that the consolidated IND of the four Companies between each of the Knowledge Dates and 25 April 2015 was as follows:

    (1) *KD1 (17 April 2015)*: £70.1 million;

    (2) *KD2 (6 May 2015)*: £103.7 million;

    (3) *KD3 (26 June 2015)*: £133.5 million;

    (4) *KD4 (13 July 2015)*: £118.5 million;

    (5) *KD5 (26 August 2015)*: £58 million; and

    (6) *KD6 (8 September 2015)*: £45.5 million.

14. The principal reason why these figures fluctuate is because of changes in the amount of the pensions deficit of the BHS Group (which involves complex, technical rules of valuation). In opening, Mr Curl provided the Court with additional figures which stripped out the pensions deficit. These showed that the IND between KD1 (17 April 2015) and 25 April 2016 was £140.1 million reducing to £76.5 million on KD6 (8 September 2015).

15. This seemed counter-intuitive to me when I saw the figures for the first time. But, as Mr Curl submitted, the trend is not difficult to understand with a little reflection. The increase in the deficiency reduced over time as the group liquidated its assets and used up the cash

which they generated in order to keep trading. As those assets were used up the deficiency itself increased but the amount of the IND reduced and narrowed as there were fewer and fewer assets left to realise. Mr Curl also submitted that it was highly unusual for parties to agree the IND for a wrongful trading claim:

> "It is probably unprecedented for IND figures to be agreed in a wrongful trading claim. The quantum of the IND is usually a major point of contention between the parties, since the existence of a large IND, particularly over an extended period of many months, is extremely problematic for anyone seeking to defend a wrongful trading claim. This remarkable position has arisen because the accountancy expert instructed by the Second and Third Respondents (Mr Pilgrem) has been forced to accept that there was a very substantial increase in the net deficiency from each Knowledge Date until the date of administration."

16. Ms Hilliard took issue with this submission on the basis that the essence of a wrongful trading claim is knowledge. But she did not suggest that Mr Curl was wrong in practice. My own analysis of the authorities supports Mr Curl's submission. The Court has often dismissed wrongful trading claims not only because the directors did not have the requisite knowledge but also because the liquidator has been unable to prove that there was any IND: see, e.g., *Re Ralls Builders Ltd* [2016] Bus LR 555 at [268] (Snowden J). The Court may be prepared to adopt another measure where the directors' own record keeping has made it impossible for the liquidator to calculate the IND: see *Brooks v Armstrong* [2017] BCC 99 at [67] to [74] (David Foxton QC). But in some cases the liquidator and his or her advisers have simply failed to appreciate the complexity of proving that there was any IND. This was not the case here.

17. I therefore started the trial on the basis that the Respondents had a case to answer because their stewardship of the BHS Group's assets had resulted in an IND of £140.1 million over just one year ignoring the pension deficit (or £70.1 million if one adjusts for the deficit). Put another way, if the directors had resolved to put the Companies into administration on KD1 there would have been £140.1 million (or £70.1 million) more in assets or cash to meet the claims of creditors. It was incumbent on the directors, therefore, to offer some explanation. On the other hand, I had to approach the evaluation of their evidence without hindsight or any regard to the ultimate outcome.

B. Procedural Matters

(1) Mr Chappell

18. Mr Chappell was not legally represented before me at the PTR and he did not appear on the first day of the trial. Mr Ring provided him with some assistance (although he was not on the record) and on 10 November 2023 he applied to adjourn the claims against him for six months (although not the trial itself). I took the unusual step of severing the claims against him and the claims against Mr Henningson and Mr Chandler. Ms Hilliard and Mr Lightman both supported this case management decision and Mr Curl did not oppose it. His main concern was to preserve the trial date. I set out the procedural background and the reasons for my decision in my judgment: see [2023] EWHC 2873 (Ch).

19. The principal consequence of this decision was that I had to make findings in relation to the conduct of Mr Henningson and Mr Chandler which were not binding on Mr Chappell and in his absence. In this judgment, I have tried to avoid making findings of fact against him unless they are necessary to my findings in relation to Mr Henningson and Mr Chandler. I stress that where I have made findings in relation to Mr Chappell's conduct, they are not binding on him.

(2) Mr Henningson

20. Mr Henningson made two witness statements in Swedish dated 24 January 2023 ("**Henningson 1**") and 1 August 2023 ("**Henningson 2**") which were then translated into English. On 30 June 2023 I directed that he should be permitted to call a native speaker to assist him in giving evidence. By letter dated 11 October 2023 Bark & Co wrote to Jones Day stating that Mr Henningson was receiving treatment for cancer and enclosing a very brief report from his GP's surgery stating that on 29 August 2023 he had undergone surgery for cancer and was scheduled to be treated with chemotherapy in the autumn and also two social insurance agency medical certificates one of which confirmed a diagnosis of metastatic colorectal cancer. By letter dated 12 October 2023 Jones Day replied offering their sympathy but making it clear that they challenged the veracity of his evidence.

21. In the event, Mr Henningson did not give evidence in person or remotely. Ms Hilliard did not apply to adduce any expert medical evidence to establish that Mr Henningson was unfit to give evidence or to do so with reasonable adjustments. Nor did she suggest

that Mr Henningson was incompetent to give evidence because, in that event, his witness statements would not have been admissible at all: see section 5(1) of the Civil Evidence Act 1995. In those circumstances, Mr Curl submitted that it was regrettable that Mr Henningson was not prepared to give evidence and that little or no weight should be attached to Henningson 1 and Henningson 2.

22. I accept that Mr Henningson has had cancer and that he was (and, perhaps, still is) undergoing a course of chemotherapy. Although the medical evidence which Bark & Co sent to Jones Day was thin, I was not prepared to draw the inference that Mr Henningson chose not to give evidence or to draw any further inferences from his failure to do so. I had to decide, therefore, what weight to attach to Henningson 1 and Henningson 2 in the light of the contemporaneous documents and the inherent probabilities. I address this in section III (below).

(3) Pleading Points

23. By the trial the Joint Liquidators had served Re-Re-Amended Points of Claim (the "**Points of Claim**") on 18 September 2023. Mr Chappell had served a three page document which stood as his Points of Defence and Mr Chandler and Mr Henningson had served Amended Points of Defence ("**Points of Defence**") on 3 October 2023 and 10 October 2023 respectively. The Respondents advanced a number of pleading points in opening. In particular, Mr Lightman and his team took a number of points in relation to the way in which the Misfeasance Claims were pleaded. They also took a number of points during the trial about the way in which Mr Curl had put his case to Mr Chandler.

24. For the purposes of closing submissions I invited the parties to focus on the oral evidence and to identify the key passages in the transcripts upon which they relied and the findings of fact which they asked the Court to make. In their written closing submissions dated 4 December 2023 Mr Curl and Mr Perkins accepted my invitation. However, Ms Hilliard and Mr Lightman and their respective teams took a root and branch objection to the way in which the Joint Liquidators had presented their case and submitted that it was not their pleaded case. For their oral closing submissions Ms Hilliard and Ms Earle also produced a document headed "Pleading knowledge: JL's pleading vs. JL's closing" in which they compared the Joint Liquidators' pleaded case with their written closing submissions which had focussed on Mr Chandler's knowledge. They submitted that I should strike

through virtually the entirety of the Joint Liquidators' closing submissions and that they had failed to prove most of the other allegations.

25. In summary, both Ms Hilliard and Mr Lightman submitted that Mr Curl had put an unpleaded case of dishonesty to Mr Chandler and that his questioning of Mr Chandler was unfair. In particular, Mr Lightman submitted that Mr Curl had suggested to Mr Chandler that he deliberately mislead the BHS Group's creditors and that his evidence was designed to mislead the Court. I invited Ms Hilliard and Mr Lightman to address me on whether I should dismiss the entire claim on the basis that the Joint Liquidators had advanced a different case from the one which they had pleaded. But they did not submit that I should do so. The position which I reached with counsel in closing submissions is probably best reflected in the transcript of Day 20. Mr Hilliard cited a number of passages from the judgment of Park J in *Re Continental Assurance Co of London plc (No 4)* [2007] 2 BCLC 287. The following exchanges then took place:

> "MR JUSTICE LEECH: I mean, if you look at the length that Mr Justice Park has to -- has gone to, that's exactly what I'm going to have to do in my judgment. MS HILLIARD: Well, my Lord, you wouldn't have had to have done it if the liquidators had not, in their closing submissions, introduced -- and this is absolutely key -- introduced 59 -- 53 new allegations of knowledge. That's the key. Because this claim is all about what the directors knew or ought to have known in -- that's what -- that's what, if you like, controls the cause of action. MR JUSTICE LEECH: But when I've looked very closely at some of them I can see -- I can see it's actually not as clear cut as that. And when Mr Lightman got up to -- to address me yesterday, he said I've just got to disregard effectively the meat -- what I had asked Mr -- Mr Curl and, indeed, you to do was to present me with the key findings -- you know, the -- address me on the key findings of fact I had to make in what is not an easy case. MS HILLIARD: No. MR JUSTICE LEECH: And the evidence on which I was to decide this. So Mr Curl did that. He produced -- and now it's clear that the -- in a lot of cases, the individual knowledge elements of his -- his -- the individual – what you call the individual new allegations are actually wrapped up in a key part of the pleadings. They're not in exactly the same form. I take that. So what I'm going to have to do is to go away -- he's been given fair warning of the ones that -- and I want him to address me about them tomorrow. But I'm just going to have to do is go away and go through the same sort of exercise -- exactly the same sort of exercise that Mr Justice Park has done in Continental and in a much more complicated case. He's getting all worked up about an increase of nine pages in a 32-page pleading. MS HILLIARD: I know. MR JUSTICE LEECH: We've got 100-odd pages. No doubt if it had run to 300 you would have been complaining about that too. I mean, it cuts both ways -- MS HILLIARD: I understand that."

> "MR JUSTICE LEECH: And so it's -- that's the difficulty I'm having at the moment. It's not that you're not entitled to take pleadings points or that I don't accept the principles. I do. The problem is I'm going to have to go away and, in relation to every single allegation, in relation to the knowledge point, I'm going to have to look exclusively -- I'm going to have to look, very, carefully, at what they've pleaded, what I can reasonably treat as being within that. MS HILLIARD: Yes. MR JUSTICE LEECH: And I'm going to look at what the evidence on those issues is. MS HILLIARD: Yes. MR JUSTICE LEECH: That's a big task; and I'm just going to have to go away and do it. And what little help you can give me between now and the time that Mr Curl gets up in relation to the evidence is what's going to help me most. And the real -- I understand all of this. And I'm going to try the case on the pleadings. But the enormity of what I was faced with -- which is why I'm saying: what, are you just simply saying that I should non-suit the claimant? MS HILLIARD: No, I'm not saying -- because -- no, I'm not saying -- MR JUSTICE LEECH: In which case, at the centre of this are some core allegations which you've got to address, but I'm still -- MS HILLIARD: Which we have done; and what I wanted to say is what we have done -- MR JUSTICE LEECH: Can we get on to that then? MS HILLIARD: What we have done, from paragraphs 106 onwards -- I've got about three extras that were left out, but what we have done from paragraphs 106 -- MR JUSTICE LEECH: Is to address the pleaded case and the evidence on it. MS HILLIARD: Is to address the pleading and the evidence that -- what we rely on."

26. In the absence of any agreement about either the issues or the evidence which was properly relevant and admissible to decide them, I concluded that the only fair and practical way in which I could address Ms Hilliard's and Mr Lightman's pleading point was to make findings of knowledge on only those allegations which the Joint Liquidators had expressly advanced in the Points of Claim. In section V (below) I quote each allegation from the Points of Claim in turn, I then set out the evidence which I consider to be relevant and admissible on that issue and finally I make the findings of fact upon which I rely in determining the Wrongful Trading Claim in section VI and the Misfeasance Claims in section VII. This has necessarily increased the length of this judgment and involved some repetition.

27. The question whether Mr Chandler misled creditors arose out of the company voluntary arrangement ("**CVA**") which the BHS Group's creditors approved at a meeting of creditors on 23 March 2016 (the "**Creditors Meeting**") shortly before it went into administration. The Joint Liquidators did not rely on the CVA themselves. On the contrary, in their opening submissions Ms Hilliard and Mr Lightman placed strong reliance on the CVA on the basis that it was reasonable for the directors to believe that

the BHS Group would avoid insolvent administration or liquidation at all of the Knowledge Dates if they were able to put in place a CVA as late as the end of March 2016.

28. The Joint Liquidators had a number of answers to that point. But one of the answers was that the creditors were misled at the Creditors Meeting. Mr Curl submitted, therefore, that it was open to him to cross-examine Mr Chandler on this basis. During Mr Lightman's oral submissions I suggested that it would be unnecessary for me to decide whether Mr Chandler misled creditors if he no longer relied on the CVA and Mr Lightman agreed. However, Ms Hilliard, who followed him, did not agree with Mr Lightman and continued to place great emphasis on the CVA. It remained necessary, therefore, for me to make detailed findings in relation to the CVA. However, in making an overall determination, it was not necessary for me to decide whether Mr Chandler deliberately misled the BHS Group's creditors. I have also discounted his evidence in relation to this issue in assessing Mr Chandler's credibility.

(4) The Carlwood Payment

29. On 28 May 2015 Carlwood Capital SA ("**Carlwood**") issued an invoice (the "**Carlwood Invoice**") to a company called Allied Commercial Exporters Ltd ("**ACE**") and on 19 June 2015 ACE gave instructions to HSBC to make a payment of £300,00 into the account at SEB Stockholm identified on the invoice (the "**Carlwood Payment**"). The Joint Liquidators allege that this was a secret commission which ACE paid to Mr Henningson. I address the law in section IV and the substantive allegations in section VI (below). In their written closing submissions Ms Hilliard and Ms Earle submitted that the Joint Liquidators deliberately withheld the invoice and payment instruction from Mr Henningson in breach of CPR Part 31.11(2):

> "175. Such conduct is not only a breach of CPR 31.11(2) (if documents to which the duty of ongoing disclosure applies come to a party's notice at any time during the proceedings, he must immediately notify every other party) it is also inexcusable for JD to write that that the documents had been provided to the JLs/JD after Mr Henningson's evidence was served when they quite clearly had not been. 176. The inescapable inference is that JD/the JLs took the tactical decision to hold back from disclosing these two documents so that they could see what Mr Henningson said in his witness evidence and then ambush Mr Henningson with them. That is reprehensible conduct and unworthy of licensed insolvency practitioners and their lawyers. It is a factor that the Court should take into account in

> considering what weight to give to those documents and whether the JLs have discharged the burden of proof. If the JLs' have a strong case why play tactical and unfair games?"

30. Ms Hilliard repeated this submission orally and she invited me to read all of the relevant correspondence. Following the conclusion of the trial, however, the issue was resolved. Mr Henningson accepted that the Joint Liquidators and Jones Day had not withheld disclosure of the Carlwood Invoice and payment instruction until after he had served his witness evidence and the allegation that the Joint Liquidators and Jones Day had engaged in reprehensible conduct by withholding the documents was expressly withdrawn. I am grateful to the parties that they were able to resolve this issue and I express no further views about it.

II. The Facts

C. Background

(1) The BHS Group

31. I begin with a brief description of British Home Stores ("**BHS**") which I have largely taken from the CVA Proposal (below). In 2015 BHS was a household name. Its primary activity was the retail of clothing, homeware, lighting and furniture in the UK and it employed about 11,500 people. The BHS brand had been established in 1928 and was one of the UK s most recognised brand names. In 2015 the BHS Group performed on average 1 million transactions a week across 164 stores and 67 franchise stores in 16 countries. BHSL also managed the international franchising operations and operated UK retail outlets through a network of premier high street and shopping malls, together with an online platform. However, over the previous decade the profitability of the BHS Group had declined. The retail market had become more competitive with the growth of value retailers such as Primark and supermarkets introducing clothing. BHS had also struggled to respond to changing consumer behaviours and did not capitalise on the growing trends of digital sales and retail park-based shopping.

32. The BHS Group had been very successful under the ownership of Taveta and BHSGL had made operating profits of £99 million, £104 million and £89 million in the financial years 2003, 2004 and 2005. However, between 2009 and 2014 BHSL had made losses every year and by the date of sale it had a cumulative operating loss of £442 million.

Management were optimistic, however, that they could turn the business around. Mr Richard Price, who was then the managing director, told the Work and Pensions Committee and the Business Innovation and Skills Committee (the "**Select Committee**"), which conducted an investigation and prepared a report after the collapse of the group that in 2013 and 2014 there had been like for like growth for the first time in eight years.

33. Before 11 March 2015 the BHS Group was owned by the Taveta group of companies which were associated with Sir Philip Green and his wife Lady Christina or "Tina" Green. Taveta Investments (No 2) Ltd ("**Taveta**") was the owner of the entire issued share capital of BHSGL. It also held the entire issued share capital of Arcadia Group Ltd ("**Arcadia**") which owned and traded brands such as Topman, Topshop, Burton and Miss Selfridge. By 11 March 2015 Taveta had provided £256 million of support to the BHS Group and £72 million in the preceding seven months. Although Arcadia had a number of separate businesses it provided the finance function and senior management to the BHS Group (and charged management fees for these services).

(2) The Pension Schemes

34. BHSL was the sponsoring employer of two defined benefit pension schemes (the "**Schemes**"). The first was the BHS Pension Scheme (the "**Main Scheme**"), which had 20,462 members, and the second was the BHS Senior Management Scheme (the "**Senior Scheme**"), which had 233 members. Davenbush was a guarantor of both Schemes. Trustees of defined benefit pension schemes are required (subject to limited exceptions) to complete a triennial valuation of scheme assets and liabilities (the "**Triennial Valuation**") and have a period of 15 months after the valuation date to complete and approve the valuation, agree the schedule of contributions and, if the scheme is in deficit, submit a recovery plan to the Pensions Regulator.

35. As Mr Lightman and his team pointed out in their opening submissions, the obligation to pay members under the Schemes rested with the Trustees and not with BHSL itself. BHSL's legal liability was limited to making agreed annual contributions to the Schemes. Section 75 of the Pensions Act 1995 ("**S.75**") provided that if a "relevant event" occurred, then BHSL would have become liable in debt for the entire deficit. This included an "insolvency event". I will describe this as the "**S.75 Debt**" and it was calculated as the

amount of money estimated by the scheme actuary to be required to secure the Schemes' liabilities by purchasing life assurance annuities for each member of the scheme to pay their benefits in full.

36. The 2012 Triennial Valuation had disclosed a combined funding deficit for both Schemes of £253.2 million on a "PPF basis", £232.5 million on an "ongoing basis" and £514.5 million on a "buy-out" basis. The "PPF basis" involved a valuation using the prescribed methodology of the Pension Protection Fund ("**PPF**") under section 179 of the Pensions Act 2004 (the "**PA 2004**"). The "ongoing basis" involved a valuation based on a set of assumptions used to determine the Schemes accrued liabilities assuming they continued to operate on an ongoing basis. Finally, the "buyout basis" involved a valuation based on a set of assumptions used to estimate the cost of securing the Schemes' pension benefit in full by purchasing annuities with an insurance company.

37. On 3 September 2013 the trustees of the Schemes (the "**Trustees**") agreed a recovery plan ("**Recovery Plan**") for each of the Schemes with Mr Paul Budge, the finance director of BHSL, by which BHSL agreed to pay an annual contribution of £10 million to the Schemes from 1 September 2013 until 30 April 2036 of which £9.5 million was to be paid to the Main Scheme and £0.5 million to the Senior Scheme. These contributions are variously described in the contemporaneous documents as "**Annual Contributions**" or "**Deficit Repair Contributions**" or "**DRCs**". These contributions were to be reviewed as part of the Triennial Valuation process which had to be completed and agreed by 30 June 2016.

38. On 5 July 2013 Baker Tilly Tax and Advisory Services LLP produced a report which gave a negative assessment of BHSL's ability to fund the Schemes. On 23 June 2016 Ms Margaret Downes, the former chair of the Trustees, wrote to the Select Committee giving her assessment of Baker Tilly's advice which was that BHSL was unable to pay higher Annual Contributions than the £10 million which it was already paying into the Schemes. On 31 December 2013 Ms Downes retired and from 1 January 2014 Independent Trustee Services Ltd ("**ITS**") became the corporate Trustee of each Scheme. Mr Christopher Martin was the Executive Chair of ITS and for ease of reference I will refer to the board of directors of ITS as the "**Trustees**" and Mr Martin as the chair of the Trustees. The Trustees were advised by KPMG LLP ("**KPMG**") and Eversheds LLP ("**Eversheds**").

(3) Project Thor

39. In January 2014 Taveta instructed Deloitte LLP ("**Deloitte**") to advise it in relation to restructuring the Schemes under the code name "**Project Thor**". The legal mechanism for restructuring such a scheme was a regulated apportionment arrangement ("**RAA**") under Reg 7 of the Occupational Pension Schemes (Employer Debt) Regulations 2005. In a report dated June 2017 the Pensions Regulator issued a regulatory intervention report under section 89 of the PA 2004 describing what action it had taken in relation to the Schemes (the "**TPR Intervention Report**"). I set out some of the narrative and findings below. But for present purposes, it contains a useful introduction to the statutory framework:

> "While the best security for a DB pension scheme is a strong, ongoing sponsoring employer, we recognise that in some situations this support may no longer be available, if an employer is at serious risk of insolvency. Where this is the case, it is important for employers, trustees and their respective advisers to explore the available options for the pension scheme. One such option, which offers an outcome other than insolvency for the employer, is a Regulated Apportionment Arrangement (RAA). In the Project Thor proposal, members would be given the opportunity to transfer to a new scheme with the existing schemes going into the PPF, while allowing the sponsoring employer to continue in business and to support the new scheme. RAAs are rare and must be approved by TPR. The PPF must also confirm it does not object. The continuation of a scheme (whether the existing scheme or a new scheme) following a RAA is even less common."

40. Both parties took me through the history of Project Thor in some detail in their written opening submissions and I read the relevant documents. It is unnecessary for me to set out the precise proposals which Sir Philip Green and his advisers debated other than to state that Deloitte originally calculated that it would require BHSL to make a contribution of £54 million to the new scheme and that the Trustees were also supportive of the restructuring of the Schemes. It was also necessary for Taveta to obtain clearance from the Pensions Regulator and before it would have given clearance for an RAA it would have been necessary for BHSL to establish that insolvency was inevitable. In practice, this meant that Taveta or Arcadia would have to provide the additional funding of £54 million.

41. Sir Philip Green was not personally liable for the pensions deficit. Nor were Taveta or Arcadia. Indeed, BHSL was not immediately liable to pay more than its Annual

Contributions unless an insolvency event occurred under S.75. However, the Pensions Regulator had what were described as "moral hazard" powers under which it could require individuals and entities to contribute to an under-funded scheme. The benefit to Sir Philip Green, therefore, of BHSL entering into an RAA with the Trustees was that he, Taveta and Arcadia would be released from any risk that the Pensions Regulator would exercise those powers. In the TPR Intervention Report the authors described those powers as follows:

> "**Moral hazard assessment**
>
> When considering whether a better outcome for the scheme might be obtained by means other than a RAA, we will examine whether any of our other powers could be used. For example, we have power under the Pensions Act 2004 to issue either a CN or FSD, which are often referred to as our avoidance or moral hazard powers. We ask the trustees to conduct their own moral hazard assessment to consider whether, in their view, our avoidance powers could be used.
>
> **Anti-embarrassment assessment**
>
> The PPF has its own criteria for assessing whether it would object to a RAA proposal, which includes the PPF being given an equity stake in the surviving restructured company. This is a form of anti-embarrassment protection to make sure that, where the PPF has taken on a scheme from a company with a large pension liability, the PPF won't lose out if the restructured company goes on to become profitable as a result of being released from its pension obligations. The PPF will generally seek at least 10% equity in the restructured company for the scheme if the future shareholders are not currently involved with the company. It will seek at least 33% if the future shareholders are parties currently involved with the business."
>
> "**Anti-avoidance powers**
>
> We have power under the Pensions Act 2004 to issue a CN under sections 38 and 47 and/or a FSD under section 43, which are often referred to as our anti-avoidance or moral hazard powers.
>
> **Contribution notice**
>
> A CN requires a cash payment to be made to a scheme (or, in some circumstances, to the PPF by the respondent(s), which might be the scheme's sponsoring employer or a person(s) connected to or associated with the employer (including individuals). A CN creates a debt due from the respondent(s) to the trustees or managers of the scheme, payment of which can be enforced by those trustees or managers (or the PPF, where the scheme is in PPF assessment). Alternatively we may enforce on their behalf. In order for a CN to be issued under section 38 of the Pensions Act 2004, we must be of the opinion that the respondent(s) was party to an act, or failure to act, which either meets the main purpose test or the material detriment test.

> The main purpose test is that one of the main purposes of the act (or failure to act) was either (a) to prevent the recovery of all or part of a debt due to the scheme under section 75 of the Pensions Act 1995, or (b) to prevent such a debt from becoming due. The material detriment test is met where we are of the opinion that the act or failure has detrimentally affected in a material way the likelihood of accrued scheme benefits being received by or in respect of members. We must also be of the opinion that it is reasonable to require the respondent(s) to pay the sum specified in the contribution notice. This will include, where relevant, consideration of issues such as the degree of involvement of the respondent(s) in the act or failure to act; the relationship the respondent(s) had with the employer; and the value of benefits which the respondent(s) receives or is entitled to receive from the employer.
>
> We can initiate our Warning Notice procedure seeking a CN up to six years after the act in question occurred. A CN may also be issued under section 47 of the Pensions Act 2004 following non-compliance with a FSD.
>
> **Financial support direction**
>
> A FSD requires financial support for a scheme to be put in place by the respondent(s). If a FSD is issued by the PR, the form and amount of any financial support will then need to be proposed by the respondent(s) concerned and approved by us. If we do not approve the financial support offered, then the law allows us to take further action to impose a CN under section 47 of the Pensions Act 2004 to require specified support to be put in place. As with CNs, the respondent(s) can be the scheme's sponsoring employer or a person(s) connected to or associated with the employer. In contrast to CNs, FSDs can only be issued to individuals in specific limited circumstances.
>
> In order for a FSD to be issued, we must be of the opinion that the scheme's employer was either (a) a service company or (b) insufficiently resourced, at a time chosen by TPR (referred to as the relevant time). Being insufficiently resourced requires that an employer's resources are valued at less than 50% of its estimated section 75 debt to the scheme at the relevant time, and that there is an associated or connected entity (or entities) that have sufficient value to make up the difference. The respondent(s) must have been either an employer in relation to the scheme or a person connected to or associated with the employer as at the relevant time."

42. By email dated 28 August 2014 Arcadia's general counsel, Mr Adam Goldman, wrote to Mr Budge after a call with the Pensions Regulator. It is clear that the Pensions Regulator had asked a number of very searching questions about Project Thor and was concerned that Arcadia might attempt to "cram down" the BHS Group's creditors by a CVA. He also stated that the Pensions Regulator "would be asking KPMG to look at whether a better outcome could be achieved through use of moral hazard powers". Mr Martin confirmed in his first witness statement dated 16 January 2023 ("**Martin 1**") that

the Pensions Regulator wanted to receive information from Sir Philip Green, Arcadia and Taveta which would allow it to conduct a moral hazard review including an examination of prior transactions and dividend payments.

43. The Pensions Regulator also had information gathering powers. Section 72 of the PA 2004 ("**S.72**") gave the Pensions Regulator a wide-reaching power to require the disclosure of information or documents which were relevant to the exercise of its functions. Failure to comply with a S.72 request was a criminal offence. It is one of the striking features of this case that the Pensions Regulator did not look favourably on the sale to RAL and exercised its power under S.72 almost immediately after the sale.

44. In autumn 2014 Taveta decided to put Project Thor on hold and on 3 October 2014 the draft clearance application was withdrawn. By email dated 15 September 2014 Mr Martin wrote to Mr Budge expressing disappointment and confirming that the Trustees recognised the need for change whether this was Project Thor or some other form of restructuring. It is unnecessary for me to speculate about why Sir Philip Green put Project Thor on hold but one reason may have been changes in market conditions and gilt yields which meant that the contribution which Taveta or Arcadia would have to make to the Schemes had now increased. By email dated 7 January 2015 Mr Budge wrote to Sir Philip Green stating that Deloitte now advised that £97 million was required to secure full funding of the Schemes.

(4) Project Albion

45. In April 2013 Sir Philip Green began to make sustained efforts to sell the BHS Group. Ms Robin Saunders, a high profile entrepreneur, introduced him to Mr Paul Sutton as a potential purchaser and on 16 July 2013 a business plan was prepared using the code name "**Project Albion**". Mr Sutton had a chequered history. In 1982 he was made bankrupt and his discharge was suspended for over 10 years because of his failure to cooperate with his trustee in bankruptcy. In 2000 he was adjudicated bankrupt in France for 15 years for his role in a transaction involving the Anglo-Irish Bank and in 2002 a French Court found him guilty of fraud and sentenced him to three years imprisonment (although Mr Sutton successfully resisted extradition to France on the basis that he had not been duly notified of the proceedings). On 10 February 2014 he was adjudicated bankrupt for a second time in England.

46. In their first report dated 25 July 2016 (the "**Select Committee Report**"), the Select Committee found that Sir Philip Green continued to negotiate with Mr Sutton until at least March 2014. In May 2014 he terminated contact with Mr Sutton and Mr Chappell became involved. The Select Committee described the way in which he became involved in the acquisition as follows (footnotes removed):

> "56. Contrary to what he told Ms Saunders, Sir Philip or his team continued to work with Paul Sutton until Spring 2014, during which time he developed a business plan to purchase BHS called 'Project Albion'. Paul Budge, Sir Philip's Finance Director, told us that attempts to do a deal with Mr Sutton ended in March 2014. Contradicting this, we have seen copies of emails showing that Sir Philip's office arranged a meeting with Paul Sutton for 13 May. It was only after it emerged that Paul Sutton was using Sir Philip's name "as a reference in Monaco" that Sir Philip appears to have decided the risk to his reputation of continuing to discuss a deal was too great. Mr Budge was asked to investigate Paul Sutton and Sir Philip subsequently decided to terminate contact; Mr Budge told us that this had happened on 13 May 2014, the same date they were due to meet. The person who arranged the meeting on behalf of Mr Sutton was Dominic Chappell, who described the meeting in an email at the time as "conformation [sic] on the BHS deal with SPG [Sir Philip Green]".
>
> 57. Dominic Chappell started working with Paul Sutton in around January 2014 — initially as his driver then, later, as an associate in structuring the deal to purchase BHS. The discrediting of Paul Sutton enabled Dominic Chappell to take the reins of the deal; as Mr Sutton "stepped back" from BHS, "Dominic stepped forward". Paul Budge confirmed that he met with Mr Chappell and Peter Graf (the man Mr Sutton had proposed as BHS's new CEO) on 16 July 2014. By Autumn 2014, Mr Chappell was presenting his plan to purchase BHS as a done deal, advising River Rock and others that he would be acquiring BHS for £1 both debt free and pension free.
>
> 58. In reality, Dominic Chappell had scarcely, if any, more credibility than Paul Sutton as a suitable buyer for BHS. Mr Chappell had a record of bankruptcy, of which Sir Philip was aware, and neither retail experience nor any experience of running a similar-sized company. It has subsequently been reported that Mr Chappell was forced out of a previous venture in the oil business "after taking around €400,000 (£315,000) from the company for his personal use". It is amazing that his association with a convicted fraudster and previous bankruptcy did not lead to more thorough scrutiny of his credibility, not least when it became known that he had been misrepresenting the deal to his own advisers, as was made clear to Goldman Sachs in December 2014."

47. Mr Chappell's conduct since 25 April 2016 bears out the Select Committee's assessment of him. In October 2019 Mr Chappell was disqualified as a director for a period of 10 years. In November 2020 Mr Chappell was sentenced to a six-year

custodial sentence for tax offences in respect of sums that he extracted from the BHS Group. The following passages from the sentencing remarks of Bryan J show that his appreciation of Mr Chappell was much the same as the Select Committee's assessment:

> "1. Dominic Chappell, you have been found guilty of three counts of cheating the Public Revenue in relation to the fraudulent and dishonest non-payment of VAT, corporation tax and income tax over a sustained period of time. I must now sentence you for this catalogue of serious offending. 2. The backdrop to your offending is the acquisition, and subsequent management, of the British Home Stores (BHS) chain of department stores which you purchased from Sir Philip Green's Arcadia Group for £1 on 11 March 2015 through your corporate vehicle Retail Acquisitions Limited (RAL)."
>
> "15. You did not pay your tax. Instead you holidayed in the Bahamas over the Christmas period on a yacht that was purchased in your name for €320,000 (albeit with money from RAL), and which you renamed "MAVERICK 6". As you put it in contemporary emails, "I am having to slum it in the Bahamas for the next three weeks. I know you will all feel my pain". On your return you did not pay the VAT, the corporation tax or your income tax. Rather the day after the latter should have been paid you purchased a Bentley Continental for £91,000 and purchased a pair of Beretta guns for £11,000 (net after a part-exchange)."
>
> "25. You have previous motoring convictions which I put to one side as not of relevance. But you are not of positive good character. Your offending occurred against a backdrop of successive bankruptcies (four in total, the last of which was in 2009 the bankruptcy sum being £24m) as well as company insolvencies. You were also convicted on 11 January 2018 under section 77 of the Pensions Act 2004 in respect of your refusal to provide information required under section 72 notices issued by the Pensions Regulator. Whilst these convictions post-date your current criminality there is some overlap in time given that they relate to your conduct between May 2016 and August 2017. I regard such matters as neutralising the suggestion that you have no relevant convictions as a mitigating factor but not as increasing the overall seriousness of your offending."
>
> "32. Evading the Public Revenue is a very serious offence, and your offending in relation to three separate taxes involving substantial amounts of unpaid tax evaded over a substantial period of time is an egregious example of such offending. 33. Your offending is so serious that neither a fine alone nor a community sentence can be justified for it, and only an immediate custodial sentence is appropriate. This will be shortest sentence which in my opinion matches the seriousness of your offending, and takes into account the mitigating factors in your case and the period you will spend on licence following your release. 34. Having regard to the aggravating and mitigating features of your offending, and having had careful regard to totality as well as the current features of the pandemic, the sentence I pass is one of 6 years imprisonment on each of Counts 1 to

> 3, concurrent on each count, a total sentence of 6 year's imprisonment. 35. You will serve one half of this sentence in custody. You will then be released on licence for the remainder of your sentence. While you are on licence, you must comply with all its conditions. At any time during your licence, the Secretary of State may withdraw it and order your return to custody."

(5) RAL

48. On 31 January 2014 Swiss Rock plc ("**Swiss Rock**") was incorporated under the name Containia Ventures plc. It was a company controlled by Mr Chappell and Olivia Investments Ltd, a Gibraltar company, and its board of directors consisted of Mr Chappell and his father, Mr Joseph Chappell. On 20 November 2014 RAL was incorporated under the name "Swiss Rock Ventures Ltd". Between 20 November 2014 and 5 December 2015 Mr Eddie Parladorio was the sole shareholder. From 5 December 2015 Mr Chappell held 90% of the issued shares, Mr Parladorio held 5% and Mr Stephen Bourne and Mr Mark Tasker held the remaining 5% between them.

49. Mr Parladorio was a solicitor and the principal of Manleys Solicitors Ltd ("**Manleys**"), a law firm originally located in Chester. He was a director of RAL from 10 November 2014 until 24 May 2016. He was also the ultimate beneficial owner of a company called Tamed Productions Ltd ("**Tamed Productions**") which was paid substantial fees by the BHS Group and a director from 15 May 2015 to 13 June 2021. He had a very significant involvement in both the acquisition and management of the BHS Group but he did not give evidence.

50. In an interview with the Insolvency Service on 18 January 2017 Mr Parladorio stated that in 2010 he met Mr Sutton and that at the end of 2013 or beginning of 2014 Mr Sutton introduced him to Mr Chappell. Mr Parladorio is now the senior partner of a law firm called Hanover Bond Law. Mr Chandler is a practising barrister. He was self-employed between 1996 and 2011 and became an employed barrister thereafter. He gave evidence in his first witness statement dated 19 January 2023 ("**Chandler 1**") about the beginning of his relationship with Mr Parladorio and Mr Chappell:

> "11. During 2011, 1 commenced a gradual transition away from criminal advocacy. In 2013, I worked with Mr Parladorio to set up a London office for Manleys Solicitors ("Manleys"), a firm of solicitors based in Chester. In around early 2014, Mr Parladorio informed me that a client of his, Mr Paul Sutton, was exploring a potential opportunity to acquire the BHS

> group of companies. I met Mr Sutton around this time as I acted for him in an unrelated personal bankruptcy matter. I was aware that Mr Parladorio was working to assist Mr Sutton with the potential acquisition. The BHS acquisition occupied a significant amount of Mr Parladorio's time and so I focused on my work at Manleys' London office. 12. During that year, I became aware in general terms that Mr Parladorio, together with Mr Chappell, had begun to explore the possibility of making the acquisition without the involvement of Mr Sutton. However, I was not involved in the negotiations or with the purchasing company (Swiss Rock Ventures Limited ("Swiss Rock"), which changed its name to RAL shortly before the acquisition). I did not know Mr Chappell, but Mr Parladorio told me that he was an entrepreneur and commercial property expert. In around mid-2014, 1 met Mr Chappell for the first time. The meeting was a short one, but it left me with the impression that Mr Chappell was driven, energetic and keen to ensure the success of BHS should the proposed acquisition complete. 14. In early 2015, I was aware that Mr Chappell and Mr Parladorio were continuing to explore the opportunity. During this time, Mr Parladorio was spending increasing amounts of time working on the proposed transaction, whilst I continued to look after the legal practice at Manleys. Although I was aware in very general terms that this work was being done by Mr Chappell and Mr Parladorio, and others associated with Swiss Rock, including Mr Mark Tasker and Mr Stephen Bourne, I was not involved in the negotiations. I was also not involved in the preparation or review of any documentation."

51. Mr Stephen Bourne was a chartered accountant and director of RAL from 5 December 2014 until he resigned on 11 March 2015. He was former head of corporate finance at BDO Stoy Hayward with over 30 years' experience in advising on corporate transactions. His wife, Mrs Zoe Bourne, was a financial consultant to the BHS Group following the acquisition. Mr Mark Tasker was a solicitor and partner in Bates Wells Braithwaite LLP. He was a director of RAL from 5 December 2014 until his resignation on 11 March 2015.

52. Finally, Mr Henningson was a director of RAL from 6 March 2015 to 23 February 2016 and from 21 April 2016 to 25 May 2016. Mr Henningson's evidence in Henningson 1 is that for most of his working life he has advised companies on corporate finance and he gave the following description of his experience:

> "I was a senior advisor on structured finance, real estate and corporate finance at HSH Nord Bank, which is a commercial bank, between 2000 and 2009. After that I was a director at LHKX Capital AG, which was a start up company, between 2009 and 2011. I then became a senior advisor on corporate finance at River Rock Securities Limited ("River Rock"), which was in the business of managing funds and providing investment solutions from 2013 until 2015. 11. I have acted as a professional director of one company in Switzerland, LHKX Capital AG, together with

> Jonathan Clelland and Martin Graham, both of whom have been engaged in the AIM list in London, where the latter was the managing director. The rest of the companies, in which I was a director, were my own companies. 12. My work has always involved international travel and, as a result, I have contacts all over the world particularly in the fields of investment and finance."

53. Mr Henningson's evidence was that he had known Mr Chappell since the mid to late 1990s and that Mr Chappell first told him about his intention to acquire the BHS Group in mid to late 2014. His evidence about the involvement of River Rock Securities Ltd ("**River Rock**") was as follows:

> "Mr Chappell explained to me in or about December 2014 that River Rock had not presented him with any workable solutions as to the financing or investment needed but he said that he was in active discussions with Sir Philip Green in relation to the intended acquisition of BHS Group. Around this time, Mr Chappell told me that if he managed to complete the acquisition then he wanted to invite me to join the project in some capacity. During this period, I was still employed by River Rock but I was content to keep the door open with Mr Chappell to see how matters progressed as I thought the opportunity sounded interesting. During this period, I understood from Mr Chappell that BHS was underperforming, and that he believed he could tum the business around to become very successful, but I did not have any real or detailed knowledge of the group's financial position. We never discussed the details such as figures or specific issues."

54. The Select Committee formed a different view about the reason why River Rock withdrew from the transaction. They also had a general view about the involvement of advisers more generally which has a particular resonance in this case (and again I have removed the footnotes):

> "63. Large numbers of advisers were involved at various stages of the deal acting for Sir Philip Green and Dominic Chappell. Some were engaged formally, some informally, and some existed on paper alone. Many of those closely involved claim to have drawn comfort from the presence of others. For River Rock, who stood down from the deal on realising they had been misled by Mr Chappell, the presence of Linklaters and Goldman Sachs had given comfort. Linklaters appear to have taken comfort from Olswang. Taveta and Sir Philip Green argue that the presence of Olswang and Grant Thornton helped give Dominic Chappell credibility."

55. Mr Curl put a number of questions to the witnesses about River Rock's decision to withdraw from the transaction as reported by the Select Committee. It is unnecessary for me to decide whether Mr Chappell misled River Rock or whether that is why it chose to

withdraw from the transaction. Nor is it necessary for me to decide what (if any) role external advisers had in the acquisition or subsequent events apart from the following four firms. Olswang LLP ("**Olswang**") and Grant Thornton (UK) LLP ("**GT**") advised RAL on the transaction and then acted for the BHS Group. Weil Gotshal & Manges LLP ("**Weil**") and KPMG acted for the group in relation to the CVA. In passing I note that Linklaters LLP ("**Linklaters**") acted for Taveta and Arcadia in relation to the acquisition and subsequent transactions. Various other firms of solicitors acted in relation to property and finance transactions and I will introduce them as and when necessary.

D. Project Harvey

(1) Early Negotiations

56. "**Project Harvey**" was the code name which Mr Chappell gave to the acquisition of BHS Group. In their written opening submissions the parties took me through the negotiations in some detail. Again, it is unnecessary for me to recite those negotiations in detail given the issues which I have to decide. For present purposes, it is sufficient to note that Mr Chappell made two proposals to Sir Philip Green to purchase the BHS Group which he originally turned down. It is also important to note that the first involved the proposal that RAL would invest £120 million and Mr Chappell would contribute £5 million by a shareholder's loan. The second involved the proposal that RAL would obtain £100 million to inject as senior debt and that RAL would invest £35 million unencumbered equity into the group. These terms formed the basis for the final deal (as agreed).

57. On 15 January 2015 Sir Philip Green informed Mr Budge that he had decided to put the group up for sale. In an interview with the Financial Times on 18 September 2015 he gave as the reasons the fact that he was personally spread too thin and that he wanted to focus on the future of Topshop and Topman outside the UK. In his oral evidence to the Select Committee on 23 May 2016 Mr Budge also gave the following explanation for Sir Philip Green's decision:

> "One of the key issues here is the cost base. There is this perception that BHS has the covenant strength of the group, so if we were to go to the landlords to renegotiate terms as Taveta, associated with Arcadia and BHS, the landlords, who also dealt with Arcadia, wouldn't really take us seriously. However assertively we wanted to negotiate, we would not be taken seriously because there was always this perception – wrong legally, but it was in people's minds, such as the landlords' – that there was always

> the covenant strength of the wider Taveta group, which didn't allow us to be able to make the kinds of changes to our cost base that we actually required."

58. On 2 February 2015 Mr Budge met Mr Martin and confirmed the press reports. He told Mr Martin that the change was driven by a number of factors but primarily that Project Thor was now considered to be too expensive but also personal factors. By email dated 6 February 2015 Mr Tony Clare of Deloitte wrote to the Pensions Regulator to provide further information about Project Thor:

> "In January the shareholders of the Thor business considered the Christmas trading and prospects for the company. Thor continues to be loss making. Further consideration was given to the Thor Pensions Restructuring disclosed to tPR [the Pensions Regulator] pre-Christmas trading. It was noted that the reduction of gilt yields since last Autumn had increased the deficit significantly and that a full actuarial valuation is due as at 31 March 2015. The cash demands on Thor would clearly increase post the valuation if current market conditions extend to the valuation date. As Thor is loss making on both an accounting and a cash flow basis, these anticipated cost increases would not be affordable."
>
> "The wider group has supported the Thor business over many years. Without the financial support to Thor it is likely there would be an immediate insolvency of the Thor business. This remains a possible outcome. However, the shareholders decided to market the Thor business with a view to obtaining a solvent disposal of the company. This will allow new investors to seek to improve its performance and to finance the pension benefits. Subsequent to deciding to market the Thor business for sale, the details of this exercise have appeared in the press and various parties have expressed an interest in the business. To date, two parties have expressed an interest in a solvent transaction and negotiations remain ongoing with both of them. Thor is committed to keeping the Trustees and tPR [the Pensions Regulator] informed of progress as matters develop."

59. Whilst Sir Philip Green was attempting to market the BHS Group, the negotiations with RAL continued. On 29 January 2015 Ms Gillian Hague, the financial controller of Arcadia and director of Taveta, sent Mr Chappell a set of slides called "BHS Information Pack". This contained very detailed financial information about the group including a number of routes to break even from an annual loss of £49.1 million calculated by reference to earnings before interest, tax, depreciations and amortisation ("**EBITDA**").

(2) The Points of Principle

60. Mr David Roberts was the engagement partner at Olswang and the principal point of contact with Mr Chappell, Mr Parladorio, Mr Henningson and the other directors of RAL. By email dated 27 January 2015 he wrote to the Olswang deal team stating that following significant press over the past three days, Mr Chappell had confirmed to him that he believed that he had reached terms with Sir Philip Green for the purchase of BHS and set out the terms of the deal as he then understood it.

61. By email dated 6 February 2015 Mr Roberts wrote to the Olswang deal team again attaching a number of draft documents. In the covering email he stated that terms were almost agreed and once they were, the parties would then negotiate a lock-out agreement. He stated that "our client" would acquire all the issued shares in BHS Group for £1 debt free and "with a normalized working capital position which will be trued up via completion accounts". Under the heading "Funding (in case you are interested)" he gave the following explanation:

> "* The client has an equity investor in the form 'Black Jack' Jack Dellal whose property investment company 'Allied Commercial Exporters Ltd' (Ace) has placed £35m into our client account. The £35m will be used to subscribe for £35m of loan notes in Swiss Rock plc (the parent company of Bidco) and on completion the parent will subscribe for £35m of shares in Swiss Rock Ventures Limited (the Bidco).
>
> * On completion, Bidco will procure SPG to sell-on of his freehold property asset Marylebone House, for £10m to Bidco and who will sell it to Ace for £45m and that purchase price will be satisfied by redemption of the £35m of loan notes and Ace paying £10m in cash, which will go to SPG.
>
> * That leaves Bidco with £35m of equity funding at completion.
>
> * The £35m is held in our client account pursuant to an undertaking given by Olswang to Ace's lawyers, Mishcon (attached) which envisages the parties enter into a more formal undertaking the terms of which are explained in the attached undertaking.
>
> * Bidco will also need to have a £120m working capital facility in place. We have now agreed terms with Farallon Capital to provide that funding package.
>
> * Charles and I have also negotiated a term sheet (attached) and letter of comfort (attached) from Farallon Capital, a billion dollar US asset manager for a £120m working capital facility to support the capital needs of the business for the next 3 years. The deal involves us selling BHS real estate and repaying chunks of cash each year and re-drawing down in three tranches of £40m per year."

62. Mr Roberts attached a draft of the "Points of Principle" (below) and a term sheet dated 4 February 2015 issued by Farallon Capital Europe LLP ("**Farallon**"). It was headed "Term Sheet for £120,000,000 Loan Facility in connection with the acquisition of BHS" and was also expressed to be confidential and subject to contract. It provided for a loan of £120 million to be advanced to Swiss Rock or an affiliate in three tranches of £40 million. However, the term sheet expressly provided that tranche 2 could only be utilised if tranche 1 was paid in full and tranche 3 could only be utilised if both tranches 1 and 2 had been repaid in full. Moreover, the loan was repayable in full within 36 months and carried interest at LIBOR plus 5.5% per annum and "Payment in Kind" or "**PIK**" interest of 7.5% per annum compounded quarterly and added to the principal. Finally, one of the conditions precedent to commitment was "satisfactory resolution and consent of the pension regulator with respect to the BHS pension issues".

63. On 16 February 2015 Sir Philip Green and Mr Chappell signed a document headed "Points of Principle Subject to Contract" on behalf of Arcadia and Swiss Rock respectively (the "**Points of Principle**"). The first eight points were as follows:

> "1. Swiss Rock demonstrates that it has £35m of provisional funding at Olswang on shore to acquire Marylebone House in its lawyer's client account and produces a letter of comfort from Farallon Capital in respect of a three year £120m working capital facility.
>
> 2. Swiss Rock will undertake to use all reasonable endeavours to continue to trade the BHS Group for at least three years to effect the turn around and put in place a new business plan.
>
> 3. In return for the above, Arcadia Group shall enable Swiss Rock and its advisers and lenders to conduct focussed due diligence to enable them to complete the transaction as soon as possible.
>
> 4. At completion, Arcadia Group shall procure the sale and Swiss Rock shall purchase all the issued shares for £1.00 and deliver the BHS Group on a debt free basis (including assigning or cancelling all inter group loan between Arcadia Group and BHS or assigning such to Swiss Rock).
>
> 5. At completion, Swiss Rock (or its nominee) will acquire Marylebone House for £35m (unencumbered).
>
> 6. On Completion, Swiss Rock shall inject £10m of new equity into the BHS Group and shall, within 120 days, put in place a staff incentive bonus scheme for senior management on terms to be agreed.
>
> 7, Arcadia Group will make annual contributions for each of the next three years to the DB pension scheme of the BHS Group of £5m per annum.
>
> 8. Swiss Rock will use its reasonable endeavours to reach a settlement, as soon as reasonably practicable, with the pension scheme trustees as

> envisaged under Project Thor (or similar) following a favourable change in interest rates for instance. Arcadia Group shall contribute the balance of any unpaid contributions as referred to in paragraph 7 above to any settlement up to a maximum £15m."

64. Point 13 provided that BHS would be debt-free on completion and that Arcadia would ensure that on completion all debt owed by BHS would be either capitalised, released or transferred to Swiss Rock. Point 20 provided that Swiss Rock would have exclusivity to complete the acquisition by 9 March 2015 and for extending the exclusivity period.

(3) ACE: Heads of Terms

65. RAL had no funds with which to comply with the very first of the Points of Principle itself and Mr Roberts' email dated 6 February 2015 explained how Mr Chappell intended to do it. Mr Henningson gave evidence in Henningson 1 that in October or November 2014 he introduced Mr Chappell to Mr Alexander Dellal of ACE. He described the Dellal family as a high profile and wealthy family and stated that Mr Dellal, his father (Mr Guy Dellal) and his grandfather (Mr Jack Dellal) were in the business of high value property investment and providing high value loans. Mr Alexander Dellal and Mr Guy Dellal were the ultimate beneficial owners of ACE and Mr Alexander Dellal was a director.

66. By letter dated 30 January 2015 Mr Dellal wrote to Mr Chappell on behalf of ACE setting out Heads of Terms (subject to contract) for the purchase of Marylebone House, 129-137 Marylebone House NW1 5QD ("**Marylebone House**") for £45 million (the "**Heads of Terms**"). Marylebone House was the BHS Group's corporate headquarters which it held on a long lease from Wilton Equity Ltd ("**Wilton**"), a company which was ultimately owned or controlled by Lady Tina Green. The Heads of Terms included an undertaking by ACE or a subsidiary to place £35 million into the client account of Olswang, who were acting for Swiss Rock, to be held to the order of Mishcon De Reya LLP ("**Mishscon**"), ACE's solicitors, in return for a fee of £1 million.

67. This arrangement was unusual to say the least. The apparent purpose of the undertaking was to enable RAL to give the appearance that RAL had the ability to fund a £35 million cash injection in the BHS Group before completion, to sell on Marylebone House to ACE immediately and then to use £10 million of the proceeds of sale of Marylebone House to make a capital injection into BHSGL. In the event, I did not have to consider whether

such an arrangement would have been lawful because Sir Philip Green refused to sell Marylebone House to RAL.

68. However, the Heads of Terms also included a "put option" under which Swiss Rock could require ACE to purchase a second property, North West House, 119 to 127 Marylebone Road London NW1 5PY ("**North West House**"), the BHS Group's office building next door, for £30 million together with a share of any profit above that figure:

> "**Put Option: -** Swiss Rock will have a 12 month put option on the Purchaser with regard to the Property known as North West House which is located at 119 Marylebone Road London W1. The option will be for the Purchaser to acquire the Freehold interest of the property with Vacant Possession, for an agreed price of £30,000,000 (Thirty Million Pounds). The Purchaser will have the right to seek an alternative buyer should they wish. In the event that the Purchaser procures an alternative buyer at a higher price, the net amount over and above £30,000,000 (Thirty Million Pounds) will be split 50/50 with Swiss Rock. In the event that the Purchaser does procure an alternative buyer without having to pay any agents fees, the Purchaser will receive a payment of 1 % of the purchase price which will be deducted from the gross proceeds. The net proceeds will then be split 50/50 with Swiss Rock. For the avoidance of doubt, the net proceeds will be the Gross proceeds less all costs associated with the transaction. At the expiration of the Put option the Purchaser will still retain the ability to collect 50% of the net overage amount together with the ability to procure the 1% fee. This will last for a further period of 12 months."

69. By 3 February 2015 Mishcon had transferred £35 million into Olswang's client account and Olswang had given a series of undertakings to hold it to their order. By letter dated 5 February 2015 Mr Chappell wrote back to Mr Dellal on behalf of Swiss Rock agreeing subject to contract to the Heads of Terms contained in the letter dated 30 January 2015. He also stated that in consideration for the payment of £35 million by Mishcon to Olswang to be held to their order, Swiss Rock would pursue negotiations for the purchase of BHSGL.

(4) Due Diligence

70. By letter dated 20 February 2015 Mr Roberts wrote to the directors of Swiss Rock confirming that Olswang had been instructed on its behalf in relation to the acquisition of BHSL. On 4 March 2015 Mr Roberts sent an updated engagement letter this time addressed to the directors of both Swiss Rock and RAL. In Schedule 1 Mr Roberts set

out the services which Olswang had agreed to provide and these included high level due diligence on a wide range of matters including Marylebone House and the provision of advice in relation to the Schemes. Schedule 2 set out a detailed breakdown of costs and billing. But in the event Olswang charged Swiss Rock and RAL a fee of £1 million (plus VAT of £200,000) for their services and on 12 March 2015 they issued an invoice for that amount.

71. On 5 March 2015 Mr Mikael Brantberg of Farallon sent Mr Chappell and Mr Henningson a revised term sheet and on the same day Mr Henningson circulated it to Mr Parladorio, Mr Tasker and Mr Bourne. It contained the same or substantially the same terms as the earlier term sheet and Mr Roberts asked Mr Charles Kerrigan, a member of the deal team, to review its contents. By email dated 6 March 2015 he wrote back to Mr Roberts with the following comments:

> "I don't think there's anything to say. It's the same form as they had before, just reverses the recent changes about property diligence. It still talks about all asset security though. Now this will go in place after completion all the points I made earlier in the week apply - there is no commitment, generic CPs and the ability for lender to make changes to terms. I don't know if you have or want to pass that on. The pensions issue will be difficult. I understand we think it's ok and no consents required but lenders are cautious. It is possible for a secured lender to inherit liabilities of a DB pension fund of a business it lends to."

72. Under cover of an email dated 7 March 2015 Mr Roberts sent the directors of RAL and Swiss Rock, including both Mr Chappell and Mr Henningson, a draft of their due diligence report (the "**Olswang Report**") and a letter dated 7 March 2015. In the covering email Mr Roberts stated as follows:

> "I attach a first draft of our due diligence report. As that is quite a large document, we have included a key findings section to point out the key issues that have emerged from the diligence exercise. In order to try to encapsulate the risks associated with proceeding, I have also prepared a letter (pdf attached) addressed to the boards of both companies which seeks to point out (at a general level) the risks associated with the transaction that is being contemplated so that the board can be fully appraised of the situation and make a balanced assessment before making a decision to move forward. I have sought to balance the risks with the comfort that the board has also received. The letter is not meant to be a substitute for the due diligence report which needs to be read and understood by the board."

73. Olswang do not appear to have issued a final signed report and the Joint Liquidators relied on the terms of the draft which Mr Roberts sent to the directors on 7 March 2015. In particular, they relied on the following passages (and in the extracts below I have ignored the changes tracked in the draft):

> "Given that there will be no ongoing access to Arcadia support, it is critical that prior to Completion, the Buyer is confident that it understands the cashflow needs of the Group and further confirms that it will have sufficient cash to fund the current loss making trading of the Group until such time as the turnaround plan presented by management can be effected. Given the size of the loan account in favour of Arcadia (circa £240m), we recommend that the SPA contains a provision to ensure that the intercompany debt from Completion is extinguished in full or it is otherwise assigned to a Buyer entity. We note that an assignment will create a £25m corporation tax change in the Group. We note that the final draft of the SPA provides that £200m of this sum is to be extinguished, with £40m being left outstanding, such sum to be secured over assets of the Group, as agreed between the parties and to be used by the Seller in negotiations as regards to the Group's pension schemes."
>
> "Please see Appendix 9 of this Report in respect of our pensions analysis. The Buyer should note that, amongst other matters arising from the pensions issues within the Group, there is a high insolvency risk in respect of the Group should the Acquisition proceed without adequate funding in order to meet the Group's liabilities post Completion. We strongly recommend that the Buyer receives separate insolvency advice and continues to do so post Completion."

74. Appendix 9 contained a number of further appendices dealing with the risks associated with Project Thor. The Joint Liquidators alleged that both Mr Chandler and Mr Henningson acquired knowledge of certain facts by reading the Olswang Report and, in particular, Appendix 9. I set out or describe the relevant passages in section V (below) when I come to consider those allegations in detail. However, in an internal email dated 6 March 2015 Mr Roberts wrote to three members of his team stating: "leave a big skull and cross bone [sic] in the exec summary section." Mr Curl submitted that this accurately captured the tone and substance of the Olswang Report.

75. In the accompanying letter dated 7 March 2015 (the "**Olswang Letter**") Mr Roberts summarised the due diligence which Olswang had been able to carry out in the limited time available. Under the heading "Solvency Issues" he stated as follows:

> "7. We note from the Seller's disclosures in the Data Room that the Group remains solvent due to the ongoing financial assistance provided by the

> Arcadia group, hence the existence of a £240 million inter-company debt owning from BHS to upstream entities including the Arcadia Group. As such, the Buyer is on notice that there is a funding gap prior to the turnaround being successfully implemented and thus it is critical that the Buyer will be able to ensure the Group remains solvent pending the turn-around.
>
> 8. To get comfort on this issue, as mentioned, you have undertaken an extensive cash flow modelling process to get clarity on the cash flow needs of the business for the next 12 months and have negotiated a working capital facility to be available to ensure that the Buyer will have sufficient working capital to enable the Group to remain solvent.
>
> 9. It is crucial that the directors of the Buyer have confidence in the working capital analysis and believe that they will have sufficient working capital to ensure that the Group remains able to pay its debts as and when they fall due, which is the test in the Insolvency Act, 1986 that the directors must continue to be cognitive of post Completion.
>
> 10. We note however that the working capital funding that is expected to be put in place at Completion is not currently in place and the directors will be relying on a £40 million bridging loan from Sir Philip Green on Completion. If it is not possible to procure refinancing for this loan, the directors should be aware that the Group may well be in a situation where it is unable to meet its debts (i.e. the refinancing of the bridge) and could be exposed to insolvency concerns.
>
> 11. Hence, we are urging the directors not to transact until they have maximum commercial comfort that they will be able to satisfy the terms of the proposed £120 million working capital facility from Farallon. Ideally, you would postpone completion until the funding was in place."

76. Under the heading "Pension Deficit" Mr Roberts stated that the pension deficit in the Schemes was "perhaps the most material issue for the directors of the Buyer to understand". He pointed out the limited access which had been given to RAL's professional advisers and that most of the material pensions warranties had been removed from the draft of the SPA (below). He then continued:

> "13. The best case scenario will be that the Group continues to meet its annual pension contributions for the foreseeable future (currently £10 million but likely to increase in 2015) without interference by the trustees of the schemes and the quantum of the deficit diminishes due to the recovery of interest rates.
>
> 14. The worst case scenario is that the Group's balance sheet deteriorates post Completion to the point where the Group is unable to continue to trade on a solvent basis which could trigger an acceleration of the funding obligation of the schemes and an almost inevitable collapse of the schemes and an insolvency.

> 15. We note however, there is a suggestion that following Completion, the Group may able to effect a restructuring of the schemes in the form of Project Thor which would result in the relevant schemes being transferred to a new company and restructured to a point where there is a chance that they will be self-funding going forward. There is no guarantee that Project Thor will be capable of being effected as the Group would need to be able to demonstrate that it is close to insolvency - which may well have knock on effects to the trading operations of the Group, in particular it could affect the ability of the Group to purchase trade credit insurance."

77. Mr Roberts also ran through the possible changes which the Trustees and the Pensions Regulator might demand and stated that Olswang was unable to give the directors of RAL any material assurance that Project Thor would be implemented or that it would be possible to deal with the deficit adequately. Finally, after dealing with other issues, he stated as follows:

> "25. Finally, we note however the commercial comfort that the directors are taking from the representations from Sir Philip Green that he will continue to support the business post Completion and that he has a big commercial interest in ensuring that the Group continues to trade (given the large concession arrangements with Dorothy Perkins, Wallis and Evans) and also due to the reputational risk he is exposed to should BhS fail. We do not doubt these commercial matters and note that great comfort could be drawn from such. 26. That being said, there is no legal obligation on him to do so."

78. On 7 March 2015 Mr Henningson forwarded Mr Roberts' email attaching both the Olswang Report and the Olswang Letter from his River Rock email account to his gmail account. A few minutes earlier he had forwarded another email to his gmail account from Mr Andrew Campbell of Olswang enclosing an updated pensions matrix for discussion the following morning. On 11 March 2015 Mr Henningson also forwarded an email from Roberts to his gmail account attaching a draft of the SPA. The covering email also identified the commercial points which remained outstanding.

79. GT had carried out the cashflow modelling process referred to in the Olswang Letter and I return to it in more detail below. On 16 February 2015 Mr Chappell instructed GT to start work and on 26 February 2015 GT produced a report in the form of an Excel spreadsheet setting out a detailed analysis of the BHS Group's suppliers and whether they were covered by trade credit insurance. Under cover of an email dated 27 February 2015 Mr James Dewey of GT sent Mr Chappell and Mr Parladorio a slide deck entitled "Project Harvey Interim Update" and under cover of an email dated 7 March 2015 Mr

Paul Martin, who was the engagement partner, sent Mr Chappell, Mr Bourne, Mr Tasker, Mr Parladorio and Mr Henningson a draft of GT's final report dated 8 March 2015. His covering email stated that there was a meeting at 9 am on the following day to discuss the draft.

80. Under cover of an email dated 3 March 2015 Ms Leanne Staines of the Arcadia Group sent Mr Matthew Woodgate, a GT senior finance manager, a business plan which the Operations Board had prepared. The parties described it as the "**Legacy Turnaround Plan**" and I adopt the same description. The plan identified the key members of the BHS management team who had prepared it:

> "**Richard Price Managing Director**
>
> Richard started his career with Next where he held various positions in Merchandising. Most latterly he was Head of Merchandising for Menswear. He moved to M&S as Head of Merchandising for Womenswear in 2006. He then took the role of Trading Director for Menswear in 2010. Richard joined BHS as MD in September 2013.
>
> **Darren Topp COO**
>
> Darren spent 23 years at M&S in the Retail division. He held various roles across Retail and Operations including senior roles in Food and Store Development. His last position at M&S was as Divisional Executive for Operations. Darren joined BHS in 2008 as Retail Director, he was later promoted to Commercial Director where in addition to Retail he was responsible for Digital and International. In 2012 he was promoted to COO.
>
> **Kathryn Morgan Finance Director**
>
> Kathryn joined the Arcadia Group in 1999 as a graduate. She worked across various brands including Topshop and Wallis. Kathryn moved into property and held various senior roles including Financial Controller in 2006, she was promoted to the role of Head of Finance, before moving to BHS in 2014 as Finance Director."

81. Mr Price did not remain in post at the BHS Group once the acquisition had taken place. Mr Topp chose to remain, however, and he was appointed the interim CEO and then CEO. He explained the genesis of the plan in his first witness statement dated 19 January 2023 ("**Topp 1**"):

> "In or around 2015, I was aware that, in its current set up, BHS would struggle to make money and that there was a need for a turnaround. There had been discussions between Sir Philip Green, Mr Richard Price (the then CEO of BHS) and Mr Ian Grabiner (Arcadia's CEO) and me about the

> steps that would be necessary to turn the business around. We all recognised the need to identify, and plan for, initiatives that would help in this way. This included (amongst other things) developing a new offering and closing loss-making stores. I was shown a document dated March 2015 which I understand has been referred to in these proceedings as 'the Legacy Turnaround Plan'. Sir Philip Green had asked me and the Operations Board to put this together in order to present to potential purchasers of the business. This was not a fully costed plan, but rather a guide to what the management team were getting on with, as well as further ideas for what a new owner might do to successfully turn the business around. It was some thoughts and ideas on how to transition the business from loss-making to profitable."

82. GT's final report was dated 11 March 2015 and entitled "Project Harvey Phase 1 Report" (and I will refer to it as the "**GT Report**"). It consisted of 81 slides and a number of Appendices including GT's engagement letter dated 7 March 2015 (the "**First GT Engagement Letter**"). The Joint Liquidators alleged that both Mr Chandler and Mr Henningson acquired knowledge of certain facts by reading the GT Report. I set out or describe the relevant slides and passages in section V (below) when I come to consider those allegations in detail. But in opening Mr Curl and his team described the following statements on slide 9 as a "big skull and crossbones" (using Mr Roberts' language). That slide stated as follows:

> "If Project Thor can be delivered, the deficit could reduce to c.£80m on a self-sufficiency basis (based on Deloitte figures). This will still leave residual risk in the remaining pension scheme that would need funding. All execution risk in Project Thor will lie with the Employer/Buyer. There remains a risk that the Trustees/tPR/PPF may not agree to it from a point of principle or that if they do they will require an equity stake in Bhs Ltd and/or additional financial mitigation. Without Project Thor or a similar exercise it would appear that the scheme size and funding needs present a real threat to the viability of the business. As things stand the Buyer should assume it is acquiring a business that is struggling to fund a pension scheme with a funding deficit of c.£300m (subject to imminent review at upcoming triennial valuation) and a buyout deficit in excess of £500m and which is under the close scrutiny of the Pension Regulator."

83. The trial bundle does not contain an email circulating or enclosing the GT Report to the RAL board. But by email dated 11 March 2015 Mr Martin wrote to the board of directors of RAL (including both Mr Chappell and Mr Henningson) stating as follows:

> "Later today you will receive the final version of our Project Harvey report that has been updated from our draft of 8 March to reflect the currently proposed funding structure and SPA/TSA. The cash flows in this report

> have assumed a £5m equity injection from RAL. We understand that the specific terms of this funding source are not yet final. To the extent that this funding is repayable or is otherwise withdrawn from the business, then then cash flows and subsequent headroom will be reduced by an equivalent amount. This has not been reflected in our report."

84. The First GT Engagement Letter set out the scope of the engagement which GT had undertaken during what was described as "**Phase 1**" from 16 February 2015 to 13 March 2015 at the latest: see paragraph 3.1. The scope of the engagement was described as "assistance with due diligence, negotiations with the Vendor and completion of the work set out in Appendix 2": see paragraph 2.1. The fee which GT charged for Phase 1 was £1 million (plus VAT of £200,000): see paragraph 5.2. On 12 March 2015 GT issued an invoice for that amount plus the VAT. Ms Hilliard relied on paragraph 7.1 which stated as follows:

> "You acknowledge that we will rely on the commercial assessment by you of the benefits and risks associated with the Transaction and you will be responsible for that assessment accordingly. We will advise you in what we consider to be your best interests in the light of the circumstances at the time we give our advice which may mean that our advice may be subject to change. We do not expressly or by implication warrant it will be possible for the Transaction to proceed. Should you wish to proceed against our advice in a manner which we do not consider to be in your best interests we may seek to discuss and re-negotiate the terms of this engagement to protect our position (which may involve an underwriting of part of our fees or an increase in fee level to reflect the perceived increase in risk to us). We reserve the right to terminate this engagement should you and we be unable to agree suitable terms following such discussions."

85. Appendix 2 stated that the information contained in the report was based primarily on information provided by BHS and Arcadia management. GT also stated that they had not carried out an audit and that the responsibility for the BHS management plan, the cash flow forecasts and the assumptions on which they were based was solely that of BHS and Arcadia management.

(5) Trade Credit Insurance

86. Trade credit insurance or supplier credit insurance became an important issue for the BHSGL board immediately after completion. As Mr Topp explained in evidence, this was not insurance taken out by the BHS Group itself but by its principal suppliers, who would supply goods to the group on credit and take out insurance cover against the risk

of insolvency or non-payment. Mr Topp also explained that the suppliers would pay the premiums rather than the BHS Group itself. Nevertheless, BHSGL had an indirect but powerful interest in ensuring that the insurers continued to provide cover because the alternatives were far less attractive. BHSL would either have to accept less advantageous payment terms from its suppliers or provide letters of credit upon which the suppliers could call if BHSL failed to pay.

87. Mr Topp also explained that the withdrawal of cover by trade credit insurers was not an all or nothing event. The cover which suppliers had obtained would gradually unwind but once it had expired, suppliers would either demand new payment terms or require BHSL to arrange letters of credit. But the effect of the withdrawal of trade credit insurance had a significant effect on the BHS Group's cashflow. As cover expired and BHSL had to arrange letters of credit to cover future payments, it had to provide cash as collateral which was then locked up until the board was able to persuade the trade credit insurers to restore cover or the letters of credit expired.

88. On 24 February 2015 Euler Hermes SA NV ("**Euler Hermes**"), which now trades in the UK under the name Allianz Trade, withdrew cover from the BHS Group's suppliers. On 26 February 2015 Atradius NV ("**Atradius**") also withdrew cover to be followed by Nexus CIFS Ltd ("**Nexus**") on 3 March 2015. Euler Hermes and Atradius were two of the leading trade credit insurers. Mr Roberts made two witness statements dated 7 March 2019 ("**Roberts 1**") and 11 January 2023 ("**Roberts 2**"). He did not give evidence but the Joint Liquidators served a hearsay notice in respect of his evidence. In Roberts 1 he gave evidence that Sir Philip Green had given an assurance to sort out trade credit insurance:

> "RAL indicated that SPG had agreed to put in place working capital loans from Goldman Sachs immediately on completion. Also, SPG had indicated in a meeting a week prior to completion that he would "sort" the trade credit insurers. This was in reply to a request that we had made during an all parties meeting where RAL asked for comfort (either via diligence or a warranty) that completion would not affect the willingness of trade credit insurers to continue to offer trade credit insurance on the BHS covenant. SPG also agreed that annual contributions would be made to the BHS group pension scheme and executed a side letter on behalf of Arcadia Group Limited addressed to Dominic Chappell and BHS Group Limited on completion of the SPA on 11 March 2015."

(6) The Pensions Position

89. On 19 February 2015 the Trustees met Mr Chappell and Mr Parladorio for the first time. Mr Martin made notes of that meeting together with notes of an earlier meeting with Sir Philip Green and Mr Clare of Deloitte. Mr Martin's notes record that Sir Philip Green and Mr Clare told him that the purpose of the meetings was to ask whether the Trustees would support the sale process. He also recorded that they told him that RAL had undertaken to provide £120 million of working capital. His notes of the meeting record that the meeting with Mr Chappell and Mr Parladorio was a short one and his evidence in Martin 1 was that it lasted only 15 to 20 minutes. His notes also record that Mr Chappell told him that RAL would recapitalise the business and that funding of £120 million was lined up.

90. On 4 March 2015 Mr Martin attended a meeting with Sir Philip Green and the Pensions Regulator and, once that meeting had finished, Sir Philip Green invited Mr Chappell to join the meeting. By letter dated 5 March 2015 Mr Geoff Cruikshank of the Pensions Regulator wrote to Sir Philip Green recording what he had been told at the meeting in paragraph 7 of his letter:

> "a. The share sale of the Arcadia Group's holding in BHS Limited to a new investor. As we understand it, the new investor is to provide £10m of equity to the business and will raise £120m of new debt within the business. This finance is to be secured by the new investor's lenders taking a fixed charge over certain parts of BHS Limited's property only, and not over the floating charge assets (stock, debtors etc). The Schemes' position is to be subordinated below the new lender's fixed charge. In return the Schemes are to receive a £15m dowry from the Arcadia Group over a three year period to support proposed deficit recovery contributions totalling £10m pa. The scheme will also receive a floating charge over current assets (stock, debtors etc). This charge will secure £80m of existing debt from BHS to the wider Arcadia Group, ownership of which will be transferred to the Schemes. This charge will sit pari passu to that securing the £160m of existing intra-group debt. which will be transferred to the purchaser. The current intention is for this transaction to complete on Monday 9 March 2015.
>
> b. The potential for the new investor to execute a modified version of Project Thor after this transaction has been completed is being considered. Instrumental to the success of Project Thor as previously proposed is a Regulated Apportionment Arrangement (an RAA), though it was unclear yesterday whether this will still be central to the proposal."

91. In his letter, Mr Cruikshank also explained how the Pensions Regulator approached the exercise of its powers. He stated that it sought to be risk-based and proportionate and that

its approach was to educate, enable and enforce. He also explained that two of the powers which it had were to grant "clearance" for materially adverse events and the approval of an RAA (above). He confirmed that no application for clearance of the acquisition or approval of an RAA had been made. He also provided the following guidance which is relevant in the present case:

> "**Clearance**
>
> 14. We provide 'clearance' (clearance statements) in respect of certain events. Clearance is relevant for corporate transactions or scheme-related events which are materially detrimental to a defined benefit pension scheme and its members (these we call Type A events). It is a voluntary process.
>
> 15. A clearance statement is not approval of a transaction such as an acquisition or merger, rather it gives assurance that we will not use our anti-avoidance powers in relation to that transaction based on the information contained in the clearance application. We only give clearance if we have received an application and if we consider it reasonable to do so. Whether we choose to do so will be fact-sensitive.
>
> 16. It is also for the trustees to identify if it believes there has been any material detriment. If the trustees do form the view that a Type A event has or will taken [sic] place, it needs to raise this with the employer and seek mitigation. It would be for the employer to then apply for 'clearance'.
>
> 17. If a Trustee is left unsatisfied that any material detriment has not been (or is unlikely to be) mitigated, the Trustee should then report to the regulator setting out its reasons for this view."
>
> "**RAA**
>
> 19. The best form of support for a pension scheme is an ongoing sponsoring employer. We recognise that in some situations this form of support may no longer be available where the sponsoring employer is at serious risk of insolvency. Where this is the case, it is important for employers, trustees and their advisers to engage in discussions at an early stage to explore the available options, including any which may offer an outcome other than insolvency. We are also willing to engage at this early stage.
>
> 20. An RAA is such an option. It is effectively a means for a scheme's controlled entry into the Pensions Protection Fund (the "PPF"), or continuation of the scheme without recourse to the original employer, usually involving a buy-out of scheme benefits, whilst allowing for its sponsoring employer to continue.
>
> 21. RAAs are extremely uncommon; the expectation when they were introduced into legislation was that they would be used rarely, which has proved to be the case.
>
> 22. Both the regulator and PPF have regulatory functions as part of the RAA process. An RAA must be approved by the regulator, and the PPF

> must confirm that they do not object to the RAA. The regulator can only approve an RAA if it believes it would be reasonable to do so. The PPF and the regulator have, therefore, always worked very closely together on any RAA application and the PPF would need to be involved in any discussions. Importantly, a 28 day referral period must pass after approval, before an RAA takes effect.
>
> 23. In order for the Regulator to approve an RAA, the circumstances that would need to be considered, include (to our satisfaction): a) Whether insolvency of the employer would be otherwise inevitable or whether there could be alternative solutions which would avoid insolvency; b) Whether the scheme might receive more from an insolvency; c) Whether a better outcome might otherwise be attained for the Scheme by other means, including the use of the Regulator's powers (for example, anti-avoidance powers) where relevant (following the draft application made for Project Thor we have asked the Trustee for this analysis and we understand this is hand); d) The position of the remainder of the employer group; and e) The outcome of the proposals for other creditors."
>
> "25. Where there is an application for an RAA we also expect there also to be an application for 'clearance'."

(7) A New Deal

92. In December 2014 Sir Philip Green and Mr Chappell were discussing an equity injection of £35 million. The capital which Mr Chappell would be required to inject into the BHS Group came to be described as "hurt money": see, for example, an email dated 15 December 2014 which Mr Chappell sent to Mr Budge. By the time Sir Philip Green and Mr Chappell signed the Points of Principle the amount of the capital injection was £10 million. Moreover, the way in which Mr Chappell intended to raise this was by buying Marylebone House for £35 million and selling it on to ACE for £45 million.

93. This remained the position until a few days before completion. On 3 March 2015 Mr Bourne recorded in his note book under the heading "RAL": "Lends £35m from ACE Buys BVI/M House for £35m Sells [for] £45m Pays £1m fee to ACE Has net £9m Pays £5m fees Cash £4m". Over the night of 5 March 2015 Mr Paul Wareham, who was an adviser to RAL but later became an employee of BHS, circulated a "Points of Principle" tracker which was designed to show how RAL would satisfy each one. Against "SR inject £10m of capital" it stated "Sale of MH for £45 million".

94. Mr Bourne's notes (above) show that even on the existing terms Mr Chappell would have found it difficult to fund both the hurt money and the costs of the transaction out of the proceeds of Marylebone House. Mr Henningson was, therefore, trying to raise the

additional funds to pay the acquisition costs. He approached Mr Johann Robb, executive chairman of MMV Investments Ltd, for a loan of £1 million but by email dated 5 March 2015 Mr Robb turned down the opportunity on the basis that it was an unsecured loan backed only by Mr Chappell's personal guarantee.

95. On Saturday 7 March 2015 the acquisition team met together to discuss the outstanding points and Mr Bourne recorded "Points to Completion" in his notebook. Item 6 was "M House to Arcadia £400k? When payable?" In a different pen he had later crossed through this note and recorded "M House now sold". In an email dated 9 March 2015 to Mr Benjamin Shore, his associate, Mr Roberts explained the reason (or, at least, the reason which he had been given):

> "We have communicated to ACE that SPG has decided to sell Marylebone House to a third party. It has been agreed that we will sell them NWH for £32m plus a £5m loan to DC (to be documented separately). As we hold more than the £32m in the client account, we have been instructed to proceed asap with the NWH sale."

96. Mr Roberts also recorded that Mishcon had asked for a sales pack together with the existing drafts of an option agreement and an agency agreement. He also asked Mr Shore to confirm that ACE would grant a lease to BHSL immediately on completion and that it would operate as an overriding lease. By this time Mr Chappell was also being put under pressure to complete immediately. Mr Roberts was asked why Sir Philip Green had accelerated the sale and he gave the following answer in Roberts 1:

> "While I cannot know for sure, I believe there were a few factors that might have been responsible for the Acceleration including (i) the existence of a story in the Times by Oliver Shah on 25 January 2015 that leaked the fact that SPG was planning to sell BHS (ii) the fact that the leak might make BHS's trade credit insurers nervous about its financial covenant post completion and (iii) the possibility that SPG wanted the deal done prior to having to meet the rent and VAT obligations for the next rental quarter (30 March 2015)."

97. By email dated 10 March 2015 Mr Matthew Wentworth-May, a senior associate at Olswang, wrote to the deal team to explain the consequences of the withdrawal of Marylebone House from the acquisition:

> "Our expectation (on the assumption that we are still acquiring Carmen tomorrow) is that the headlease of Marylebone House which is currently

> between Wilton Equity and Carmen will be surrendered by Carmen before completion. BHS will then, immediately following completion of the acquisition of BHS, surrender its existing 25 year occupational lease to Wilton Equity, in return for the grant of a new 2 year rent free occupational lease. This would then reflect what we believe to be the new commercial deal Arcadia keeps Wilton Equity and will sell Marylebone House to a third party following completion subject to a two year rent free lease to BHS (with £14.5 million of the proceeds of sale being gifted to BHS through the existing share premia mechanism). I hope that this makes sense, perhaps we can review the relevant documentation together to make sure it all works from a tax perspective."

98. The inference which I draw from Mr Bourne's notes and these emails is that on or shortly after 7 March 2015 Sir Philip Green told Mr Chappell that Marylebone House would no longer form part of the deal because he had received a better offer but that he would agree to pay a substantial sum out of the proceeds of sale to Mr Chappell. I also infer that Sir Philip Green agreed to postpone the payment of £5 million of the hurt money until Marylebone House was sold. This is consistent with the evidence of both Mr Chandler and Mr Topp. It is also consistent with the Completion Statement (below) and the negotiations leading up to the variation of the SPA on 26 June 2015 (below).

(8) Hurt Money

99. This new deal still required Mr Chappell to find £5 million of hurt money by completion and, although he appeared to have a deal with Mr Dellal by 9 March 2015, he and Mr Parladorio continued to look for an alternative source of funds. They approached Mr Mahmood Ismailjee who had been introduced to Mr Chappell by Mr Paul Sutton. By a loan agreement dated 29 September 2014 Mr Ismailjee's wife, Ms Sara Ismailjee, had lent Swiss Rock £500,000 for nine months at a rate of interest of 10% per annum and in an email dated 9 March 2015 Mr Roberts described him as a director of ASM Investments (UK) Ltd, a Dubai backed property investment company. On 19 January 2017 Mr Ismailjee was interviewed by the Insolvency Service and he gave evidence that he was introduced to Mr Sutton and Mr Chappell and that he advanced money to them to buy shares in AIM listed companies.

100. By the end of 9 March 2015 Mr Chappell and Mr Parladorio appeared to have reached agreement with Mr Ismailjee instead of ACE and at 12.05 am on 10 March 2015 Mr Parladorio wrote to the other directors of RAL (including Mr Henningson) commenting on the current state of negotiations:

> "Dallal ludicrously and disgustingly greedy and the proposed structure will be transparent to SPG because of the requested property charge. Mo far more reasonable. On the basis the the [sic] Mo option will now be pursued (£3m to DC in return for option to buy NWH for £32m) tomorrow I will also pursue a private loan of £2m to get us to where we want to be. Will report back on this tomorrow."

101. By email dated 10 March 2015 and timed at 08.37 Mr Chappell wrote to Mr Roberts stating that he had agreed terms with Mr Ismailjee and forwarded on his email to Mr Ismailjee himself. Mr Roberts also emailed Mr Ismailjee's solicitor, Mr Rohan Campbell of Irwin Mitchell LLP ("**Irwin Mitchell**"). However, at 10.13 Mr Parladorio sent an email to Mr Paul Martin of GT, Mr Tasker and Mr Roberts:

> "It seems we truly are at squeaky bum time on the £5m. The Mo prospect is around 50/50. Delal/ACE is a non starter. Can the three of us have a ten minute telecom asap as I am very urgently trying to find the £5m for DC but I need to know what can be offered (DC has told me what I can offer commercially but I need to get advice on whether this can work before offering it out. Can we say now or say 10-30am latest. Can we do a dial in via Olswang conference call to make it easier ?"

102. Mr Parladorio also asked Mr Chandler to approach a contact of his, Mr Wayne Davis, to see if he was prepared to lend the hurt money of £5 million. By email dated 10 March 2015 and timed at 12.23 Mr Chandler wrote to Mr Davis as follows:

> "As discussed, an opportunity has arisen for an investor, prepared to loan £2m (or possibly £5m will know this shortly) to a bid company which is involved in the forthcoming acquisition of all the shares in a privately owned UK company. The target company is well known and has a turnover of around £800m p/a. The bid co has arranged all its senior and mezzanine funding (circa £100m) and has been badly let down at the 11th hour (in the last 24 hours) over a small (but important) loan of £5m necessary to get the deal done. Accordingly the individual behind the transaction needs to borrow £5m very quickly on a very short bridging basis (days /weeks not months) and is prepared to offer an extremely attractive return (see below) for the loan as he appreciates that time is short. The negotiations for the acquisition are at a very advanced stage (with major law and accountancy firms preparing documents for signature tomorrow), and so any investor would need to be able to act today, or at a push, tomorrow morning. This would mean transferring the loan monies to the well-respected city firm acting for bidco today to be held to order pending security documentation being agreed and finalised and with a view to the loan being effective and drawn down tomorrow (Wednesday). Given the lateness of the hour (and the requirement arriving out of the blue and at the last moment with a deadline date of tomorrow the for reasons which are complex) alternatives

> are naturally being sought (first come first served), so any interested person would need to be able to reply and move very quickly."

103. Mr Chandler accepted that Mr Parladorio drafted this email and asked him to send it. He also accepted that he later discovered that it contained a number of material inaccuracies although he did not accept that Mr Parladorio knew that they were untrue at the time or deliberately asked him to lie to Mr Davis.

104. By email dated 10 March 2015 and timed at 16.39 Mr Roberts wrote to members of his team stating that he was expecting £2.5 million in two tranches from ASM and that the first tranche should already be with Olswang. By email timed at 17.30 and headed "hurt money" Mr Roberts wrote to Mr Parladorio stating that an agreement had been reached:

> "I am in good shape on this. We have provisionally agreed a deal with ACE for 32m NWH and a £5m loan backed by security over the Atherstone DC. They will allow us to put the £5m into links account tomorrow am and I have sent an undertaking to links to hold it to our order - so that such can go tomorrow first thing. Mishcon are preparing the loan between DC and ACE. We are preparing the SPA and lease back on NWH. Mischons are preparing a legal mortgage and draft fixed charge that BHS Properties Ltd would need to give ACE. ACE also would like a £1m loan note from RAL - which we would draft."

105. Under cover of an email timed at 17.35 Mr Shore wrote to Mr Kirpal Kaur of Mishcon enclosing drafts of a contract for sale and transfer of North West House together with official entries from the register of title. In the covering email Mr Shore made it clear that Olswang had been instructed to send the papers to two parties:

> "Further to my voicemail message, please find attached the draft Sale and Purchase Contract and Transfer in respect of North West House, these follow the form of documents agreed in respect of Marylebone House. As your client is aware we have also been instructed to issue papers in respect of the sale of North West House to a third party; my client is not obliged to exchange upon the sale of North West House with either party."

106. At 18.59 Mr Roberts forwarded this email together with its attachments on to Mr Chappell and Mr Henningson and at 20.22 Mr Henningson forwarded it on to his gmail address. Negotiations appear to have continued with both parties because Mr Roberts did not tell Irwin Mitchell that the deal with Mr Ismailjee was off until late that night. By email dated 11 March 2015 and timed at 03.32 he wrote to Mr Campbell stating: "With apologies for the delay in getting back to you, we have been negotiating hard all

night and have run out of time and bandwidth to get your deal done I am afraid." By email dated 11 March 2015 Mr Campbell wrote back asking Mr Roberts to return the funds which he had received. He also stated as follows:

> "ASM have confirmed that they have spoken to Dominic Chappell and that he has agreed to cover our fees in this matter. I assume payment will be made by Swiss Rock plc, but please confirm. Our fees as at close of business yesterday were £9,138.50 (plus VAT and disbursements). Please can you confirm that you have monies on account to pay our fees and that you are instructed to do so. I will send through our invoice by email later today. I look forward to hearing from you with confirmation of the transfer of funds back to ASM and in respect of the payment of our fees."

107. Indeed, Olswang must have received £5 million from Mishcon first thing that morning because they were able to pay that sum to Linklaters and by email timed at 11.14 Mr Roberts wrote to Mr Chappell to confirm that Linklaters had acknowledged receipt. I will have to return to the timing of the agreement between RAL and ACE in greater detail below.

E. Day One: 11 March 2015

(1) Appointment of Directors

108. The Joint Liquidators referred to 11 March 2015 as "**Day One**". On that day a series of board meetings took place at which Mr Chappell and Mr Henningson were appointed to be directors of the four Companies and also of BHS Properties Ltd ("**BHSPL**"), the group's principal property company, and I refer to a number of these meetings below. On the same day both Mr Bourne and Mr Tasker resigned as directors of RAL and on the following day, 12 March 2015, Mr Smith was appointed to be a director of RAL. A week later, on 18 March 2015, Mr Smith and Mr Chandler were also appointed to be directors of BHSGL and on 20 March 2015 Mr Chandler was also appointed to be a director of BHSL. Finally, on 9 April 2015 Mr Topp was also appointed to be a director of BHSGL and on 17 April 2015 he was appointed to be a director of BHSL.

(2) The SPA

109. By an agreement dated 11 March 2015 and timed at 5 pm Taveta agreed to sell and RAL agreed to buy the entire issued share capital of BHSGL. The agreement was executed

by Mr Budge on behalf of Taveta and by Mr Chappell on behalf of RAL and it provided as follows (so far as is relevant to the issues between the parties):

(1) The term "**BHS Loan**" was defined as a loan of £3.5 million made to BHSGL.

(2) The term "**Capital Injection**" was defined as the amount of £10 million to be paid by RAL to BHSGL as a subscription for additional shares in the company.

(3) The term "**Completion Statement**" was defined by reference to Schedule 10, which contained a very detailed mechanism for drawing up the statement in accordance with UK GAAP and the BHS Group's current accounting principles and practice (including the appointment of an expert accountant).

(4) The term "**Deed of Release**" was defined as a deed also dated 11 March 2015 between BHSGL and Arcadia in relation to the release of monies owed between the BHS Group and the Arcadia Group.

(5) The term "**Fixed and Floating Charges**" was defined as the first ranking fixed charge over the BHS store in Bristol, 19 The Mall, Cribbs Causeway Regional Shopping Centre, Patchway, Bristol BS34 5GF ("**Cribbs Causeway**") to secure a debt of £15 million owed by BHSGL to Arcadia and the floating charge over the non-property assets of the BHS Group to secure a debt of £25 million owed by BHSGL to Arcadia.

(6) Clause 2.1 and clause 3 provided that Taveta should sell and RAL should buy all the issued shares of BHSGL for £1.

(7) Clause 4.1 provided that completion would take place at the offices of Taveta's solicitors immediately after the execution of the Agreement.

(8) Clause 4.2 provided that at completion Taveta would procure that there was an amount of cash in the BHS Group of £23,660,000 (clause 4.2.1), procure the making of the BHS Loan (clause 4.2.2) and procure that the BHS Group companies' debt was zero (clause 4.2.3).

(9) Clause 4.3 provided that at completion RAL would pay the purchase price to Taveta (clause 4.3.1), procure that the Capital Injection took place (clause 4.3.2), procure that the Fixed and Floating Charges were granted (clause 4.3.4).

(10) Clause 5 provided that the Completion Statement shall be drawn up in accordance with Schedule 10 and that Taveta and BHSGL would comply with their respective obligations under Schedule 10 pursuant to which the Completion Statement was to be prepared and become final and binding on the parties.

(11) Clause 6.1 provided that within 120 days from completion RAL would put in place a senior management incentive plan. Clause 6.2 also provided that all funds available on completion (including the proceeds of sale of properties) were to be used for the sole purpose of the day to day running of the BHS Group:

> "The Buyer shall procure that: 6.2.1 all monies in or available to the Group Companies at Completion, including the Group Cash Amount, the Capital Injection and the BHS Loan shall be used for the sole purpose of the day-to-day running of the business of the Group Companies; 6.2.2 all proceeds realised by the Group Companies from the sale of the Properties shall be retained by the Group Companies and used for the sole purpose of the day-to-day running of the business of the Group Companies until the compromise with the BHS Pension Scheme and the BHS Senior Management Scheme described in paragraph 1.1.1 of Schedule 8; and 6.2.3 no steps are taken by the Buyer or the Group Companies that would reasonably be expected to adversely affect the ability of the Group Companies and the BHS Business to continue to operate as a going concern and to pay their debts as they fall due."

(12) Clause 28 provided that the SPA and the documents referred to in it were to constitute the entire agreement of the parties and RAL agreed and acknowledged that, in entering into it (and the documents referred to in it) it was not relying on any representation, warranty or undertaking not expressly incorporated into it.

(13) Schedule 8, paragraph 1 imposed an obligation upon RAL to reach agreement with the Trustees to compromise the liabilities of the Schemes and to agree and implement that compromise as soon as reasonably practicable.

(14) In Schedule 8, paragraph 2 Taveta agreed that it would pay £5 million to the Trustees in each 12 month period following completion up to a maximum of £15

million over a 36 month period and RAL agreed to procure that BHSL would also pay £5 million to the Trustees up to a maximum of £15 million over the same period.

(3) The Side Letter

110. By a letter dated 11 March 2015 (the "**Side Letter**") Sir Philip Green wrote to Mr Chappell on behalf of Arcadia referring to the Fixed and Floating Charges which were ultimately contained in the Arcadia Security Agreement (below). The Side Letter stated as follows:

> "I confirm that the £15m fixed security over Bristol Cribbs Causeway and the £25m floating security over the stock and debtors of the Bhs Group is held to your order: a) To secure the ongoing £10m per annum contributions to the Bhs Pensions Schemes, £5m of which is to be paid by us and £5m of which is to be paid by you; and b) In the event of a compromise or winding up. The floating charge will reduce pro-rata as contributions are made. Should you wish to sell Bristol Cribbs Causeway, it must be replaced with £15m cash or a suitable asset, to be mutually agreed."

111. I did not find the Side Letter easy to understand. But Mr Chandler gave evidence that after speaking to Mr Parladorio he understood it as a commitment to transfer the security of £40 million into the Schemes. It appeared to me to provide security for the obligations of both Arcadia and BHSL to pay £5 million a year and to reflect either an express or implied agreement between Sir Philip Green and Mr Chappell that Arcadia would either release the security or transfer it to the Trustees at the direction of BHSGL as part of a wider resolution of the pension deficit.

(4) Completion

112. Despite the complexity of these arrangements and the very last minute changes to the deal the parties did not undertake the exercise set out in Schedule 10 to the SPA. Instead, Sir Philip Green and Mr Chappell signed a handwritten document headed "Final Statement" (the "**Completion Statement**"). It was in fact more of a Day One balance sheet than a completion statement and it recorded that RAL had received – or would receive – a "dowry" of £64.16 million (the "**Dowry**"). This consisted of £18.64 million of miscellaneous cash and assets, £32 million for North West House, £4.92 million for the BHS Group's store at The Lanes Shopping Centre, Carlisle CA3 8NX ("**Carlisle**")

and £8.50 million for Marylebone House. Beneath the Dowry total were two additional numbers: first, £5 million of "Equity" and secondly, an additional £25 million which was explained on the left hand side of the page as a "Goldman's Facility" of £40 million "less Jersey" of £15 million. This produced a grand total of assets of £94.16 million which was what RAL had either received or inherited on Day One or which it would receive in the coming days.

113. The Completion Statement shows that Sir Philip Green did not insist on strict compliance with the SPA and agreed instead that the BHS Group would receive £8.5 million out of the proceeds of sale of Marylebone House and that RAL would use that money both to pay for the BHS Loan and the second £5 million of the hurt money or the "**Capital Injection**" as it was described in the SPA. This is not spelt out in the Completion Statement but is the only obvious way to reconcile this document with the SPA. The SPA did not impose an obligation upon Taveta to sell Marylebone House to RAL (or to pay over any part of the proceeds of sale) and the Completion Statement did not refer to the balance of £5 million of the Capital Injection. Nor did it refer to the BHS Loan of £3.5 million. 11 March 2015 was a Wednesday and it is clear from Ms Hague's email dated 12 March 2015 (below) that on completion the parties expected the balance to be paid the following Monday, 16 March 2015. Mr Roberts also gave evidence in Roberts 1 that there were two key changes in the structure of the sale which caused him to reassess the risks:

> "There were in my view two key changes that increased the risk to RAL, being (i) the removal of a formal completion statement mechanic and (ii) the removal of the sale of Marylebone House as a completion matter."

(5) The Security Agreement

114. By a deed of release also dated 11 March 2015 and made between the Companies, BHSPL and Arcadia, Arcadia unconditionally released BHSGL from any indebtedness other than in respect of an aggregate amount of £40 million which remained owing to Arcadia. The deed also contained mutual releases by Arcadia and each of the other Companies and BHSPL. By letter dated 14 April 2015 BHSGL acknowledged the debt of £40 million and by a deed also dated 14 April 2015 the Companies, BHSPL, BHS (Jersey) Ltd ("**BHSJL**") and Epoch Properties Ltd ("**Epoch**"), another Jersey company, entered into a security agreement with Arcadia (the "**Arcadia Security Agreement**").

BHSL agreed to grant a first legal charge over Cribbs Causeway and BHSGL and the other companies charged all of their assets (both present and future) by way of first floating charge. There was no dispute that the Security Agreement created a qualifying first charge ("**QFC**") which gave Arcadia the right to appoint an administrator and priority over other floating charge holders if the debt was not repaid.

(6) North West House

115. On 9 March 2015 Cushman & Wakefield LLP ("**C&W**") produced an Excel spreadsheet containing desktop valuations of 54 of the BHS Group's property. It is clear from an invoice dated 26 March 2015 that C&W undertook these valuations for Farallon as part of its due diligence. It is also clear from the spreadsheet that Vail Williams LLP ("**Vail Williams**"), a firm of estate agents and advisers in Reading, had provided information to C&W for the purpose of the exercise and that C&W had been provided with Arcadia's own valuations of the properties.

116. C&W valued North West House at £45 million which was the same as Arcadia's valuation. Vail Williams' comments were: "Short term rent to be agreed. Heads of terms issued at capital value of £45,000,000." C&W also valued the group's flagship store at 252-258 Oxford Street and 16 and 17 Princes Street London ("**Oxford Street**") at £50 million which was also Arcadia's valuation. Again, Vail Williams' comments were: "Freeholder verbally offered circa £50m on 13 February 2015, for insertion of a LL break clause in 2018. Open market rent would be circa £6,750,000 plus premium." I understood "LL" to be a reference to the landlord. C&W valued the BHS Group's entire portfolio at £167 million (compared with Arcadia's valuation of £212 million).

117. At 12.05 pm on 11 March 2015 a BHSGL board meeting took place at which the Arcadia directors appointed Mr Chappell and Mr Henningson to be directors and then resigned themselves. At 12.15 pm a Lowland board meeting took place and at 12.30 pm a BHSPL board meeting took place at which the same thing happened. The Arcadia directors appointed Mr Chappell and Mr Henningson and then resigned themselves. By 12.30 pm, therefore, on Day One Mr Chappell and Mr Henningson were the sole directors of BHSGL, Lowland and BHSPL. Mr Smith was not appointed until the following day and Mr Chandler a week later. Mr Topp was not appointed until 9 April 2015.

118. At 2 pm on 11 March 2015 a RAL board meeting also took place at which Mr Chappell, Mr Tasker, Mr Bourne, Mr Parladorio and Mr Henningson were all present. The minutes record as follows:

> "The Board noted that BHS had retained Vail Willlams to advise on a property strategy and to confirm valuation of the property estate and it was noted that the Directors had comfort that (absent the property portfolio held by Carmen Properties Limited – which was encumbered to RBS but which was being refinanced to HSBC for £70 million and the Jersey property which was encumbered as to £20 million, but which was being refinanced post completion) the balance of the property portfolio was unencumbered. The Directors confirmed that Vail Williams has prepared a property valuation report for the benefit for circulation.
>
> The Board was ultimately satisfied that a combination of the dowry left on the balance sheet by Sir Philip Green (' SPG"), the availability of the sale proceeds of North West House (which was to happen for £32m immediately on completion), the agreement by SPG to contribute further funds from the sale of Marylebone House and also the offer from SPG to help to procure a cheaper form of working capital facility than the facility that the Company was proposing with Farallon, meant that there was not only sufficient cash and assets available to meet the Group's cash flow needs, there was a reasonable buffer."

119. The property valuation referred to in these minutes was set out in a letter dated 11 March 2015 from Mr Mark Sherwood who was a partner in Vail Williams but was about to be engaged by the BHS Group as its property director (although he was never appointed to be a *de jure* director of any of the Companies). He advised Mr Chappell on behalf of Swiss Rock about the value of the BHS portfolio of properties:

> "As requested, we have undertaken a desktop review of the BHS Property Portfolio. We set out below a summary of our views on the likely price achievable if they were to be offered for sale in the current investment market. In formulating our advice, we have relied upon the information on tenure, floor areas and lease details supplied by Arcadia. We have not undertaken detailed planning enquiries and some of the lower value properties have not been inspected by Vail Williams.
>
> As you are aware there are three significant assets within the portfolio. Marylebone and North West House are office buildings fronting onto the Marylebone Road with net internal floor areas of 63,674 sq ft and 41,933 sq ft respectively. We would anticipate Marylebone House achieving a price for the freehold with a 16 month leaseback at nil rent of approximately £62,000,000. The freehold interest in North West House with a 16 month leaseback to BHS at nil rent is likely to achieve a figure in excess of £40,000,000.

> 252/258 Oxford Street is a retail leasehold interest until 2061. This property has the potential to generate a significant premium from either the landlord or another occupier as the lease has the benefit of being at a significant discount to the open market rental value. In our view, this leasehold interest is likely to generate a premium of between £50,000,000 and £60,000,000. Thus the three principle [sic] assets are likely to generate capital receipts in excess of £150,000,000."

120. I was not taken to the executed contract or transfer but it was common ground that on 11 March 2015 Lowland exchanged contracts and completed the sale of North West House to J9 Properties Ltd ("**J9**"), a company owned or controlled by ACE, for £32 million. Immediately before the sale Lowland granted a lease of North West House to BHSL for a term of two years expiring on 10 March 2017 at a peppercorn rent. The Joint Liquidators' pleaded case was that completion took place at 7.18 pm and Ms Hilliard and Mr Lightman and their teams did not dispute this. It is common ground that no minutes were kept of any Lowland board meeting to approve the sale of North West House.

121. By an agreement also dated 11 March 2015 and made between Lowland, J9 and Olswang (the "**Escrow Agreement**") Lowland and J9 jointly instructed Olswang to hold £750,000 in their client account subject to the joint instructions. The email correspondence between the solicitors states that the purpose of the Escrow Agreement was to provide security for the obligations which Lowland had agreed to guarantee under the lease of North West House.

(7) The ACE Loan Note I

122. On 11 March 2015 a BHSGL board meeting took place at which Mr Chappell and Mr Henningson were present to approve the following transaction. By a deed dated 11 March 2015 and made between BHSGL and ACE (the "**ACE Loan Note I**") BHSGL agreed to issue a series of loan notes to the value of £3,465,000 which were repayable in tranches of £1,075,000, £1,285,000, £642,000 and £642,000 at six monthly intervals. The principal sum of £3,320,000 represented two years rent at an open market rack rental value for North West House (which Lowland had let to BHSL at a peppercorn rent immediately before the sale). The balance was made up of the £1 million fee payable under the Heads of Terms dated 30 January 2015, the £750,000 held by Olswang under the Escrow Agreement and £75,000 for professional fees. On 27 March

2015 BHSGL issued a certificate recording that J9 was the registered holder of £1,075,000 unsecured loan notes in respect of the first repayment.

(8) ACE I

123. At 5.10 pm on 11 March 2015 another RAL board meeting took place at which Mr Chappell and Mr Henningson were present and at which they resolved to enter into a loan agreement with ACE. By that agreement (the "**ACE I Loan Agreement**") ACE agreed to make available to RAL a loan facility of £5 million for the purpose of funding a subscription for shares in BHSGL. Clause 5 provided that £2 million was repayable 5 days after the date of the agreement and £3 million was repayable after 60 days. Clause 7 provided for default interest at 10% per annum and clause 8 provided for the payment of an exit fee of £1 million on the final repayment date. It also required RAL to pay Mishcon's costs of £25,000.

124. By a legal charge also dated 11 March 2015 and made between BHSPL and ACE (the "**ACE I Charge**"), BHSPL charged the freehold of the BHS Group's principal distribution centre at Unit 8, Carlyon Road, Atherstone, Warwickshire CV9 1LQ ("**Atherstone**") to secure repayment of the loan facility. Where I refer to "**ACE I**" in this judgment, I intend to refer to the ACE I Loan Agreement and the ACE I Charge as amended from time to time (as I explain below). ACE I was the source of the £5 million Capital Injection which RAL was required to make to complete the SPA although the payment itself had been made to Linklaters earlier in the day.

(9) Proceeds of Sale

125. Olswang's client account entries show that on 4 February 2015 they received £35 million from ACE pursuant to the Heads of Terms and that on 10 March 2015 they returned £3 million to Mishcon leaving the balance of £32 million which represented the proceeds of sale of North West House. It was common ground that Lowland sold the property directly to J9 and that RAL was not itself a party to the sale. It follows that Olswang held the proceeds of sale of £35 million in their client account on behalf of Lowland and not RAL after 7.28 pm on Day One.

126. By email dated 12 March 2015 Ms Hague wrote to Mr Matt Crane, an Associate Director in GT's Business Consulting division, confirming that BHSGL had received

the £5 million Capital Injection together with other payments which represented the £18.6 million cash and assets forming part of the Dowry. However, she also stated that it had not received the proceeds of sale of North West House which was due to be sold that same day for £32 million. She also stated that the proceeds of Carlisle and Marylebone House were due to be received on the following Monday, 16 March 2015:

> "Balances at close of play today are shown below: key movements being the +£5m equity injection into the first account listed (BHS Group Ltd); £(3.6)m having been paid out of the AP account (2nd on the list) which is primarily the three transfers to Hudson Road that we discussed (ie the up-front payments); £19.8m having gone into the BHS Ltd No 1 account (the £18.66m transferred from us+ some sales receipts). You will note that we have not received the £32m relating to NWH which was due to be transferred from Olswang - we chased Olswang and left a message on your voicemail Stephen to ensure that you were aware, but I know you were in meetings - not sure what happened to this today? I believe that the Carlisle proceeds and £8.5m re MBH is due to be received on Monday."

127. By email dated 12 March 2015 Mr Parladorio instructed Olswang to pay £5 million into RAL's account at Metrobank and on the same day Mr Chappell also sent an email confirming those instructions. By email dated 13 March 2015 Mr Chappell also gave instructions to transfer £25 million to BHSGL's bank account (and not the £32 million which Ms Hague had expected). Olswang's client account ledger confirms that these two payments were made on 12 and 16 March 2015 respectively. Olswang's client account entries also establish that they made the following additional payments:

(1) *Mrs Ismailjee*: On 13 March 2015 Olswang paid £11,484.29 to Irwin Mitchell LLP in relation to their legal fees and in accordance with the agreement recorded in Mr Campbell's email to Mr Roberts on the morning of the 11 March 2015.

(2) *ACE I:* On 20 March 2015 they paid £1,028,415 to Mishcon in part repayment of the first instalment of £2 million which was due within five working days.

(3) *RAL*: On 25 March 2015 they paid £211,495.62 into RAL's bank account.

(4) *The Escrow Agreement*: On 27 March 2015 they paid the escrow amount of £750,000 to Mishcon.

128. These arrangements have taken a considerable amount of print to explain. But in simple terms the position on completion was as follows. RAL paid £1 for the entire issued share

capital of BHSGL and it borrowed £5 million from ACE to make the Capital Injection. Olswang were also holding £35 million to ACE's order until completion of the purchase of North West House when they released £3 million back to Mishcon. They then paid £25 million of the proceeds of sale to the BHS Group and £5.2 million to RAL. RAL then used £1 million to pay part of the first instalment of ACE I and £0.75 million to pay Mishcon pursuant to the Escrow Agreement. RAL provided no funds itself and even the loan which it received to make the Capital Injection was secured on the assets of the BHS Group (and ultimately repaid out of those assets).

(10) Mr Henningson's SMS Messages

129. It is possible to piece together the sequence of transactions on Day One from the minutes of the various board meetings, the transactional documents and the emails sent that day. However, the trial bundle also included an Excel spreadsheet containing text and iMessages passing between Mr Dellal and Mr Henningson. On 11 March 2015 there were 20 messages which Mr Henningson either sent to or received from Mr Dellal or which Mr Dellal sent to or received from Mr Chappell and to which either or both of them copied Mr Henningson. I will have to consider them in greater detail below.

F. 12 March 2015 to 17 April 2015

(1) Noah I

130. Despite the change of control, HSBC Bank plc ("**HSBC**"), the BHS Group's primary lender, agreed to roll over the group's existing facilities. Historically, it had made its facilities available to Carmen Properties Ltd ("**Carmen**"), which was registered in Jersey and a fellow subsidiary of Taveta. Both companies were owned by Taveta Investments Ltd ("**TIL**") which was ultimately owned and controlled by Sir Philip and Lady Green.

131. On 12 March 2015 BHSGL and BHSPL board meetings took place at which Mr Chappell and Mr Henningson approved the new arrangements. By a facility agreement dated 13 March 2015 ("**Noah I**") HSBC agreed to provide a facility of £70 million to Carmen for the purpose of re-financing the existing facility. BHSGL, BHSL and 18 group property companies guaranteed the facility which was secured by first legal

charges over 12 BHS stores. It was common ground that Noah I did not involve any "new money" and was no more than a continuation of the existing facilities.

132. Some, or perhaps all, of the legal charges which BHSGL and its subsidiaries were required to grant, however, were not put in place until the negotiations with Arcadia over the Security Agreement had been completed. On 13 April 2015 a BHSL board meeting took place at which Mr Chappell and Mr Henningson approved the relevant documents and on 15 April 2015 BHSL and BHSPL granted a legal mortgage over six BHS stores including Oxford Street to secure Carmen's obligations under Noah I. On 15 April 2015 BHSL also granted a third party legal charge over the BHS store in Milton Keynes to secure the repayment of Noah I. On 17 April 2015 a BHSPL board meeting took place at which it was proposed that Mr Chandler be appointed a director.

(2) Mr Bourne

133. On 13 March 2015 Mr Bourne recorded a conversation with Mr Chandler in his notebook in which he discussed why he had not agreed to join the board of any of the Companies and why it might be risky for Mr Chandler to do so. He stated his reasons succinctly: "didn't know the deal, didn't know the people, seen erratic behaviour, cast of weird advisers swimming around, lack of clarity on all sorts of issues." By email dated 13 March 2015 he expressed similar views to Mr Parladorio under the heading: "We must pay Olswang and GT today Eddie":

> "Lots of reasons for this. Volatile owner who changes his mind, poor track record on fees and has little respect for professionals - until cash moves all fees are at severe risk of not being paid We cannot pretend that this is not damaging all of our reputations. We need total commitment form GT and O going forward. We have to draw a line with Dominic who seemed to have had the time to make some sort of payment to himself! Things are kicking off, we don't need this grief and will be in a stronger position when this is done."

134. The concerns which Mr Bourne had raised with Mr Chandler were clearly a matter of concern to him and were still in his mind a week later. By email dated 18 March 2015, and shortly before he was appointed a director of BHSGL and BHSL, Mr Chandler wrote to Mr Parladorio in the following terms:

> "Just been doing lots of reading. If there is an insolvency event, then there will be an investigation into the company's affairs. This could lead to

> directors disqualification proceedings. This has to be reported to the bar council. This could lead to disbarment. Which would be bad. I think there are steps that could be taken that would inoculate me from risk sufficiently to assuage my concerns: importantly I think around company secretarial support, but other things too.... I urgently need to discuss all this with you. I know we are all busy but this is critical to me/us. I will be at Marylebone house early reading the BHS articles ready for the board meeting."

(3) Marylebone House

135. The C&W spreadsheet shows that before the acquisition took place Carmen owned the freehold or long leasehold interests in a number of stores which were leased to BHSL or other group companies including Marylebone House. On 13 March 2015 it surrendered its 25 year head lease of Marylebone House to Wilton Equity Ltd ("**Wilton**"), which was also ultimately owned or controlled by Lady Green, and on the same day Wilton granted a short two year lease to BHSL at a peppercorn rent. By email dated 13 March 2015 Mr Roberts wrote to Mr Chappell shortly before the surrender and asking about the Capital Injection:

> "Before we confirm Carmen can take place, we are just trying to sort out definitively where the £5m of cash coming into the business following the sale of Marylebone House come in. The Seller had agreed to contribute £5m into the business following the sale of Marylebone House. We thought that this £5m was going to be delivered in the Carmen bank account. Linklaters tell us that you and SPG had reached a separate agreement as to how the £5m comes into the group. All that we need to know is that you are happy to confirm that £5m of cash will come into the business via the agreement that you reached with SPG. We don't need to know the agreement, merely that the cash will come into the business as it is needed in the business. If you are happy to confirm the £5m is coming into the business, that is all we need to know and we can then complete Carmen. We need that confirmation now(ish) so that Linklaters can move forward and complete Carmen."

136. I was not taken to a reply to this email and it is clear that the question how RAL would raise the second £5 million of the Capital Injection remained unresolved until 26 June 2015 (below). Moreover, I was not taken to any documents to suggest that there were any other negotiations for the sale of Marylebone House (whether for the freehold or the head lease) or that it was ever sold on the open market. Mr Curl and Mr Perkins stated in their written opening submissions that all that appears to have happened is that the share capital in Wilton was transferred to Arcadia for £35 million. Ms Hilliard and Mr Lightman did not dispute that this was correct.

(4) The MSA

137. Shortly after Day One BHSGL also agreed to pay RAL for its own services. By a Management Services Agreement dated 13 March 2015 (the "**MSA**") and made between RAL and BHSGL, RAL agreed to provide the services set out in Schedule 1 to BHSGL and other members of the BHS Group in a form and manner to be agreed from time to time between them. The MSA did not provide a fixed fee or fee structure either but provided for the fees to be agreed from time to time between the parties. The "**Services**" set out in Schedule 1 included general administration, marketing, finance, treasury, human resources, procurement, taxation, legal, health, safety, environmental and quality services.

138. RAL also used the £5.2 million proceeds of sale of North West House to pay the costs of acquisition and to reward its own management or consultants for their services to RAL. In particular, RAL's ledger confirms that it made the following payments to the following parties:

(1) *Swiss Rock*: Between 12 March 2015 and 26 June 2015 RAL paid a total of £1.25 million to Swiss Rock or to Mr Chappell personally under seven invoices which stated that the payments were for: "Agreed success fee on the completion of the purchase of BHS LTD". The invoices were also in evidence.

(2) *Mr Tasker*: On 17 March 2015 RAL paid £465,000 to Mr Tasker under an invoice dated 16 March 2015 for consultancy services including a success fee of £325,000. Again, the invoices were in evidence.

(3) *Mr and Mrs Bourne*: On 17 March 2015 RAL paid £465,000 (including VAT of £77,500) to Moreton Acquisitions Ltd in respect of fees for Mr Bourne's services as a director until his resignation and £36,000 (including VAT of £6,000) in respect of the services of Mrs Zoe Bourne after Day One. Again, the relevant invoices were in evidence.

(4) *Mr Parladorio*: On 19 March 2015 and 18 June 2015 RAL transferred £634,500 to EWP1 Ltd ("**EWP1**") to pay an invoice dated 18 March 2015 raised by Tamed Productions for services described as: "strategic/business consultancy services (non-legal) in relation to the acquisition of BHS". Mr Chandler had been the sole

director and shareholder but he confirmed in evidence that the invoice was reissued in the name of another company and that these sums were paid into the account of Mr Parladorio.

(5) *GT*: On 17 March 2015 RAL paid £1,200,000 (inclusive of VAT) to GT under an invoice dated 12 March 2015 for their "professional services in connection with Project Harvey".

(6) *Olswang*: On 17 March 2015 RAL also paid £1,200,000 (inclusive of VAT) to Olswang under an invoice dated 12 March 2015 for their professional services. On 19 March 2015 RAL also paid Olswang's disbursements of £5,628.95 (including VAT).

139. By email dated 13 March 2015 Mr Budge wrote to Ms Hague, stating that he had spoken to Sir Philip Green a number of times and that he was "quite jumpy that only 25 of the 32 coming in, apparently 7 in Bank of China according to Dominic as they may be looking for finance from them too!" The inference which I draw from this email is that on or before 13 March 2015 Mr Chappell told Sir Philip Green that he had put the missing £7 million on deposit at the Bank of China. This inference is supported by a number of other documents to which I refer below.

140. By email dated 14 March 2015 Mr Mark O'Sullivan, a GT advisory partner, wrote to Mr Bourne asking why the proceeds of sale were so much lower than anticipated and Mr Bourne replied informing him that £5 million was being retained "for adviser fees etc". Arcadia were still providing the accounting and treasury functions for the BHS Group after completion and by email dated 25 March 2015 Ms Morgan wrote to Ms Hague stating that the proceeds of sale should have been transferred to Lowland and asking for instructions to transfer the £25 million between BHSGL and Lowland. By an internal email dated 31 March 2015 Ms Hague also asked where the remaining £7 million had gone and Mrs Bourne was asked to follow it up.

141. By email dated 9 April 2015 Mr Crane of GT reported to Mrs Bourne that £5 million had been used to pay transaction costs and £2 million to repay ACE I. His breakdown of the various transaction costs was not an accurate one and no doubt reflected his instructions. He described the loan repayment issue as a "somewhat sensitive one" and he stated as follows:

> "The £2m, per the loan agreement summary I have from Olswang, is an initial repayment of a £5m loan from Allied Commercial Exports Limited. We're not yet sure exactly what has been paid of this as yet, but understand this is why the £2m was not transferred to Lowland or RAL. I believe there is some connection between this and the new owners of NW House, the Dellal's, but currently don't have any more information."

(5) 13 to 25 March: Board Meetings

142. On 13 March 2015 a BHSGL board meeting took place at which Mr Chappell and Mr Henningson were present and at which the existing bank mandates were brought to an end. On 20 March 2015 a further board meeting took place at which Mr Chappell, Mr Henningson and Mr Chandler were present and at which all three became authorised signatories together with Mr Topp and Ms Morgan. For any payment between £25,000 and £1,000,000 two of their five signatures were required and for any payment between £1,000,000 and £5,000,000 two of the four signatures of Mr Chappell, Mr Henningson, Mr Chandler and Mr Topp were now required.

143. On 14 March 2015 GT prepared an updated report on trade credit insurance in which they set out the total of outstanding payments covered by each insurer and the total of outstanding commitments immediately after completion. On 17 March 2015 Mr Chappell, Mr Topp, Ms Morgan and Mr O'Sullivan of GT met Euler Hermes and on the same day Mr O'Sullivan circulated an email summarising the meeting. He recorded that the representatives of Euler Hermes had been unhappy to learn about the acquisition from the press. They had also made it clear that they had written cover on the basis that the Arcadia Group was cash rich and that it would now take weeks (not days) to get to a decision whether to restore cover after the separation of the BHS Group from Arcadia. Mr O'Sullivan identified one way to expedite the process:

> "Clearly we can't wait for them to jump through their internal hoops and therefore at the same time as complying with their request, we need to see if we can accelerate a decision by raising it up the chain within EH. This may involve pulling on SPG's commitment to DC to provide a bond guaranteeing the EH exposure to BHS. DC is also looking into potential other sources of a bond to back up the EH exposure to BHS. However, need to consider if others get wind of this whether they will come asking as well."

144. On 18 March 2015 a BHSGL board meeting took place at which Mr Chappell and Mr Henningson appointed Mr Chandler to be an executive director and Mr Smith to be a

non-executive director. The board also resolved to appoint Mr Topp as interim CEO. The minutes of the meeting also record that Mr Chappell set out his reaction to the meeting with Euler Hermes:

> "DC1 reported that the meeting had been difficult. EH had asked for a substantial amount of information that GT and Katherine (KM) Morgan would now be working on. Even if there was any decision to begin offering cover again it would take a few weeks to process. DC1 indicated that HSBC has begun to offer cover again, and that SPG had offered to provide a bond. DC1 also had a contact in Dubai who might also be able to assist in the provision of a bond."

145. On 25 March 2015 a BHSGL board meeting took place at which Mr Smith, Mr Chappell, Mr Chandler and Mr Henningson were all present. The minutes record that at that meeting the board resolved to appoint Ms Emma Reid as the company secretary and to pay Mr Chappell remuneration of £300,000 per annum and Mr Smith and Mr Henningson £150,000 per annum. The minutes also record that the board agreed to pay Mr Michael Morris, who was a corporate finance professional engaged to raise finance, remuneration of £125,000 per annum pro rata. The minutes also record that Mr Chappell reported to the meeting about the meetings with the Trustee and the Pensions Regulator:

> "DC1 reported that the meetings with the Pension Trustees and the Pension Regulator had been difficult. The Regulator in particular reported that it had been trying to obtain answers to questions from the previous owner of BHS for many years, without any success. It was felt that there was a real intention to fix liability for the pension deficit on the previous owners, and that this might hamper any potential deal with the Trustees to rectify the deficit."

(6) Noah II

146. Although the Points of Principle required Swiss Rock to produce a letter of comfort from Farallon, the SPA was not conditional upon RAL entering into a working capital facility for any amount. Indeed, by completion it appears that the negotiations with Farallon had come to an end because the Completion Statement contemplated that RAL would obtain a facility of £40 million from Goldman Sachs. However, there was no evidence before me that Goldman Sachs was ever willing to provide a loan facility and by 17 March 2015 BHSGL was in further negotiations with HSBC. On that day Mr Roberts sent an email to Mr Keith Hinds, a pensions partner at GT, stating as follows:

> "It is certainly the case that given the deal RAL was able to negotiate with SPG, it was not necessary to utilize the very expensive £120m working capital facility that was being considered from Farallon and, instead, a smaller £25m facility is being considered and meetings have been held this week to help progress such a deal."

147. On 24 March 2015 BHSGL and BHSL board meetings took place at which Mr Chappell, Mr Henningson and Mr Chandler approved a working capital facility of £40 million to be granted by HSBC. By a facility agreement dated 26 March 2015 ("**Noah II**") HSBC agreed to grant a facility of £40 million to BHSGL in two tranches of £15 million and £25 million. Tranche A was to be used for the purpose of repaying an existing facility agreement dated 18 April 2013 between BHSGL and Bank of Scotland plc ("**BOS**"). Tranche B was to be used for the purpose of BHSGL's working capital requirements. Epoch, BHSJL, BHSL and BHSPL all guaranteed BHSGL's obligations under Noah II.

148. The term of the loan was three years and after two initial payments of £250,000 it was to be repaid in monthly instalments of £500,000. It carried interest at 3 months LIBOR plus 1.6% and BHSGL was required to pay an arrangement fee of £280,000 and a commitment fee of 1.05% on any undrawn element of the facility. The loan was secured on Oxford Street and the BHS stores in Manchester, Jersey, Carmarthen, Sunderland, Taunton and Grimsby. Tranche A was drawn immediately to repay the existing BOS facility. On 26 March 2015 BHSGL drew down an initial £597,150 of Tranche B to pay the arrangement fee and legal fees for Noah II and on 30 April 2015 BHSGL drew down £3 million. On 21 May 2015 it drew down a further £10 million. But this was the extent to which the facility was utilised and according to GT's weekly cashflow updates £12.8 million remained undrawn. On 26 June 2015 BHSGL repaid £15,907,474.12 to discharge Noah II in full.

149. By a deed of guarantee and indemnity also dated 26 March 2015 Arcadia agreed separately to guarantee Noah II. Although Arcadia was not a party to Noah II, the facility agreement provided that BHSGL was not permitted to submit a drawdown request without the consent of Arcadia (which was defined as the "**Corporate Guarantor**"):

> "(a) To use the Tranche A Facility the Borrower must give to the Lender a duly completed Drawdown Request not later than 10.00am on the Drawdown Date or such other time as may be agreed between the Lender and the Borrower. (b) Subject to paragraph (c) below, to use the Tranche

> B Facility the Borrower must give to the Lender a duly completed Drawdown Request not later than 10.00am 3 Business Days prior to the Drawdown Date. (c) The Borrower may not submit a Drawdown Request in respect of the Tranche B Facility without the prior written consent of the Corporate Guarantor, such consent not to be unreasonably withheld or delayed."

150. On 24 March 2015 members of the BHSGL board also attended a meeting with Mr Roberts who advised them about the detailed terms of Noah II. Mr Chandler took handwritten notes of the meeting which show that it took place immediately after the board meeting. Mr Roberts advised the BHSGL board that Arcadia's consent was required under clause 2.1 but that it could not to be unreasonably withheld. He also advised them that it would be reasonable for Arcadia to withhold its consent if BHSGL was in breach of the existing facility or in the event of insolvency. He also advised that there was no upside to Arcadia letting the BHS Group go under and that it was "not a bad facility."

(7) The S.72 Notice

151. As I have already stated, the Pensions Regulator has extensive powers to give notice require a sponsoring employer to provide documents under S.72 of the PA 2004 and it was a criminal offence not to comply with such a notice. By letter dated 27 March 2015 Ms Claire Boorman of the Pensions Regulator wrote to Olswang on behalf BHSL giving notice under S.72 requesting a detailed list of documents in relation to the acquisition and any security which had been offered to the Schemes. I will refer to the letter as the "**S.72 Notice**" and Ms Boorman explained its purpose as follows:

> "The Regulator is currently investigating whether or not the use of its power to issue a financial support direction ("FSD") under section 43 of the Act or issue a contribution notice ("CN") under section 38 of the Act is appropriate. In particular the Regulator currently is interested in the sale that took place of BHS Group Limited ("BHS") to Retail Acquisitions Limited ("RAL"), the steps that were taken in the build up to that sale and the subsequent impact that the sale might have had on the Schemes. Additionally, we anticipate that we will subsequently be seeking information to assess the flows of value between BHS, and Arcadia and Taveta and between BHS and its ultimate beneficial owners since 2000."

152. Mr Parladorio instructed Mr Ashley Hurst of Olswang to act on behalf of RAL in relation to the S.72 Notice and by an engagement letter dated 30 March 2015 Mr Hurst

wrote to Mr Parladorio agreeing to act for RAL in relation to the information requests. He described the engagement as "**Project Rubus**" and he confirmed that Olswang were also acting for BHSL and Mr Chappell.

(8) The Second GT Engagement Letter

153. On 30 March 2015 GT produced a draft engagement letter addressed to RAL, BHSGL and BHSL (the "**Second GT Engagement Letter**"). The copy in the trial bundle was unsigned and I was not taken to any covering email under which it was sent. Nevertheless, Ms Hilliard and her team placed considerable reliance on it and for that reason I set out its principal terms. The letter stated that GT would work to support the BHS management in relation to the separation of the BHS Group from Arcadia and that this assistance would cover the following areas:

> "● Business separation and development of operating model
>
> ● Monitoring of short term cash flows and development of a working capital and funding monitoring team
>
> ● Providing advice and support in respect of the Group's defined benefit pensions schemes (the Schemes)
>
> ● Providing advice on tax related matters including separating the Group from the Seller Group's VAT registration, ad-hoc advice as required eg in relation to property transactions and development of an in-house group tax team
>
> ● Supporting the development of the Group's three-to-five year strategy including the business plan and underlying financial model"

154. In Appendix 2, GT set out their detailed scope of work. They identified as a key work area the development of robust business cases and plans for EBITDA growth initiatives which would feed into the 3 to 5 year business plan (above). Under the heading "Funding, cash flow and monitoring" they identified as "key work areas" working closely with management to do the following:

> "● Meet with Seller Group finance and treasury teams to agree processes and flow of data and reports to allow daily tracking of Group cash balances
>
> ● Update the weekly cash flow forecasts to reflect variances between planned and actual cash flows
>
> ● Provide advice on the preparation of presentations for, and attend meetings with, relevant external stakeholders (eg, credit insurers and suppliers) to discuss funding, headroom and cash flow matters

> ● Support Management in considering the working capital assumptions to be incorporated as part of the integrated business model and in considering where there may be opportunities to drive working capital improvement as part of any future business initiatives
>
> ● Work with Management to develop internal capability in relation to weekly cash flow monitoring and forecasting with the finance function on a standalone basis
>
> ● Based on the activities above, prepare and discuss with RAL and Management a 2-3 page weekly cash flow and headroom paper summarising current position, any potential issues or challenges and actions being taken to mitigate"

155. Under the heading "Business plan development and Model development" GT also identified as "key work areas" the following in relation to both the management's turnaround plan and also the 3 to 5 year business plan and financial model:

> "● Analyse the like for like historical performance (revenue, growth, contribution) of each division, relative to each other and to space allocated taking into account impact of concessions/inserts
>
> ● Compare historical performance of each division to relevant market/ competitive benchmarks
>
> ● Work with each of the divisional management teams to explain causal factors underlying historical performance, and to understand/challenge/ develop their plans for growth (including food store rollout)"
>
> "● Synthesise analyses above together with carve-out and operational/ supply chain strategies to develop with Management a comprehensive plan and implementation timing taking into account resource requirements, inter-dependencies, pilot testing, etc
>
> ● Design/develop divisional financial model driven by actionable drivers
>
> ● Work with management to populate these drivers with robust, evidence-based assumptions
>
> ● Review and test reasonableness of financial forecasts, conduct sensitivity analyses, and iterate as appropriate
>
> ● Finalise business plan and financial forecasts for presentation to the Parent's board for its consideration and approval"

(9) The GT weekly cashflow updates

156. By the date of the Second GT Engagement Letter, GT had already begun to produce a weekly cashflow update which usually consisted of about 7 slides and was produced during the relevant week or within a day or so after the week in question had ended. The

weekly cashflow update for the week ended 28 March 2015 was dated 24 March 2015 and it contained the following:

(1) *Headroom key issues as at 28 March*: These were identified by a traffic light system of red for "critical", amber for "urgent" and green for "monitor" with a description of the issue and the action required. The only red or critical issue identified in this week was "Supplier credit insurance" and the action required was for daily updates with follow up calls to all insurers and the development of a reporting format.

(2) *Cashflow variance analysis*: This slide contained a breakdown of the variance against forecast together with commentary explaining why the forecast had been missed. This week there was a positive variance of £26.5 million which was explained by a number of factors.

(3) *Cashflow forecast w/e 4 April*: The next slide consisted of a cashflow forecast for the coming week showing that the total closing cash balance was forecast to be a negative balance of £15.8 million.

(4) *Revised headroom forecast*: This slide contained a graph showing the forecast cashflow for a year comparing a "Base Case" against a "Revised Forecast" and setting out the key assumptions on which it was based. This headroom forecast assumed the sale of Marylebone House at the end of May, the sale of Carlisle at the end of August and the sale of Oxford Street in September 2015.

(5) *Important Information*: On the final slide GT set out the basis for the forecast, the extent to which GT had been able to test the assumptions and the adjustments which they had made.

157. GT continued to produce weekly cashflow updates until 1 September 2015 when Mr Harry Carver began to produce internal BHS cashflow forecasts on a similar basis. Throughout the period between April and September 2015 GT adopted the same format with some minor modifications (including the introduction of a much more detailed forecast in tabular form). For present purposes, it is sufficient to describe the general form of the GT weekly cashflow updates. The Joint Liquidators alleged that both Mr Chandler and Mr Henningson acquired knowledge of certain facts by reading the

weekly updates and that at various times they knew (or ought to have known) that GT's instructions were inaccurate or false. I set out or describe the relevant updates in section V (below) when I come to consider those allegations in detail.

158. Finally, it is important to note at this stage that the "Base Case" shown in the headroom forecast in each weekly cashflow update was based on the Base Case in a similar graph in the GT Report preceding the acquisition. This graph contained a conventional line for the "Base Case" together with two further lines based on two sensitivities: first, a 5% sales sensitivity and, secondly, a "no working capital facility" sensitivity. It is important that I should record that this Base Case was not the same as the Base Case described in the July 2015 Turnaround Plan (below).

(10) 9 April 2015: BHSGL Board Meeting

159. On 9 April 2015 a BHSGL board meeting took place at which Mr Smith, Mr Chappell, Mr Chandler and Mr Henningson were all present and Mr Parladorio was in attendance. The minutes record that in addition to Mr Topp's appointment, Mr Sherwood's package was discussed, that there was discussion about the property portfolio and that the board approved Vail Williams' terms of engagement. The minutes then record under the heading "BHS Pension":

> "EP reported that there were two issues that needed to be addressed: i) a comfortable dialogue needed to be established with the trustees and ii) the Company had been served with a S72 notice by the Pensions Regulator (the Regulator).
>
> With regards to the s72 notice, it seemed the Regulator's view was that it needed to understand the motives and know more about the sale of BHS as their request included information relating to why and how the purchase of BHS had taken place. To assist with the supply of information, external assistance had been arranged. It would take until the end of the month to complete the data collection. Olswang would provide a road map that laid out the motives and reasons for the purchase of BHS along with where the pension trust sat within that. This would then be presented to the Regulator, as well as used for discussions with the trustees over arrangements for the deficient reduction.
>
> KS suggested that at some point the Regulator would need to consider the distraction that this was having on the business itself and the way in which the S72 notice was using valuable funds that would otherwise have been available to put towards the deficit. DC2 had queried why the Regulator had not served the S 72 notice to SPG despite their asking questions of him for many years and those not having been answered. The board noted

> despite these observations, the immediate supply of information needed to be dealt with.

160. At the meeting on 9 April 2015 Mr Chandler also arranged for Olswang to provide presentations to the board on the duties of directors. Mr Roberts gave a presentation on directors' duties generally, Mr Julian Turner gave a presentation on insolvency law matters and Mr Ron Burgess gave a presentation on pensions law. Olswang also produced two memos on directors' duties and their duties and potential liabilities in relation to insolvency. The minutes of the meeting record that Mr Roberts explained the general duties of directors to the board members and that Mr Turner then gave the following explanation about insolvency and wrongful trading:

> "JT then explained to the directors what their duties were if the company became financially vulnerable and likely to be heading towards liquidation or administration. He explained that the actions of the board leading up to administration were crucial and would determine to what extent creditors would be paid. If the company were to go into a formal process, the issue that the board would be faced with was one of Wrongful Trading. Whereas, when a company went into liquidation, a case could be brought against directors individually.
>
> Wrongful Trading depended upon whether there was a reasonable prospect of avoiding liquidation and the action taken to avoid that situation. If found liable the individual director could be required to personally contribute for the shortfall in the amount owed to creditors. The amount that a director could be liable for depended upon their role. This formed an objective test whereby a different standard of care and level of duty was expected according to the directors' experience and role. Returning to the liability that could rest on wrongful trading, JT explained the test was whether there was a reasonable possibility of avoiding involuntary liquidation. If the board had reached that point, they needed to minimise loss to potential creditors and address what steps they could take to achieve that.
>
> There were 2 stages for the board to keep in mind:
>
> 1. Had the company reached the threshold where involuntary liquidation could no longer be avoided?
>
> 2. If so, had the board done all they could to avoid this?
>
> The company's creditors were the bank, the landlords, trade creditors, pension funds, Arcadia and employees. On reaching the threshold, the board should bring in an insolvency practitioner to advise them on what actions to take. The board needed to ensure they continued to hold meetings, that all meetings were minuted and that no unnecessary expenses were incurred. This would provide evidence that the board were seeking to protect creditors from any further loss. The board queried how likely it was for a director to be found liable. JT explained there was little case law

> around this. In practice, a director would have insufficient funds to justify a case being pursued or a settlement would be reached."

161. The minutes also record that Mr Turner gave a detailed explanation about administration and that Mr Burgess then explained the duties of the directors in relation to the Schemes before discussing the concept of "moral hazard":

> "RB then introduced the concept of moral hazard. The board heard how the regulator could compel a company to contribute to its pension scheme and how moral hazard could be avoided. The board needed [to] keep under consideration its obligations to fund the pension scheme when entering into discussions around financing of the business. Activities and transactions could be broken down into different types. Type A activities were those that could have a material detriment to the ability of the scheme to meet its pension liabilities. Type A events included a change in creditor priority and changes in capital arrangements.
>
> The board also considered other powers the Pensions Regulator had, which included the power to issue a contribution notice, how the material detriment test worked, a financial support direction and the situation in which that would arise. This was an area that the Pensions Regulator was currently exploring through its S72 notice. The board would need to consider, with advice, whether permission was required from the trustees and the Pensions Regulator for some of the proposed transactions to ensure the moral hazard was not invoked. This was known as the clearance procedure. The board discussed SPG and Arcadia's position in relation to moral hazard."

162. Finally, on 9 April 2015 Mr Smith signed a "Request for Services" form dated 20 March 2015 which had been issued by Vail Williams. The form described those services as the provision of professional advice and the management of the process to reduce real estate costs and maximise capital returns from both freehold and leasehold disposals. It also described Mr Chappell as the primary point of contact but also named Mr Wareham and Mr Sherwood, who confirmed in his evidence that he had taken up his role of BHSGL's property director by this date.

163. As I have already stated, Mr Sherwood was a partner in Vail Williams before he became the BHS Group's property director and an issue arose during his evidence whether he remained a partner and was seconded to BHS or whether he was separately retained or employed. It is unnecessary for me to decide that issue because there is no dispute that Mr Sherwood carried out the functions or duties of the BHS Group's property director.

164. On 2 March 2015 Mr Sherwood had also entered into an agreement with a company called Capital Management Ltd ("**CML**") on behalf of Vail Williams to share equally all transactional fees paid by the BHS Group or RAL on a joint agency basis for a period of 24 months. The agreement was signed by Mr Colin Sutton on behalf of CML, who was a business associate of Mr Chappell or his father. In a letter to the Insolvency Service dated 1 February 2017 Vail Williams stated that the only sum paid under this agreement was a single payment of £164,200 in respect of the sale and leaseback of the BHS Group's distribution centre at Atherstone (below) which completed on 26 August 2015 (below).

(11) £521,976: Payment to Swiss Rock

165. By letter dated 16 April 2015 Mr Chappell submitted a letter to Arcadia which contained a payment request for £521,976 to be paid to Swiss Rock's bank account at Barclays. Both he and Mr Henningson had signed the letter and it stated: "Please ensure that this is done on a same day transfer." Ms Jessica Kitchiner, a finance analyst at Arcadia (which was still providing back office support to the BHS Group), completed a payment request form and submitted it to Ms Morgan for approval. The form stated that the purpose of the payment was: "Acquisition Fees for Grant Thornton - £521,976."

166. By email timed at 11.11 Ms Morgan approved the payment. By email timed at 11.41 Ms Hague wrote to Ms Morgan asking to speak to her urgently. She referred to the request for payment to Swiss Rock and then continued as follows:

> "You've approved it so not my place not to pay it. BUT I just wanted to ensure that you are aware that virtually the same amount was the subject of a transfer request yesterday (somebody went in to a bank branch to ask for the transfer) but the bank thinking it was an unusual request coming through a branch queried it with Treasury on your behalf not being able to get hold of anyone at BHS we queried it with Matt Crane and put it on hold as none of us knew what it was feedback from Rich B later was that it was stamp duty and that in fact has to be paid from BHS so the transfer was declined. Just want to check that you are aware of all of this as the TT request says Grant Thornton Fees but payable to Swiss Rock."

167. Ms Morgan then contacted Mr Topp. After some discussion, they approved the payment and Mr Topp endorsed the payment request with his signature and annotated the letter from Mr Chappell and Mr Henningson as follows: "Discussion with DC ref payment, needed in order to claim VAT back on transaction. Monies will return to BHS in approx.

3 weeks' time." The payment was made that day out from BHSL's current account into Swiss Rock's current account. The funds were never returned. Swiss Rock's bank statements show that the sum of £521,976 was not used to pay either GT or HMRC. £300,000 was paid to Mrs Ismailjee and £165,000 was withdrawn by Mr Chappell personally. The balance was used to pay a number of debts or to make payments to Mr Chappell's father, Mr Joe Chappell.

(12) The 17 April Board Meeting

168. On 17 April 2015 GT produced a set of five slides entitled "Credit insurance considerations". On the first slide they stated that as far as they were aware, credit insurers were not writing cover and that there was currently about £25 million of orders on hold. They set out a range of updates and actions and explained the position in relation to the individual insurers. In particular, they stated that they were awaiting responses from Euler Hermes and Atradius.

169. On 17 April 2015 a BHSGL board meeting took place at which Mr Smith, Mr Chappell, Mr Chandler, Mr Henningson and Mr Topp were all present with Mr Parladorio, Ms Morgan and Ms Reid in attendance. I will refer to this meeting as the "**17 April Board Meeting**" and for it the board members had GT's weekly cashflow update dated 15 April 2015 for the week ended 11 April 2015 available. By email dated 29 April 2015 Mr Chandler wrote to Mr Turner and Mr Burgess incorporating the following extract from the draft minutes of the meeting into his email and asking them whether any amendments were required:

> "KM referred to the revised headroom forecast as at 11 April that had been circulated to the board and reported:
>
> • as of this week, the closing balance was £19.9m, with a headroom of £20.6m next week;
>
> • the low point for headroom would be in October at £5.1m and factored in the sale of MH by the end of May and Oxford Street in September; and
>
> • the sale of MH would take the headroom low to £8.5m.
>
> DC1 thought it likely that the sale of MH would be better than forecast. The sale of Oxford Street had to take place post September for tax reasons but was critical to cash flow and the ongoing success of the business. DT said that in recent discussions with Compass, the sale of Oxford Street had been raised. However, the benefits of the sale had not been factored in and whilst these would not been in this financial year, they would come

through the following year. The board noted the forecast disposal price of Oxford Street was in the region of £50m.

DT raised the trouble caused by the trade credit facility. As at today letters of credit (LoC) totalling £6.5m were required to secure Autumn stock. The board took the opportunity to consider the matter further. The discussion included:

● if LoCs were written then negotiations with trade suppliers to extend their terms beyond 60 days, to 90 or 120 days needed to take place. This would also have a positive impact on cash flow;

● GT wanted to put the change in credit terms into a cash flow model;

● moving rental payments from a quarterly to monthly basis would alter the nature of cash flow and avoid peaks and troughs that was a current feature;

● LoCs were required today so that gift shop stock for Christmas could be ordered;

● LoCs could only be issued on the condition that they would drop away once underwriters were willing to issue trade credit insurance again;

● KM would address credit terms being extended to 120 days;

● whether SPG had been able to provide assistance: SPG did not want to write LoCs and considered this part of a larger discussion and requirement for a greater amount of credit, however, for the business this was critical and the gift shop order needed to covered and resolved immediately;

● the business was already close to its low point and the cash flow did not include issue of LoCs, which once issued, did put cash flow in the red.

[A] Concerned at the solvency of the business and the potential for wrongful trading, in particular in relation to the fact that the intended LoC might take the headroom in October below Zero, the board agreed that they needed to identify factors that would prevent insolvency and had a real likelihood of materialising. The board noted that the following factors needed to borne in mind:

● the sale of Oxford Street for circa £50m;

● the sale of MH for circa £7-8m;

● the Carlisle disposal;

● moving from quarterly to monthly rental payments;

● the HSBC £25m draw down facility;

● talks with Bank of China for a potential £1m overdraft and a £120m draw down facility;

● the overall property portfolio management would relieve pressure on cash flow;

● change in credit terms to 90 or 120 days would benefit cash flow;

● savings as a result of the Compass deal through the transfer of staff;

> ● guaranteed profits from Compass were not currently in the cash flow;
>
> ● the Booker deal would allow logistics for the supply of food to be closed down as Booker would manage logistics themselves. This created a benefit to cash flow which had not yet been added in; and
>
> ● announcements relating to Bookers and Compass was expected to demonstrate other significant businesses were willing to invest in BHS and ease trade credit supply issues.
>
> **[B]** For all of the above reasons, it was considered that the Company was taking all necessary and reasonable steps to ensure that the Company was not trading insolvently. KS commended KM on her fortnightly board report and asked KM also provide a table of information that showed current amounts of stock, cash, borrowings and headroom. Terms of the borrowings and facilities needed to be included so that maturity dates could be considered by the board during discussions if necessary."

170. For ease of reference I will refer to the twelve factors referred to in the third set of bullet points (above) as the "**Solvency Factors**" in the remainder of this judgment. I have also inserted the letters "A" and "B" in bold type in the text immediately above and below the Solvency Factors and I will refer to those two paragraphs as "**Passage A**" and "**Passage B**" for reasons which will shortly become apparent. On 1 May 2015 Mr Turner replied to Mr Chandler's email attaching a revised draft of what he had called "Cash Flow" wording. He had amended Passages A and B so that they read as follows (and I have highlighted the changes in the text):

> "**[A]** Concerned at the solvency of the business and the potential for wrongful trading, in particular in relation to the fact that the intended LoC might take the headroom in October below Zero, **the directors agreed that they needed to consider if there was a reasonable prospect of the Company avoiding going into insolvent liquidation** and identified the following factors, which had a real prospect of materialising, **that would impact on this assessment**"
>
> "**[B]** For all of the above reasons, **the directors considered that there was a reasonable prospect that the Company would avoid going into insolvent liquidation. Furthermore, the directors considered that they were acting in the best interests of the Company's creditors.** KS commended KM on her fortnightly board report and asked KM also provide a table of information that showed current amounts of stock, cash, borrowings and headroom. Terms of the borrowings and facilities needed to be included so that maturity dates could be considered by the board during discussions if necessary."

171. In the covering email Mr Turner described these amendments as "minor changes to reflect what the directors should be considering from a wrongful trading perspective".

He also stated that he had "added an additional sentence to reflect the fact that what the directors are doing they are doing with the interests of creditors in mind." He did not, however, change any of the Solvency Factors and he repeated the advice which he had given on 9 April 2015:

> "As we discussed at the board meeting we attended, should the directors conclude at any time that there is not a reasonable prospect of avoiding insolvent liquidation, then at that point in time the directors should take every step with a view to minimising the potential loss to the company's creditors that they ought to take. We also advised that even if the point had not yet been reached where there was no reasonable prospect of avoiding insolvent liquidation, it may still be prudent, depending on the actual financial circumstances, to ensure that every such step was taken. In such a situation it may be sensible to specifically make a reference to that in the minutes. However, if the board still feel that they are some way from that point, then it may be that that additional wording is not needed at this point in time and that what is included is sufficient."

172. The amendments which Mr Turner had made to Passages A and B (above) were incorporated into the minutes and signed by Mr Smith at the BHSGL board meeting which took place on 4 June 2015. This reflected the BHSGL board's normal and conventional practice of the board approving the minutes of the previous meeting and Mr Smith signing them (or whoever took the chair).

G. 18 April to 26 June 2015

(1) The LOC Facilities

173. By a facility agreement dated 15 April 2015 Barclays Bank plc ("**Barclays**") agreed to grant BHSL a documentary letter of credit facility for £2 million for the purpose of financing the purchase of stock and commodities (the "**First LOC Facility**"). The facility was to be secured by a cross-guarantee and debenture to be granted by BHSGL, BHSL, BHSPL and Davenbush. It was also a special condition of the facility that BHSL should provide a guarantee for £2 million from Arcadia in a form and substance which was satisfactory to Barclays by 27 April 2015.

174. In the event, Arcadia did not provide this guarantee and by a letter of variation dated 30 April 2015 Barclays required BHSL to agree to amended terms under which a new special condition was substituted with effect from that date requiring BHSL to ensure that at all times its credit balance was equal to the facility of £2 million and to grant a

charge over that credit balance. By email dated 5 May 2015 Ms Laura Sims of Barclays sent the letter of variation to Ms Bourne and it took effect immediately.

175. By a second facility agreement also dated 30 April 2015 Barclays agreed to grant BHSL a bonds guarantee or indemnity facility for £6 million for general corporate purposes (the "**Second LOC Facility**"). This facility was also to be secured by a cross-guarantee and debenture to be granted by BHSGL, BHSL, BHSPL and Davenbush although it was not a term of the facility that BHSL had to maintain a minimum credit balance or grant a charge over it. At a board meeting on 1 May 2015 Mr Topp and Mr Chandler approved the terms of the facility agreement and on 6 May 2015 they both signed it. Under cover of a letter dated 4 May 2015 (which must have been wrongly dated by mistake) Mr Chandler returned the signed facility agreement to Barclays.

176. By letter dated 5 May 2015 Barclays also required BHSL to agree to amend an earlier bonds guarantee or indemnity facility agreement for £1 million originally dated 25 July 2012 to ensure that at all times its credit balance was equal to the facility of £1 million and to grant a charge over that credit balance. It was common ground that the principal purpose of this facility was to cover deferred duty payable to HMRC on imported goods. I will refer to this as the "**Barclays HMRC Facility**".

177. By a letter of variation dated 22 May 2015 Barclays agreed to increase the Second LOC Facility to £13.1 million. By a further letter of variation dated 12 June 2015 it agreed to increase the Second LOC Facility to £19.92 million and by a further letter dated 21 October 2015 it agreed to increase it to £22.42 million. On 6 May 2015 the total amount of the facilities available to BHSL was £8.6 million (excluding the Barclays HMRC Facility). On 26 May 2015, when BHSL counter-signed the first letter of variation, the total amount of those facilities was £15.1 million and on 16 June 2015, when BHSL counter-signed the second letter of variation, the total amount of those facilities was £21.9 million. These figures are admitted by Mr Chandler in his Points of Defence.

178. In the cashflow update for the week ended 9 May 2015 GT identified supplier credit insurance and letters of credit as a critical issue in relation to cashflow, funding and headroom. They stated that supplier credit insurance lines remained largely closed and that the estimated supplier cover was £31 million for "AW15" which I take to be a reference to autumn and winter 2015. They also reported that the latest cashflow

forecast indicated that there was likely to be insufficient headroom to post £31 million of cash collateral to write all of the necessary letters of credit. Finally, GT also reported that BHSL had agreed to issue letters of credit worth £7 million to four critical suppliers of which £4.6 million was in place and £2.4 million would be actioned during that week.

179. The revised cashflow forecast for the following week ended 16 May 2015 showed, however, that there would now be a total closing cash balance of £17.2 million and closing headroom of £14.8 million after taking into account the letters of credit worth £2.4 million to be issued the same week. The revised headroom forecast showed a separate line for headroom excluding cash held for letters of credit which still showed substantial headroom. However, GT also made the following comment about the position at the end of the following week (original emphasis):

> "Headroom drops to £14.8m in week 37, and includes £7m of L/Cs, and a further £2m duty deferment collateral in week 38 **but does not include any further collateral to fund more L/Cs although management has recommended a further £6m of L/Cs be provided over the coming weeks**."

(2) The Deed of Amendment and Variation

180. RAL failed to repay the £2 million due within five days under the ACE I Loan Agreement and defaulted on its obligations immediately. By letter dated 14 April 2015 Mr Dellal wrote to RAL and Olswang on behalf of ACE stating that £1 million had been paid to Mishcon on 20 March 2015 but this did not satisfy RAL's obligations. He stated that an Event of Default had occurred under ACE I and he reserved ACE's rights. On 16 April 2015 Mr Chappell met Mr Dellal to discuss the position and by email dated 17 April 2015 headed "without prejudice" Mr Bernard Berman, who was a director of ACE, put forward the following proposals:

> "I really do need your help on this as a matter of urgency. As a suggestion I believe I might be able to help and try and avert the action if we can do one of the following:-
>
> 1) The Lease on North West House completed as per our intention. I understand this is probably a non-starter for you in a very short timeframe due to third party matters.
>
> 2) Another entity to be either BHS Properties Ltd or BHS Group to enter into the lease.

> 3) The unsecured loan note to be added to the Atherstone loan. On this basis we will keep the remaining amount of the escrow account as set off for the loss of the rental income.
>
> I want to try and help the situation as much as I can and really do need you to get David Roberts to present an acceptable proposal to Mishcons by the end of Monday at absolute latest which can be implemented in very short order."

181. The first two numbered paragraphs related to a proposal that the existing lease granted by Lowland should be surrendered and that J9 would grant a new lease to BHSGL or BHSPL (and I note that a draft lease was in circulation at the time). On 21 April 2015 Mr Henningson met Mr Dellal as his SMS messages record. By email dated 21 April 2015 headed "without prejudice and subject to contract" Mr Dellal wrote directly to Mr Henningson setting out the following revised proposals:

> "Thank you for coming in to see Bernie and myself. We have now given the matter some thought and we believe the way to appease our Trustees is as follows:- We will extend the time period for repayment of the Secured facility until December 2015. In consideration of doing this:
>
> 1) The entire Escrow amount of £750,000 will be released immediately and will cover the repayments up until August 2015, together with accrued interest, legal costs and the insurance. A further payment of £500,000 will be payable in June 2015. The remaining payments under this section of the unsecured loan will then be paid for a further 17 months. This amount totals £2,128,333.35 and for the avoidance of doubt will be paid as follows:-….
>
> …2) The payment of £1,075,000 under the unsecured facility will be paid as per the original agreement in September 2015.
>
> 3) The on-going occupation at Atherstone will have to be regularised in accordance with comments to be made by Mishcon de Reya. This will be on the basis of either an express tenancy at will to the occupier or lease to it which is contracted out of the security of tenure provisions of the Landlord and Tenant Act 1954 containing a rolling break clause exercisable by the landlord on one months notice. In essence we must be able to obtain vacant possession of the property should we need to enforce our security. I trust we can agree this as soon as possible to avert any formal action."

182. Beneath the first numbered paragraph and above the second was a table showing monthly payments of £125,196.08. By email dated 30 April 2015 Mr Roberts wrote to Mr Parladorio, Mr Henningson and Mr Chappell (copying in others) setting out the terms finally agreed:

> "● The £3.65m loan note from BHS Group is being reduced by £1.075m
>
> ● This £1.075m is being switched up to be covered by the original ACE £5m loan and will thus become secured over Atherstone and repayable on 31 Dec like the balance
>
> ● The original £5m loan from ACE will be amended and the repayments rescheduled so that:
>
> o the £4m balance will now not be payable until 31 December 2015
>
> o the £1m exit fee (per clause 8 of the loan) will be payable on 31 December 2015
>
> o the £1.075m will also be payable on 31 December 2015
>
> o default interest under the existing breach is capitalized and also repayable on 31 December 2015 (circa £12,600)
>
> o costs and expenses (circa £69,900)
>
> ● The £750,000 in MdR s client account is paid to ACE tomorrow when we sign
>
> ● The new balance of the loan note is £2.585m which is repayable as per the agreed schedule…
>
> I have spoken to Eddie to inform him of the fact that RAL s indebtedness is increased by this deal but also confirmed that its existing breach is remedied and obligation to pay postponed until the year end. He has reluctantly agreed that this is unavoidable and will discuss with Dominic a potential early sale and lease back of Atherstone to clear the ACE debt."

183. By letter dated 1 May 2015 Lowland and J9 terminated the escrow agreement on terms that Olswang released the £750,000 to J9 and paid it into J9's bank account and by a deed of amendment and variation also dated 1 May 2015 and made between ACE, RAL and BHSPL (the "**Deed of Amendment and Variation**") the parties agreed to vary the ACE I Loan Agreement so that a total amount of £5,157,884 became repayable by 31 December 2015 (together with the original exit fee of £1 million). Clause 2.3 explained that the figure of £5,157,884 was made up of the following amounts:

(1) *£4,000,000*: This was the amount originally payable under the ACE I Loan Agreement less the £1,000,000 paid on 20 March 2015 out of the proceeds of sale of North West House.

(2) *£1,075,000*: This was the first repayment due under ACE Loan Note I and the face value of the first of the loan notes issued by BHSGL on 27 March 2015.

(3) *£12,680.44*: consisted of default interest.

(4) *£69,907.80*: consisted of legal fees.

184. By a further agreement dated 1 May 2015 (the "**ACE Loan Note II**") BHSGL agreed to issue a new series of loan notes for the principal sum of £2,585,365 which was the balance of the principal sum due under the ACE Loan Note I. Schedule 2 provided that £500,000 was to be repayable on 11 June 2015 and that £122,668.51 would be repayable on eleventh day of each month until 11 December 2016. Finally, on 1 May 2015 BHSGL issued a certificate recording that ACE was the registered holder of £2,585,365 unsecured loan notes.

(3) The Pensions Regulator

185. Once the S.72 Notice had been issued by the Pensions Regulator, Mr Parladorio became concerned about the way in which the use of the proceeds of sale of £7 million from North West House might be perceived and he instructed GT to give advice. Mr Keith Hinds was the lead partner at GT in relation to the pensions issues and by email dated 30 April 2015 Ms Lucy Orhnial, an associate director in GT's tax department, wrote to Mr Parladorio stating as follows:

> "Thanks for your time at our meeting earlier this week. As discussed, I have spoken to Keith on the point you raised in relation to RAL, in particular around the £7m loan from Lowland Homes Ltd and the position for RAL in case of a BHS Group insolvency. I have summarised the key points below. Please note that the comments below are high level only and do not factor in any potential legal implications, which should be confirmed with Olswang.
>
> · Part of the proceeds of the disposal of NW House by Lowland Homes Ltd were used to fund £7m costs at the level of RAL (deal fees and the partial repayment of debt to ACE).
>
> · As discussed, the proceeds belong to Lowland Homes and therefore this step created a £7m intercompany debt between Lowland Homes (creditor) and RAL (debtor) in order to get the cash to the right place. It is not possible to distribute the amount up to RAL as there are negative reserves at BHS Ltd
>
> · This leaves RAL exposed in case of a liquidation of the BHS group, as the liquidator would seek repayment of the debt. We discussed simply writing the debt off, which whilst possible from an accounting perspective and should not cause material tax implications it does have other associated risks (see below).
>
> · If the BHS group were to go into liquidation in the near future, it is possible that such a transaction could be challenged by a liquidator as a

> transaction at a preference with a connected party. In particular, unless there is justifiable commercial rationale for funding the cash to RAL in a scenario where BHS is about to go into liquidation, the liquidator could still seek repayment of the debt.
>
> · Unless RAL is able to refund the £7m to Lowland Homes, there is unlikely to be a simple solution to this issue. As discussed, over time the debt could potentially be released in consideration for payment of management fees and it may be possible for a small portion of the deal fees (relating to the acquisition of NW House) to be recharged to Lowland Homes. However we would need to consider how to structure this correctly, and the unwind is likely to occur over a period of 5-7 years.
>
> · In addition, the £7m loan to RAL may raise moral hazard issues from a pension scheme perspective."

186. By email dated 6 May 2015 Mr Hurst of Olswang wrote to Mr Chappell, Mr Chandler, Mr Tasker and Mr Parladorio stating that the Pensions Regulator had requested details of all fees and payments made to RAL directors and shareholders in connection with the acquisition. He stated that they needed to be able to explain the £5.2 million paid to RAL and asked for further instructions. By email dated 7 May 2015 he wrote to them again enclosing a copy of the letter which had been sent to the Pensions Regulator and stating as follows:

> "We did not provide the amended schedule with details of payments to the Directors. I spoke to Eddie this afternoon, who provided the details of those payments and attach for your comments an amended version of the schedule with tracked changes to reflect that conversation. In relation to the payments made to DC1, these appear to be more than his contractual entitlement and so they will need to be explained to tPR, in particular the £550K paid to Swiss Rock plc from RAL and the £570K paid to Swiss Rock plc by BHS. I would recommend that you seek advice from GT in relation to these payments as to how they should be treated for accounting purposes. Given that there have been suggestions of insolvency in the build of the sale of BHS, it may also be a good idea for each of the directors to obtain independent legal advice on their fiduciary duties etc. Were there ever to be an insolvency situation, documenting that the directors were taking such precautions tends to prove very helpful."

187. On 8 May 2015 Mr Hurst spoke to leading counsel, Mr Paul Newman QC, about the payments made to directors. He relayed the following advice which he had received from Mr Newman:

> "I have spoken to Paul Newman QC. He shares my concerns that, viewed collectively, the payments to Directors from the assets of BHS (through BHS itself or through RAL) shortly after completion could potentially

> trigger the material detriment test for contribution notices. If tPR takes the view that the directors have paid themselves in a way that cannot be justified, and the effect of those payments is to weaken the covenant (which it is), tPR will ask itself whether the size of the overpayments are material to the overall deficit. The more that payments cannot be explained or justified, the more likely it is that tPR will take the view that they are material and seek contributions from the Directors. Documenting the payments to DC1 as loans will of course help the position but the tPR will potentially look behind those loans and assess the likelihood of the money being repaid. Given that no security has been granted for the loans, tPR may take the view that the covenant has been weakened to a material extent."

(4) North West House: sale to WELPUT

188. On 5 May 2015 ACE sold North West House to the West End of London Property Unit Trust (the "**WELPUT**") for £38.5 million. By email dated 7 May 2015 Mr Roberts wrote to Mr Shore asking: "Was there any valuation done or evidence to support the £32m purchase price for NW House?" Mr Shore replied stating that Olswang had not seen any valuation advice and Mr Roberts took up the issue with Mr Parladorio. On the same day he replied stating as follows:

> "Thanks. I spoke to Mark (Vail Williams) and he said he had no valuation made of NWH and had very little if anything to do with the transaction. So it remains a slight mystery on what basis £32m was regarded as a reasonable price. Hawker was rather hoping we could point to a valuation or some other good reason for the £10m sudden difference in purchase and sale as otherwise the journalists will seek to make a lot of noise over this! I understand we got two years rent free occupation from this sale so was wondering what the market value of that could be said to be? This may help as part of the argument back, if there is leakage."

189. Mr Parladorio copied in Mr Sherwood who responded in an email the same day offering a suggestion. His reply indicates that a journalist had already been asking about the transaction:

> "So why don't you go back to the journalist and say yes North West House exchanged on the day of the purchase by RAL at a reduced price as part of a funding deal that had been pre agreed with Allied Commercial. BHS and Arcadia both benefit from a significant period of rent free occupation and we are pleased to see Allied Commercial unlocking the upside from this building. I guess the pension guys might have an issue with this? Was it actually BHS that sold it? I thought SPG did it direct?"

190. The final email in the chain that day was from Mr Roberts who confirmed to Mr Sherwood that North West House had been owned by the BHS Group and not by Arcadia. On 8 May 2015 a BHSGL board meeting took place at which Mr Chappell, Mr Henningson and Mr Chandler were present. The minutes of the meeting record the following in relation to the sale of North West House:

> "DC1 referred to the sale of Northwest House. The board agreed careful consideration had gone into the sale and the terms which had formed part of the acquisition of BHS by RAL. The board noted that Northwest House had been sold to Alex Dellal for £32m. In the time since that sale, Mr Dellal had spent considerable time and effort with a team of specialists working on planning so that the sale he had now arranged, for £40m [sic]. This represented the additional time and expertise that his specialist property team had invested into the property. The board agreed that they [sic] it was unlikely they would have been able to achieve the same price and that as part of the agreement a rent free period for occupation of Northwest House had been agreed which represented a saving in excess of £3m. Overall the board considered the price paid by Mr Dellal to have been a fair market price for a buyer willing to take a longer term view of the market."

191. Ms Hilliard and Mr Lightman did not adduce any evidence to prove that Mr Dellal had engaged a team of specialists who had been working on either obtaining planning permission or carrying out improvements and I was not taken to any documents in the trial bundle to suggest that he had. Moreover, the statement that the sale involved a rent free period of occupation was untrue. Although Lowland had granted a short lease of North West House for two years at a peppercorn rent shortly before the sale, BHSGL agreed to pay the passing rent of £3.46 million under the ACE Loan Note I and to provide £750,000 as security for that obligation by entering into the Escrow Agreement.

(5) Bank of China

192. On or about 13 March 2015 Mr Chappell had told Sir Philip Green that he had £7 million on deposit with the Bank of China and at the 17 April Board Meeting the board identified talks with the Bank of China as a Solvency Factor. In their cashflow update for the week ended 16 May 2015 GT reported that Arcadia had agreed to permit BHSL to draw down a further £17 million of the Noah II facility to fund letters of credit. However, they also stated that Arcadia required a charge over the £7 million cash held at the Bank of China. By email dated 22 May 2015 Ms Caroline Grant of Olswang wrote to Mr Chappell and Mr Chandler stating as follows:

> "We understand from the below email from Linklaters that it has been agreed that rather than Arcadia lending BHS £7m as a secured loan, Arcadia are instead going to consent to a further £7m being drawn down under the Noah II working capital facility. However, their consent to the £7m being drawn down is conditional upon the following being provided:
>
> 1. a counter-indemnity agreement between Arcadia and BHS whereby BHS indemnify Arcadia for their liabilities as corporate guarantor of the Noah II liabilities (we assume this will only relate to the new £7m rather than the total borrowings under this facility but it is not clear); and
>
> 2. a charge over the Bank of China account as security for the above counter-indemnity.
>
> Arcadia have also asked for evidence of the amount standing to the credit of the Bank of China account. Could you let us know whether this is agreed and how you would like us to proceed?"

193. Ms Grant included in the email chain an email from Linklaters attaching drafts of a loan agreement for £7 million and a security agreement and asking for comments on those drafts. Mr Chappell forwarded the chain to Mr Parladorio, who replied on the same day to Mr Chandler:

> "The bank of china point (£7m charge over that cash) does not seem to go away. Per our chat yesterday: is this definitely ok with SPG? If so presumably Linklaters have got wrong end of stick and can be told?? As an aside and in any case, I recommend that we pursue a written and enforceable option to borrow £20m from Dellal as this will give some cover and comfort if the cash flow issues in the next few weeks pan out any differently than that discussed on weds. If we leave that potential emergency funding till the last moment then that may cause us problems and the price may also go up. I know some very High Net Worth folk (though of course none of them give the stuff away) and so if Della [sic] doesn't truly fancy it but the security is there (oxford street as I understand would be used for Dellal), then with a little time still on our side, I could seek such a sum from elsewhere for us."

194. I have already set out the evidence which shows what use RAL made of the proceeds of sale of North West House and that it could not have placed £7 million on deposit at the Bank of China. Moreover, in an interview on 18 January 2017 Mr Parladorio told the Insolvency Service that he had never heard or seen anything to suggest that RAL had done so although he could vaguely recall some discussions about the Bank of China between Sir Philip Green and Mr Chappell. Finally, by early June GT had stopped mentioning these funds in their cashflow updates. In the light of this evidence, I find on

a balance of probabilities that RAL never placed £7 million on deposit with the Bank of China.

195. On 21 May 2015 BHSGL submitted a request to Arcadia to drawdown a further £9.2 million of the Noah II facility and Arcadia consented to that request. On 4 June 2015 a meeting of the board of BHSGL took place at which Mr Chappell, Mr Henningson and Mr Chandler were all present. The minutes record that letters of credit worth £9.2 million were to be issued the following week. However, Arcadia did not agree to any further requests to draw on the Noah II Facility and approximately £12.8 million of the facility remained unused.

196. There was no clear evidence to which I was taken to explain why Sir Philip Green refused to permit BHSGL to draw down the balance of the Noah II facility or, at least, to draw down a further £7.8 million to fund letters of credit (as he had apparently agreed before 16 May 2015). The inference which I draw is that Sir Philip Green refused to permit this once it became clear that RAL would not provide evidence that it had £7 million on deposit at the Bank of China or able to provide security over that deposit. In giving evidence to the Select Committee on 16 June 2016 Sir Philip Green stated that he did not become aware that there was no money on deposit at the Bank of China until the Companies went into administration:

> "Yes, we can agree on that. Arcadia were running all the back office, because it was still joined. The £7 million didn't arrive. When we inquired about the £7 million, we were told the explanation we gave you, and this explanation carried on for several weeks. The £7 million never materialised, nor did the Bank of China. It only transpired, sadly, at the end of this whole process which is about four weeks ago, when an administrator appeared the £7 million remained in the Olswang bank account. Twenty-four or 48 hours after this covenant that I read to you was signed, £7 million of the funds did not arrive in the cash flow that you are looking at; it remained from a statement the administrator showed me in Olswang's client account. There is no track from there, other than that £1.2 million went to Olswang, £1.2 million went to Grant Thornton, £1.8 million went to Chappell, several hundred thousand pounds went to each of the gentlemen who were sitting here, and then certain loan repayments, or whatever interest payments he arranged with ACE, got paid to ACE. That's where the £7 million went."

(6) The Atherstone Plan

197. Mr Chandler gave evidence that in early May 2015 a plan emerged to sell Atherstone to Swiss Rock at an undervalue and for Swiss Rock to sell it on at a profit. On 5 June 2015 a meeting of the BHSGL board took place at which Mr Chandler and Mr Topp were present and which Mr Roberts attended. Mr Chandler outlined the plan which involved the sale of Atherstone to Swiss Rock for £10 million and that Swiss Rock would use any excess to repay the inter-company debt of £5.17 million which it owed to BHSGL at that date. The minutes record that Mr Roberts pointed out that the directors would have to have regard to four factors and went through the various considerations with them. Mr Curl suggested to Mr Chandler that his evidence about this plan was misleading and that Mr Smith was the one who opposed it. He also relied on Mr Chandler's handwritten notes of a meeting in the middle of June 2015.

(7) The Third and Fourth GT Engagement Letters

198. By an engagement letter dated 19 May 2015 (the "**Third GT Engagement Letter**") GT wrote to BHSGL and BHSL to confirm that they would provide advice and assistance in relation to the separation of the BHS Group from Arcadia. The letter was signed on behalf of both GT and BHSGL and it stated that it was to have effect from 12 March 2015. The scope of work in the body of the letter contained the first three bullet points set out at [153] but not the fourth. The detailed scope of work in Appendix 2 contained the first five bullet points set out in [154].

199. By a further engagement letter dated 21 May 2015 (the "**Fourth GT Engagement Letter**") GT wrote to BHSGL and BHSL to set out the additional services which they would provide in relation to the development of the BHS Group's three year business plan, the underlying financial model (defined as the "**Model**") and the group's fundraising options. This letter was ultimately signed by both parties (as I explain below). Section 2 of the letter contained the following terms:

> "2.6 Our deliverables, which may take the form of verbal advice, presentations, reports, Microsoft Excel models, and email communications, in connection with the Additional Services (the Additional Deliverables) will be presented in the format we consider to be most appropriate. You should be aware that all Additional Deliverables are subject to the terms and conditions set out in the Existing Engagement Letter as if they were Deliverables (as defined therein)."

> "2.9 We may require a written representation from the respective directors of the Addressees confirming the factual accuracy of the information contained in our Additional Deliverables."

200. Section 3 stated that GT's assistance was required for the preparation of the Model to underpin the business plan and this was described in the letter as the "**Model Purpose**". It then identified two workstreams turnaround planning (stream A) and fundraising options (stream B). In relation to Stream A, GT stated as follows:

> "We will assist Management in the preparation (including advice on content and layout) of the Business Plan for the purpose of understanding the potential for engaging in fund raising discussions with third party debt providers. The Business Plan will be presented in Bhs branded format and responsibility for the contents of the Business Plan remains with the Directors and Management.
>
> As part of the planning process, we will work with Management and use both our understanding of the sector and the results of desktop research to identify and to clarify the following:
>
> • Appropriate key performance indicators, based upon indicative benchmarking against other companies in the sector (including both performance measures and recent transaction valuation indicators)
>
> • Analysis of the property portfolio, setting out core stores, potential closures and the impact of various store closure scenarios on contribution, cost base and strategic capability
>
> • The turned-around target operating model for the business (taking account of the benchmarked performance data identified through our work above)
>
> • The transition roadmap to this new operating model (Including setting out key assumptions on brand, sales, produce and promotions)
>
> We will set out the key cash movements anticipated over the three year Plan period and will set out the identified cash requirement of the business under this new operating model. It should be noted that our understanding is that the Business Plan is for internal use by the Directors and Management, we do not at this stage anticipate the Business Plan prepared under this addendum letter of engagement being made available or presented to external parties, including potential financiers of the Bhs business. In the event that you wish to make the Business Plan available to potential financiers, this will be subject to further agreement with us."

201. After describing the scope of Stream B, GT stated that they would provide specialist financial modelling for the delivery of both streams and then set out their understanding of the requirements. In particular, they stated that: "The Model is to underpin the Business Plan and support your discussions with potential funding providers." They

then set out the terms and conditions for the Model development which included the following:

> "1.2 We will be responsible for the following in relation to the development of the Model:
>
> • suggest alternative approaches for your approval to the extent that your requirements for the Model appear to us to be unachievable or inappropriate for technical, practical or other reasons;
>
> • inform you if the timetable for completion of our work, or our anticipated fees for our work, are likely to exceed those described in this letter;
>
> • development of the Model in accordance with your requirements, in terms of its logical design and the construction and arrangement of its calculations; and
>
> • provide you with interim and unfinished versions of the Model for your review and comment as appropriate.
>
> 1.3 You will be responsible for the following in relation to the development of the Model:
>
> • provide the detailed requirements of the Model through discussion with us;
>
> • approve the detailed requirements prior to our commencing work on the construction of the Model;
>
> • provide all input data and assumptions required to populate the Model;
>
> • provision of overall approach and tax and accounting treatments upon which the Model is constructed;
>
> • review the interim versions of the Model during its construction and provide comments or requests for change on a timely basis;
>
> • on-going use and maintenance of the Model, including any future update of the Model on a rolling basis, once our direct involvement with its development has ended; and
>
> • outputs and results of the Model, including any financial statement projections, in terms of the information that the Model creates and its factual accuracy.
>
> 1.4 We will not undertake an audit examination, carry out due diligence on any management in formation or any financial accounts provided to us. You may not make any representation to third parties that Grant Thornton has in any way validated the input data, assumptions or output from the Model.
>
> 1.5 We will develop the Model in line with the Model Purpose. We do not warrant that the Model will be suitable for use for any other purpose. To the fullest extent permitted by law, we do not accept any responsibility for any loss or damages arising out of the use of the Model, our advice or other communications by the Company for any purpose other than in connection with the Model Purpose.

> 1.6 We do not accept any responsibility for any formula, programming or other structural changes made to the Model after our direct involvement in its construction has ended, or for any consequences of such changes. Furthermore we do not accept any responsibility for any consequences in the results or use of the Model which arise as a result of any inherent defect in Microsoft Excel or any other software or platform on which the Model relies."

202. GT also stated that they would carry out limited testing of the Model but that this would not constitute an audit and would not be conducted independently of the development process and that their testing should not be relied upon to indicate that the Model was free from material error. They then explained what tests they would carry out:

> "2.3 We will undertake the following limited procedures in respect of testing the Model or to facilitate separate testing by you;
>
> • perform limited testing of the Model by inputting specimen and test data and comparing the test results to expected results in the course of its development;
>
> • construct the Model, insofar as it is practical to do so, in a way which facilitates independent testing;
>
> • include consistency and structural error checks in the Model where appropriate to do so;
>
> • assist you in responding to queries about the Model that arise from independent testing; and
>
> • rectify any defects in the Model identified by such testing."

(8) Farallon

203. On about 12 May 2015 the BHS Group resumed negotiations with Farallon for a working capital facility. GT's weekly cashflow update for the week ended 16 May 2015 referred to discussions with Farallon for a £70 million facility. The revised headroom forecast as at 16 May 2015 also assumed that the cash headroom would increase because of the sale of Marylebone House at the end of May and that it would increase again about two weeks later because of the remaining Capital Injection by RAL of £5 million. In cross-examination Mr Chandler accepted that up to this point in time the sale of Marylebone House and the Capital Injection were treated as cumulative sources of funds.

204. The minutes of the board meeting on 4 June 2015 record that Mr Chappell, Mr Henningson and Mr Chandler were all present and that Mr Parladorio, Mr O'Sullivan

and Mr Crane were present. They also record that Mr Crane outlined the cashflow position by reference to the weekly cashflow update for the week ended 31 May 2015 and that Mr Topp outlined the possible outcomes if the BHS Group was unable to re-finance its existing loans:

> "DT then put a series of variances on assumptions to MC, which assumed that the refinancing did not take place but proceeds from the sale of MH (£8.5m), Atherstone (£5m) and RAL (£5m) were received prior to the end of June, and the remaining £21.3m HSBC facility was drawn. MC provided explanations that the impact of these would have on the business which could bring cash flow to negative £1.1m on 21 June, after which it would begin to build up again. This was the worse position until September. The board agreed that where possible, LoCs should not be issued. The board also noted that the company held £200m of stock that needed to be sold. MM raised the repayment of the HSBC facility wherein once funds were paid back, the facility could not be drawn down again. In effect selling a property repaid the facility, and it was agreed a waiver should to be put in place to prevent this."

205. The minutes also record that once Mr Crane and Mr O'Sullivan had left the meeting the board of BHSGL considered the solvency of the company and the BHS Group as a whole:

> "The board reflected on their discussions and concerned at the solvency of the business, the board noted they had considered what the reasonable prospects were of the Company avoiding going into insolvent liquidation in their discussions and had identified factors that had a real prospect of materialising that would impact on that assessment. For all of these reasons the board considered that there was a reasonable prospect that the Company would avoid going into insolvent liquidation. Furthermore, the directors considered that they were acting in the best interests of the Company's creditors."

206. Item 6 of the minutes (financing) then record that Mr Morris, to whom the board had now delegated task of arranging finance and who was handling the negotiations with Farallon, reported to the board of BHSGL on their progress:

> "MM provided an update on financing. He explained:
>
> • the valuations had come back as he had hoped, albeit Jersey was short £2m and Oxford Street was valued at £50m although it was expected to achieve nearer to £55m;
>
> • Farallon were positive and understood the turnaround plan and the facility requirement, which they believed would not put their own business at risk;

> • he had more information to deliver to Farallon today as they were looking at ring fencing security and needed to understand how all aspects of the current arrangements interacted;
>
> • the information provided included details of the Arcadia guarantee on the HSBC facility;
>
> • in respect of the pension, he needed to show their security was ring fenced and that the pension would not be able to reach through the security. He was considering taking up an opinion on this;
>
> • he expected to receive an indicative response tomorrow with an offer and term sheet;
>
> • thereafter once due diligence was complete, the position would become firmer;
>
> • Farallon were aware of the cash flow forecasts and the forthcoming rent payments in June;
>
> • the total financing was for £74m which carried a charge of 5.5% and 2.7% LIBOR, in total this was near to £4m; and
>
> • GT had confirmed this was around market standard for arranging financing at this level."

207. Under cover of an email dated 7 June 2015 Mr Mikael Brantberg of Farallon sent Mr Morris a draft term sheet. In the covering email which was copied to Mr Henningson and Mr Chappell he stated as follows:

> "Please find revised term sheet and exclusivity letter attached reflecting our latest discussions. I need these signed during Sunday in order to approach the committee in a credible way on Monday morning which is necessary in order to stick to the timeline discussed. As an outcome of our further legal due diligence we have found that we need a qualifying charge over BHS Ltd, which is currently granted for the benefit of the £40m facility to Arcadia, as we could otherwise find ourselves in a situation whereby an administrator is appointed which could block an enforcement over the Oxford street lease. We are available to discuss on Sunday so we can get this agreed and signed in time."

208. On 9 June 2015 Farallon provided a revised draft of a term sheet to BHSGL which provided for a total loan facility of £75 million of which the first tranche was £66 million (subject to satisfaction of a loan to value test). The primary purpose of the loan was to enable BGHSL to refinance Noah II, the term of the loan was 26 months and the interest rate was 5.5% above LIBOR together with PIK interest of 7.5% per annum compounded on a quarterly basis to be added to the principal. The term sheet also provided for a facility fee of 6% of the loan amount. The loan was to constitute the senior secured obligations of BHSGL and the loan's individual guarantors and to be secured by first

priority security over a number of properties (which included Oxford Street) and a first priority fixed and floating charge over the assets of BHSL and BHSPL. These terms were acceptable to BHSGL because Mr Chandler signed the term sheet on its behalf.

209. Under cover of an email dated 12 June 2015 Mr Morris circulated the due diligence documents which he had sent to Farallon over the previous two weeks. In the covering email, which he copied to Mr Henningson and Mr Chappell, he stated that these were the documents upon which Farallon's credit committee had based "it's initial green light". They included a liquidity forecast which showed that a first funding requirement of £29.3 million would arise during June 2015. It also stated that at 18 October 2015 there would be zero cash at the bank after the group had received the proceeds of sale of Oxford Street, Atherstone, Marylebone House and Carlisle and also an equity injection of £10 million by RAL and that a cash buffer of £10 million was required. This email was not copied to Mr Chandler but he gave evidence in his witness statement that he received it.

210. On 16 June 2015, however, Mr Brantberg wrote to Mr Morris stating that Farallon would be unable to pursue the transaction. He also stated that Farallon had never signed the term sheet (or an exclusivity agreement). Both Mr Chandler and Mr Topp gave evidence in their witness statements that they did not know the reason why Farallon terminated the negotiations.

(9) The Carlwood Payment

211. On 28 May 2015 Carlwood, which was a company incorporated in the British Virgin Islands, submitted the Carlwood Invoice for £300,000 to ACE which it described as a consultancy fee for advice given in relation to the purchase of North West House. The address stated on the invoice was 173 Sutherland Avenue London W9 1ET and Carlwood required payment of the invoice to be made to a specified account at a named branch of the Swedish bank, SEB AB, in Stockholm. On 19 June 2015 Mr Dellal gave written instructions to HSBC to make the Carlwood Payment of £300,000 into that account.

(10) The 17 June cashflow update

212. On 17 June 2015 GT produced their weekly cashflow update for the week ended 13 June 2015. On the same day they also produced a draft of a turnaround plan. Since the board meeting on 4 June 2015 the weekly update had included a detailed schedule setting out "the latest weekly headroom and assumptions relating to overlays currently included in the cashflow forecast". That schedule showed that GT forecast a negative cashflow of £23.399 million for the week ended 28 June 2015 and a negative cashflow of £23.350 million for the week ended 27 December 2015. GT also identified a number of key headroom issues on slide 2:

(1) Letters of credit worth a total £29.8 million were required of which £12.5 million had been issued at the end of the previous week.

(2) The group's management were in discussions with a lender and the revised forecast assumed that tranche 1 of £41.6 million of new funding would be received in the week beginning 28 June 2015, that the outstanding balance of £12.2 million of Noah II would remain drawn and that the group would keep the remaining £13 million.

(3) The current forecast assumed a £5 million Capital Injection by RAL in the week commencing 28 June 2015 and a further £5 million in the week commencing 26 July 2015.

(4) The group's management had made the assumption that £8.5 million would be received on the sale of Marylebone House in the week commencing 29 June 2015, £4.92 million on the sale of Carlisle in the week commencing 20 September 2015 and £60 million on the sale of Oxford Street in the week commencing 30 August 2015 (of which £32.5 million would be repaid to the finance lender).

213. Slide 8 was headed "Key risks and opportunities as at 17 June". On that slide GT pointed out that there was an external valuation to support the sale price of £60 million for Oxford Street but that Arcadia had expressed the view that the valuation was more like £30 to £35 million. They also stated that the frequency of rent payments was being negotiated with landlords and that the Prudential had moved from a quarterly to a monthly cycle. They confirmed that the impacts of those agreements had been modelled but further discussions were required.

(11) ACE II

214. By email dated 17 June 2015 and timed at 4.11 pm Mr Morris sent Mr Bernard Berman of ACE a term sheet which he copied to Mr Henningson. In the covering email he stated: "We've been playing phone tennis! Please find attached the term sheet for discussion. Could you call me when you have a moment please?" In a second email that day and timed at 8.45 pm he sent Mr Berman the revised term sheet and in the covering email he stated: "Good seeing you today. Attached you'll find the revised Term Sheet reflecting our discussions earlier." He copied the email to Mr Chappell, Mr Parladorio and Mr Henningson.

215. The terms sheet provided for a loan of £60 million of which a first tranche of £45 million would be committed for drawing by the borrower and a second tranche of £15 million would be at the discretion of the lender. It specified a drawdown date of 24 June 2015 and also that the loan would be repayable in full 18 months after the date of the facility. It also specified an interest rate of 25% IRR (i.e. the internal rate of return), a facility fee of £1 million and that the loan should be secured by a first charge over a number of specified properties (including Oxford Street). The term sheet then provided for the payment of a profit share on the sale of Oxford Street (described as the "Tranche 1 Property"):

> "The Lender and Borrower shall co-operate to achieve the sale of the Tranche 1 Property for a target price of £80 million. The Lender shall use reasonable efforts to procure a formal written offer (the "**Initial Offer**") from a bona fide prospective buyer (the "**Proposed Buyer**") of the Tranche 1 Property, in the amount £80 million, as soon as is practicable following the signature of this Term Sheet.
>
> In the event that (a) an Initial Offer has been provided and the Proposed Buyer in good faith and acting reasonably remains committed to completing the relevant offer and (b) a buyer other than the Proposed Buyer concludes the purchase of the Tranche 1 Property for a price exceeding £60 million but less than £80 million, the Borrower shall pay to the Lender an amount equal to 40% of the net sales proceeds above the sum of i) the Tranche 1 loan amount plus ii) the Interest Payment plus iii) the Facility Fee.
>
> In the event that (a) an Initial Offer has been provided and the Proposed Buyer in good faith and acting reasonably remains committed to completing the relevant offer and (b) a buyer other than the Proposed Buyer concludes the purchase of the Tranche 1 Property for a price exceeding £80 million, the Borrower shall pay to the Lender a further amount equal to 30% of the net sales proceeds above £80 million.

> In the event that (i) an Initial Offer has been provided and the Proposed Buyer in good faith and acting reasonably remains committed to completing the relevant offer and (ii) the Tranche 1 Property is sold to a buyer other than the Proposed Buyer, the Borrower and Lender shall pay to the Proposed Buyer all reasonable legal and associated fees in connection with the Initial Offer in proportion to the profit splits above."

216. Mr Chandler's evidence was that he found out in late June 2015 that there were urgent talks with ACE and that on 23 June 2015 he was first told about the proposed loan at a meeting with Mr Chappell and Mr Morris at Marylebone House. His notes of that meeting record that he was told that this was a "big decision", that Mr Dellal was ready to go and that BHSGL could have the money that day. His notes also record that he was told that about the two tranches of the loan and that it was expensive but that Mr Chappell was in favour of the loan. Mr Chandler explained in Chandler 1 that the situation was urgent because rental payments were due very soon. His notes confirm this to be correct:

> "DT – write check today DC1 → Brighton – Bailiffs EP – payment date is tomorrow" and "EP – do bailiffs go in that day? MS – not usually if one day MS – Standard Life sensitive → late on £60k on Brighton KM → 80/100 cheques today → balance today → £27.5m"

217. Mr Chandler's notes also record that a discussion about the terms of the proposed loan then took place. It is clear that Mr Morris told the meeting the headline terms including the rate of return proposal, that a first charge should be granted over Oxford Street on the basis that £45 million was 70% of its loan to value and that ACE would be entitled to a profit share. The proposed profit share was 60:40 on a sale below £60 million, 50:50 on a sale between £60 million and £80 million and 30:70 on a sale above £80 million. Mr Morris also stated that BHSGL would have full control over the sale process and that it was unnecessary to sell if it was able to refinance the loan. Finally, Mr Chandler's notes record that a resolution was taken for "BHS to proceed with ACE".

218. Mr Chandler gave evidence that on 24 June 2015 a meeting also took place at Olswang's offices. He gave evidence in Chandler 1 (which was not challenged) that at the meeting Mr Chappell and he discussed the following with Mr Roberts:

> "(a) The immediate need for the money, which was, as we had also discussed in our previous meeting, the need to pay rent. (b) Mr Topp said that there were certain pinch points for cash flow coming up. The funds

> would also provide additional working capital for the business. (c) We considered whether to use the Noah II facility instead for these purposes. While the remaining amount under that facility would have allowed us to meet our rent obligations, it would not have been enough to support the plans to turn the business around. Since we were in the middle of that process - which we all believed - it was thought that the agreement with ACE was a better idea. (d) I was told again by Mr Chappell that Sir Philip Green had agreed to help in September 2015 with further financing if that was needed. This gave me confidence that we could get his help in the future if necessary. (e) We had explored all the options, but this was the best solution to the situation we faced. We did not consider whether to put the Companies into administration or liquidation. That did not, at the time, seem like a realistic thing to be contemplating. We were in the middle of the plans to turn the business around (and, for example, Mr Topp was in the middle of negotiating our new deals with Booker and Compass). Detailed work as being done on formalising that plan into a reliable, and costed, document. This facility, whilst expensive, would help us put that plan into action and would buy us time to put in place a more sustainable long term finance package (which we eventually did in September 2015 with Grovepoint)."

219. By email dated 24 June 2015 Mr Roberts also wrote to Mr Chappell and Mr Henningson with a copy to Mr Parladorio and Mr Chandler reminding them of their ongoing duties as directors of BHSGL:

> "Prior to BHS Group Limited and certain of its subsidiaries entering into the refinancing with ACE, we thought it would be helpful to remind you of your ongoing duties as board members, in particular bearing in mind the current challenges faced by the group. These duties are duties which fall on the board members of each group company.
>
> As you are aware from our previous discussions, when entering into any transaction it is imperative that the board of each relevant group company considers the interest of creditors as well as members and forms a view as to whether the transaction to be entered into is in the best interest of the creditors of each company as a whole.
>
> We discussed this issue in detail at the board meeting we attended in April and understand that the [sic] you have been considering the position of the creditors of the various group companies on an ongoing basis. We understand that Grant Thornton have been assisting you in these considerations. As has been discussed previously, you may consider that whether the current transaction with ACE is in the best interests of the creditors relates to whether it is a key step with a view to the implementation of the turnaround plan which the board of each relevant company still believes can be implemented, and that this turnaround plan will ultimately be in the best interests of all creditors. If this is not the case, then you should consider whether it is the best interests of the creditors of each relevant group company to enter into the transaction.

> A separate but related issue which we previously discussed with you is the issue of wrongful trading. In brief, individual board members could be liable for wrongful trading if the relevant group company has reached a position where there is no reasonable prospect of avoiding insolvent liquidation and from that point forward, do not take every step with a view to minimising potential loss to company's creditors. Even if that position has not been reached, it's still prudent in the current circumstances to take steps with the interests of creditors in mind."

220. By a senior loan agreement dated 26 June and made between ACE and BHSGL (the "**ACE II Loan Agreement**"), ACE agreed to make two facilities of £25 million ("**Facility A**") and £15 million ("**Facility B**") available to BHSGL. On the same day the parties also entered into a mezzanine loan agreement for £5 million (the "**ACE II Mezzanine Agreement**"). The Joint Liquidators set out the principal terms of both facilities in paragraph 203 of the Particulars of Claim:

> "203. On 26 June 2015, BHSGL entered into a short-term loan with ACE, which comprised a senior loan agreement and a mezzanine loan agreement of that date ("**ACE II**"). The following inter alia were terms of ACE II:
>
> a. £25 million would be lent by ACE to BHSGL;
>
> b. the borrowing was due for repayment on 31 December 2015;
>
> c. BHSL would grant security to ACE over the Oxford Street Property (in addition to other properties owned by the BHS Group);
>
> d. subject to agreed conditions, ACE would be entitled to a profit share (ranging from 30% to 50%, depending on the level of sale price realised and subject to a minimum sale price of £45 million) on the future sale of the Oxford Street Property ("**ACE Profit Share**"); and
>
> e. ACE would have an exclusive and unlimited right to sell the Oxford Street Property after 31 December 2015 or on an earlier event of default."

221. Subject to one point, Mr Chandler admitted these paragraphs and Mr Henningson did not plead to them at all. I, therefore, accept that this pleaded summary is correct and for the remainder of this judgment, I will use the term "**ACE II**" to describe both facilities and the term "**ACE Profit Share**" which was payable under the ACE II Mezzanine Agreement. Mr Chandler accepted that the total amount advanced by ACE under ACE II was £25 million but he pleaded that the senior loan agreement provided for a facility of £40 million.

222. It is correct to say that the ACE II Loan Agreement provided for two facilities but Facility B was described in the loan agreement as an "uncommitted facility" and it gave

ACE an absolute discretion whether to commit to Facility B at all. Further, in an email dated 25 June 2015 Ms Anne Chitan of Olswang advised Mr Morris that this was cosmetic only. She also reported to Mr Turner later that she had given this advice orally. Her two emails stated as follows:

> "There is only one draw for senior facility A and they have told you you cannot draw more that £20,000,000 (even though the facility limit has not changed). This means you have no ability to draw more later unless you do a new deal and we amend the document then. This is consistent with the report that the additional drawing is at their discretion."
>
> "Had a call with Mike and explained that although A is at 40, this is cosmetic. There is one draw agreed to be 20 and rest A is cancelled after. There is no spring back mechanics and no 2 profit share or IRR. Told him that what they are saying is if we are fine with the extra 20, we will need to amend the doc substantially and cross that bridge when we get there."

223. It is common ground that BHSGL never drew on Facility B and ACE II was repaid in full on the maturity date out of the Grovepoint Facility (as defined below). There was no dispute that the agreement provided for BHSGL to pay interest calculated by reference to the "IRR" on the "IRR Calculation Date" in the "IRR Calculation Schedule" which provided that BHSGL was to pay £1,660,958.90 for 97 days on 29 September 2015 and £1,698,266.56 for a further 93 days on repayment on 31 December 2015.

(12) The Loan Agreement

224. On 26 June 2015 Arcadia also agreed to pay the sum of £10 million to HSBC pursuant to two separate agreements. The first of those agreements was called the "**Loan Agreement**" and the second was called the "**Framework Agreement**". Mr Chandler's evidence was that Olswang negotiated the documents with Linklaters without input from him and that other than high level discussions with Mr Parladorio, he had no knowledge of their detailed terms. Mr Curl did not challenge that evidence and I accept it. It is clear from the contemporaneous documents that Mr Chappell negotiated the terms directly with Sir Philip Green on about 21 June 2015 and in order to obtain Arcadia's consent to ACE II and its assistance in obtaining releases from HSBC.

225. On the evening of 21 June 2015 Mr Chappell sent an email to Mr Roberts, Mr Parladorio and Mr Morris forwarding on an email which he had received from Mr Budge about 20 minutes before. Mr Budge's email stated as follows:

> "Following your discussions with Sir Philip Green this is [to] confirm the points agreed: Arcadia will:
>
> 1) Enter into an agreement to lend BHS Group Limited £3.5 million, in satisfaction of Taveta's completion obligation to make the BHS Loan under the SPA. Term to be over 5 years, on an interest free basis; and
>
> 2) Agree to pay £6.5m to RAL, to be used by RAL to subscribe for additional shares in BHS Group Limited, in satisfaction of RAL's completion obligation to make the Capital Injection and to settle the cash flow true ups discussed with Sir Philip.
>
> The £10m referred to above will be used to repay HSBC under the Noah 2 facility. In practice, Arcadia will pay the £10m directly to HSBC and BHS/RAL agree that will satisfy Arcadia's obligations under 1 and 2 above.
>
> Parties to acknowledge above payments are in full and final satisfaction of all completion obligations under the SPA. BHS Group Limited to repay HSBC the remaining amount of the outstanding £12.2m plus interest on Noah 2 (i.e. £2.2m plus interest). BHS Group Limited also to repay HSBC £2.5m to reduce debt under Noah 2 that is secured on Jersey. Olswang to provide undertaking that the £2.2m plus interest and £2.5m referred to above will be paid to HSBC.
>
> Arcadia to arrange for HSBC to release security on all Noah 2 properties (excluding Jersey). Arcadia to arrange for HSBC to release security over Milton Keynes from Noah 1. This may occur subsequently to Noah 2. Arcadia to arrange for HSBC to release the floating charge relating to the Noah 1 and 2 facilities. The floating charge relating to the pension scheme to remain in place."

226. The email did not refer in terms to Marylebone House or the collateral agreement between Mr Chappell and Sir Philip made at completion: see [112] and [113]. However, in the covering email Mr Chappell told the recipients: "Below from Paul B re the MH payment This agreement needs to be kept between the three of us for the time being". By email also dated 21 June 2015 Mr Roberts replied to Mr Chappell setting out his understanding of the arrangements:

> "There is a lot to unpack there. I will need to bring in Anne to the loop as I will need her assistance in documenting/advising.
>
> Summary

> A. £3.5m loan and £6.5m payment Paul is essentially saying that in order to finalise SPG's obligations under the SPA, SPG will procure that Arcadia loans BHS £3.5m and also makes a payment to RAL of £6.5m (£10m in total). I presume the £6.5m to RAL is a commission on MBH but we need to confirm this. RAL will use the £6.5m to subscribe for £5m of shares (putting £5m into BHS Group) and presumably to loan the additional £1.5m to BHS Group? This puts BHS Group in funds of £10m which they are proposing will be used to repay HSBC.
>
> B. Noah II
>
> It is suggested that the Noah II balance is £12.2m and thus BHS will need to pay the difference after taking into account the £10m above (i.e. £2.2m plus interest). BHS Group also must repay HSBC a further £2.5m to reduce debt under Noah II that is secured on Jersey. It is being suggested that we provide Arcadia with an undertaking that we hold the £2.2m plus interest and £2.5m referred in our client account and that it will be paid to HSBC.
>
> C. Releases
>
> Paul then suggests that Arcadia will arrange for HSBC to release: *security on all Noah II properties (excluding Jersey); *security over Milton Keynes from Noah 1 (this may occur subsequently to Noah II); and * the floating charge relating to the Noah I and II facilities with the floating charge relating to the pension scheme to remain in place."

227. By using the phrase "the MH payment" I understood Mr Chappell to be referring to the payment of £8.5 million which Sir Philip had agreed to make out of the proceeds of sale of Marylebone House and Mr Roberts clearly understood it that way. Indeed, he understood the £6.5 million which RAL was supposed to be using to subscribe for shares in BHSGL to be a commission on the sale of the property. I also understood Mr Budge to be referring to the sale of Marylebone House (albeit obliquely) by using the phrase "the cash flow true-ups discussed with Sir Philip".

(13) The Loan Agreement

228. The Loan Agreement was made between BHSGL and Arcadia and although the execution version in the trial bundle is undated and unsigned on behalf of Arcadia, there was no dispute between the parties that it also took effect on 26 June 2015. The recitals recorded that BHSGL had agreed that the facility would satisfy Taveta's obligation to provide the BHS Loan under clause 4.2.2 of the SPA and to use the proceeds of the loan towards the pre-payment and cancellation of Noah II. Clause 2 provided that Arcadia would make available a facility of £3.5 million and clause 3 imposed an obligation upon

BHSGL to apply any amounts borrowed under it to pre-pay Noah II. On 12 February 2016 the Loan Agreement was amended or rectified in the way in which I explain below.

(14) The Framework Agreement

229. The Framework Agreement was made between Taveta, RAL, BHSGL and Arcadia. Again, the execution version in the trial bundle is undated and unsigned on behalf of Arcadia but again there was no dispute that it also took effect on 26 June 2015. The recitals recorded that the parties had agreed to implement the terms of the agreement in connection with the re-financing of debt owed by BHSGL and in satisfaction of their completion obligations under the SPA. Clause 2.1 which was headed "Tranche B of the Noah 2 Facility, BHS Loan and Capital Injection" provided as follows:

> "2.1.1 In satisfaction of Taveta's completion obligation to make the BHS Loan and RAL's completion obligation to make the Capital Injection, in each case under clause 4 of the SPA: (i) Arcadia shall lend BHS an amount of £3.5 million for a five year term on an interest free basis pursuant to the terms of the BHS Loan Agreement; and (ii) Arcadia shall pay £6.5 million to RAL and RAL shall use such £6.5 million to subscribe for additional fully paid-up shares in BHS and for no other purpose.
>
> 2.1.2 BHS shall use the aggregate amount of £10 million referred to in Clause 2.1.1 to prepay £10 million of Tranche B of the Noah 2 Facility ("Tranche B") and for no other purpose.
>
> 2.1.3 The payments to be made by Arcadia under Clause 2.1.1 and the prepayment by BHS under Clause 2.1.2 shall be effected by Arcadia making a payment of £10 million directly to HSBC Bank plc subject to and in accordance with Clause 3.
>
> 2.1.4 BHS shall prepay the remaining outstanding amount due under Tranche B of the Noah 2 Facility to HSBC Bank plc and cancel Tranche B pursuant to Clause 5 of the Noah 2 Facility.
>
> 2.1.5 Any Security granted in favour of HSBC Bank plc over the Properties (excluding any Security granted over the Jersey Property) to secure the Noah 2 Facility shall be released in accordance with the terms of the Deed of Release.
>
> 2.1.6 BHS shall not seek any further advances from HSBC Bank plc under the Noah 2 Facility.
>
> 2.1.7 The payments and steps referred to in Clause 2.1.1 and the manner of their payment under Clause 2.1 3 shall be in full and final settlement of all of the parties' completion obligations under clause 4 of the SPA and. upon satisfaction of the payments and steps referred to In Clauses 2.1.1 and 2.1.3, the parties shall be irrevocably and unconditionally released from all claims or demands under or in connection with such completion obligations."

230. The Jersey Property was 8 to 18 King Street and 2 to 12A Don Street, St Helier, Jersey which were owned by Epoch (above), a subsidiary of BHS Jersey. Under the terms of the Security Agreement BHS Jersey had granted a floating charge over its shares in Epoch and Epoch itself had also granted a number of securities to HSBC under Noah II. The Framework Agreement also provided that BHSGL should use tranche A of ACE II to prepay £2.75 million of Noah II. Mr Budge's email dated 21 June 2015 suggests that the purpose of this pre-payment was to release the BHS store in Milton Keynes from Noah I to enable BHSL to charge it under ACE II.

231. It is common ground that the BHS Group received only £17 million of "new money" under ACE II. Olswang acted for BHSGL in relation to the loan and their completion statement for the transaction records that they received £25,000,000 from ACE and that they paid £5,907,474.12 to HSBC's solicitors, its legal fees of £151,857.60 and a sum of £2,000,000 to RAL which they described as an "arrangement fee". They also retained £75,000 on account of ACE's legal fees. Olswang's completion statement confirmed that in addition to the £5.7 million which they had paid out of ACE II, Arcadia had paid £10 million directly to HSBC:

> "Please note that this completion statement does not include transfers that did not come through Olswang's client account, which include: (i) the £3.5m loan that was made by Arcadia to RAL and by RAL to BHS Group Ltd; (ii) the RAL £5m equity injection into BHS Group; and (iii) the £1.5m repayment of intercompany debt by RAL to BHS Group Ltd, which amounts were transferred to HSBC in partial repayment by BHS Group Ltd of the Noah II loan."

(15) The arrangement fee

232. Both Mr Topp and Mr Chandler gave evidence that they challenged Mr Chappell about the £2 million payment. Mr Topp's evidence was that Mr Chappell first told him that it related to VAT and then told him that it was an arrangement fee. Both gave evidence about a meeting at the Landmark Hotel at which they confronted Mr Chappell. Mr Chandler also gave evidence that Mr Parladorio told him that RAL had already spent about £1,500,000 although Mr Topp and he were later able to recover £500,000.

233. On 2 July 2015 a meeting of the RAL board took place at which Mr Chappell, Mr Henningson and Mr Parladorio were present. The unsigned minutes of the meeting record that Mr Chappell had proposed that RAL enter into two short term secured loan

agreements under which it would advance £575,000 to a company called Wheatleys Bridge Ltd ("**Wheatleys Bridge**") and £925,000 to a company called JDM Island Properties Ltd ("**JDM Island**") for a term of six months at a rate of interest of 8% above the base rate of the National Westminster Bank plc. These minutes also record that Mr Chappell stated that he was very familiar with the property over which these loans were to be secured. Finally, the minutes record that Mr Chappell and Mr Henningson voted in favour of these loans but that Mr Parladorio voted against them.

234. On 11 January 2017 Mr Chappell was interviewed by the Insolvency Service and he stated that the balance of the arrangement fee of £1.5 million was used to buy a family property and to discharge a mortgage. Mr Colin Sutton (who may or may not have been a relative of Mr Paul Sutton) incorporated these two companies for him and on 24 January 2017 he also gave an interview to the Insolvency Service. He was asked to describe the circumstances which led to the incorporation of these two companies and he stated as follows:

> "Well first of all, tried to set the two companies up on the same date, but for some reason it rejected one, so those dates should be the same but I know they arc not. Erm secondly er Joe was about to lose his house, erm the company that owned the house erm was being sued to repay the mortgage, erm there was a valuation on the property of about 1.8 million, and er it really was to assist the family, Dominic said he could come up with a mortgage, erm so through these companies I made an offer for the house and the bridge and they were set up solely to do that. The offer was subsequently accepted, the old mortgage paid off, er thereafter as far as the house is concerned ... in fact the mortgage has now been wiped out erm in favour of, I think, a company called Otherclear, which I sold my shares to in JDM Island Management, I still hold the one share in Wheatleys 8ridge."

235. Mr Sutton also explained that two companies were incorporated to hold the property and some land and the other company was incorporated to hold land which formed an access on the basis that it might be valuable as a separate asset. In an email dated 8 March 2018 Mr Ring wrote to Mr Deane of the Insolvency Service setting out Mr Chappell's answers to a number of questions about the arrangement fee. I have combined those answers together so that they read as follows:

> "The loans to JDM and Wheatleys were discussed and agreed at a board meeting on 2 July 2015. This provided the authorisation from RAL for the loan. It was, of course, subject to there being sufficient funds within RAL

> to make the loan. I am not aware whether there was a written agreement with BHS. If there was, it will remain with BHS and be in control of the Liquidators of BHS (and probably also with the Liquidator of RAL). I do not recall any RAL board discussion of the purpose of the loan from BHS prior to the meeting on 2 July. Any record of any discussion will be in BHS or RAL emails. I do not have access to these. The loan to JDM and Wheatleys was protected by legal charges and the property was valued far in excess of the loan. Mr Chappell was 90% owner of RAL. There was also the connection to Mr Chappell's parents, so I did not believe there was any realistic possibility of any default."

(16) The June quarter rent payments

236. Mr Perkins took Mr Pilgrem, the accountancy expert for Mr Henningson and Mr Chandler, to the BHS Group's management accounts dated 1 February 2016 and he accepted that for the year ended 31 August 2015 the group paid rent totalling £95,144,000. The management accounts also record that the group paid rent of approximately £7.5 million each month (although it also received a small amount of rent itself). Mr Curl suggested to Mr Chandler that the Dowry of £23.6 million was equivalent to the rent due on the March quarter day. Mr Chandler's hand-written notes of the meeting on 23 June 2015 also suggest that on the June quarter day the group was liable to pay £27.5 million and had written about 80 to 100 rent cheques which it was about to present.

237. An email dated 19 June 2015 which Mr O'Sullivan of GT sent to Mr Chappell, Mr Topp, Mr Morris and Mr Parladorio confirms that this analysis is broadly correct. In that email Mr Morris stated that the total value of the June quarter's rents was about £25 million, that 33% of them (about £8 million) cleared within two business days with the rest following shortly afterwards, that Arcadia would normally send out rent cheques on 23 June 2015. In summary, he stated that cheques for £8 million were likely to clear that week and cheques for £16 million to £17 million were likely to clear the following week.

H. 27 June 2015 to 7 September 2015

(1) Mr Hitchcock

238. On 30 June 2015 Mr Topp met Mr Michael Hitchcock and recruited him to act as the CFO of the BHS Group. Mr Hitchcock was not appointed to the board of directors of

any of the Companies and I was not taken by any of the parties to his contract of employment or the minutes of any BHSGL board minute to demonstrate that he was formally appointed as the group's CFO. Nevertheless, there was no dispute that Mr Hitchcock carried out this role or that he had the relevant experience. Mr Topp exhibited his CV in which he described his recent career as follows:

> "I am a Board level commercial leader with fresh thinking and decisiveness, as well as a passion for retail, and expertise in the challenges of business turnarounds. I am committed to the best customer experience aligned with fiscal responsibility, the foundation of all successful businesses.
>
> Having achieved the successful sale of Beales Plc to its largest shareholder, thereby completing the turnaround of Beales and securing its longer term survival, I elected to leave the business by mutual agreement at Easter 2015. What started as an interim CFO assignment in May 2012 to avert administration through refinancing and restructuring the assets of the business, progressed into a permanent CEO role to turn the business around culturally, operationally, and financially and created significant value for all the major stakeholders.
>
> I have previously been a Finance Director with Plc, Private Equity and International experience across retail, leisure and FMCG sectors; I have a track record of buying, selling, starting and turning around companies, fully complimented with extensive commercial experience of production and manufacture through distribution and supply chain to wholesale and retailing."

(2) The July 2015 Turnaround Plan

239. In June 2015 Ms Helen Dale was a director in the Advisory department of GT and an insolvency practitioner. Mr Topp's evidence was that he worked closely with her and a team from GT on the business plan. Under cover of an email dated 2 June 2015 Ms Dale sent Mr Chappell, Mr Topp, Mr Morris and Ms Morgan a discussion draft. She stated that the content was not suitable for sharing externally and that there were a number of discussion points. On 17 June she sent Mr Topp a revised draft and they met together to discuss the plan. By email dated 10 July 2015 she wrote to him again stating as follows:

> "Just to confirm/for your records, following our meeting I have asked the team to run the following only:
>
> 1) Business plan to be updated for the current view on funding, being, NoA loans plus the new ACE funding (at £25m being repaid in December 2015).
>
> 2) Assume that Credit Insurance will be back on from April 2016,

> 3) Leave the property disposals in the plan as they are (as indicative of the property disposals that may be required). This includes Ox Str/Carlisle/ Manchester/L'pool/MK. but build in additional comments around options to fund the gap (showing properties available as security).
>
> 4) Add additional wording to show the options available to BHS re loans against unencumbered/otherwise available assets (incl. properties and stock) to plug any funding gap.
>
> I will also:
>
> 1) Call Michael (in part to understand the stock funding and in part, to ensure he is comfortable with Plan content)
>
> 2) Update the plan to demonstrate that the costs of separation have been considered but include only as an overlay (in a table). Not required to be run through the model in detail (given that the costs and potential savings continue to be refined as work progresses)
>
> 3) Recut the main deck to show one journey/one plan and to be to the point, casual in style)
>
> 4) From that, pull out the 6-10 pages of must know points for other stakeholders."

240. By email dated 12 July 2015 Ms Dale wrote to Mr Topp again updating him about the business plan and on the morning of 13 July 2015 he forwarded her email to Mr Hitchcock, Mr Chandler, Mr Chappell, Mr Parladorio and Ms Morgan. She stated as follows:

> "The team has been working on the docs over the weekend. All updates have now been run through the model and the report tables updated. I've also done a very high level sense check of the separation costs and the potential cost savings (the £5.3m) so that these two streams better hang together. We've removed all references to a separate Base Case and Target Business Plan in the presentation deck and combined the financials to show a single Plan. I would like someone my end to cold review the decks first thing tomorrow morning and will then send you the detailed deck, shortly followed by the presentation deck. By close of play tomorrow, I'll also send over a 6-10 pager (casual/succinct stylie!). Michael H and I also plan to catch up at some point this coming week so that I can talk him through the decks. Hopefully this will help with any remaining queries he might have."

241. On 13 July 2015 GT produced a slide deck entitled "Three year transition plan to a new BHS by 31 August 2018". This document appeared in the electronic trial bundle numbered as C/875 and the parties referred to it as the "**July 2015 Turnaround Plan**". It consisted of 86 slides and the title on the first page was overlaid on the same picture as the Legacy Turnaround Plan with the legend "BHS Passionate about your lifestyle"

in the bottom left-hand corner. The version of the plan to which the parties referred stated that it had been updated on 13 July 2015 but was still marked as a draft. As I explain below, it was not approved by the BHSGL Board until 14 October 2015.

242. Under cover of an email dated 13 July 2015 Ms Dale sent two documents to Mr Topp under the subject line "Business plan decks". The first was called "Project Harvey internal presentation.pdf" and the second was called "Project Harvey – Detailed Business Plan". In the covering email Ms Dale stated that she was sending Mr Topp "Presentation deck and accompanying detail deck attached for your final review". The trial bundle only contained one attachment to this email which consisted of a 52 slide pack which had clearly been adapted from the July 2015 Turnaround Plan for presentational purposes. I have assumed that this was the first attachment to Ms Dale's email and that the second attachment was the July Turnaround Plan itself. Both Mr Chandler and Mr Topp gave evidence that they had received it and referred to it in their witness statements by reference to its number in the trial bundle.

243. On 14 July 2015 Mr Topp forwarded Ms Dale's email and its attachments to Mr Henningson and Mr Hitchcock. On 14 July 2015 a BHSGL board meeting took place which was attended by all of the directors including Mr Chandler and Mr Henningson. This was the first meeting which Mr Hitchcock attended as acting CFO. Under the heading "Turnaround Plan" the minutes record that Mr Topp provided an update on the plan which was directed at the various trading initiatives. Under the heading "Any other business" the minutes also record: "DT circulated the 3 year plan. MH was asked to consider and agree the plan. Action 5: MH to report back to DCl on the plan."

244. The principal objective of the July 2015 Turnaround Plan was stated to be to create a new BHS with an enterprise value of at least £250 million by 31 August 2018, to "de-risk" the transition for all stakeholders and to "delever" the business over the medium term then refinance existing facilities with a true working capital facility. The structure of the plan was stated to be two stages to be executed concurrently:

> "Our **Base Case (BC)**: this is our three year forecast ending 25 August 2018 which includes the impact of initiatives under our six key actions opposite.
>
> Our **Target Business Plan (TBP)**: this is the Base Case plus further stretch opportunities and initiatives (under the six key actions opposite). These

> stretch initiatives are targeted at delivering an enterprise value of £250 million, creating a profitable, refinancable business."

245. I will also refer to the two components of the July 2015 Turnaround as the "**Base Case**" or "**BC**" and the "**Target Business Plan**" or "**TBP**". Six initiatives or actions were intended to deliver both parts of the plan and they were property, trading and supply base, cost base, new growth, the international business and the pension liabilities: see slide 5. The plan then set out the detailed financial forecasts and assumptions upon which the plan was based. These assumed an EBITDA for the year ended 29 August 2015 ("**FY15**") of –£55.3 million rising to an EBITDA of +£9.3 million in the year ended 25 August 2018 ("**FY18**"). This change was driven primarily by property sales of £26.2 million and improvements in trading of £27.3 million.

246. Slides 9 to 13 set out the key assumptions upon which both the Base Case and the Target Business Plan were based and I will have to consider some of those assumptions in more detail in section V (below). Slide 14 consisted of a headroom forecast graph for the Target Business Plan which was similar to those graphs which GT had produced in their weekly cashflow updates. It showed that even if the BHS Group achieved all of the initiatives in the BC and the additional "stretch" opportunities or initiatives in the TBP, it would still generate insufficient cash at four points in time. These were described as "funding requirements" because the major premise of the plan was that the BHS Group would be able to find external finance to fund those requirements.

247. The first funding requirement was shown on the headroom forecast as £19.8 million in September or October 2015 and the second funding requirement was shown as £21.6 million in February or March 2016. The third and fourth funding requirements were not specified but stated to be in October 2016 and October 2017. Consistently with the instructions which Ms Dale had received from Mr Topp, the BC and TBP forecasts had been combined and the headroom forecast only included a single line for the Target Business Plan. It was not possible, therefore, to compare the two plans or, equally importantly, the funding requirements which would be necessary if the BHS Group was only able to achieve the Base Case and not the Target Business Plan.

248. The forecast also assumed that Oxford Street and Carlisle would be sold in September 2015 for £50 million and £4.92 million respectively and that the stores at Liverpool, Milton Keynes and the Arndale Centre, Manchester would be sold for £46.1 million

during the year ended 27 August 2016 ("**FY16**"). Finally, it identified seven other unencumbered properties which could be sold for £13.3 million and stated that these sales had been included in the Target Business Plan. These included the sale of a property in Grimsby for £4 million which did not feature again in the "property collateral pool" which I describe below.

249. On 17 July 2015 GT also produced a 6 slide pack entitled "BHS Group Limited. Funding proposal information. July 2015" (the "**Bridge Funding Slides**"). It focussed on the property available as collateral for additional funding and it provided a headroom forecast and two bridge slides to a positive cashflow position under the commentary: "A bridging loan of £68.0 million is required to assist with the property disposal process and working capital requirements." The inference which I draw is that this was the "6-10 pager (casual/succinct stylie!)" to which Ms Dale referred in her earlier email.

(3) The new financing round

(i) Burdale/Wells Fargo

250. On 13 July 2015 GT produced two similar slide decks entitled "Turnaround Plan Headlines Burdale (Wells Fargo)" and "Turnaround Plan Headlines Brockton Capital". These documents were prepared for a new financing round to be led by Mr Hitchcock and Mr Morris. Wells Fargo Bank ("**Wells Fargo**") was one of the largest US banks, Burdale Financial Ltd ("**Burdale**") was a lender specialising in trade finance such as factoring and invoice discounting and wider asset-back lending and Brockton Capital LLP ("**Brockton**") was (and is) an investment house with a focus on acquiring, developing and managing large scale buildings.

251. On 22 July 2015 Mr Crane of GT sent Mr Hitchcock what he described as the "BHS short term cashflow model through to February" and on the same day Mr Hitchcock forwarded it on to Mr Jon Norton of Wells Fargo. On 22 July 2015 Mr Crane also sent Mr Topp two excel spreadsheets and an extract from the July 2015 Turnaround Plan with a copy to Mr Hitchcock. He enclosed copies of the Third and Fourth GT Engagement Letters. The Fourth letter had been signed by GT and counter-signed by BHSGL and dated 6 July 2019. In the covering email Mr Crane stated as follows:

> "As discussed, please can your read the below and confirm by responding to this email that you are happy for Michael to send an extract of the business plan cash flow model to Burdale. We've attached the financial model underpinning the business plan that we developed in accordance with our engagement letter dated 19 May 2015 and the addendum letter thereto dated 21 May 2015 (attached), along with a pasted values Excel file of the forecast financial statements that you've asked us to send you.
>
> The model's approach and assumptions have been discussed with Kate Parton and Leanne Phipps of the BHS finance team, and the assumptions have been labelled with cell comments in the Excel file to set out how they have been derived from source data provided by you. In accordance with the terms of our engagement, we will in due course require you to sign a letter (the format of which is set out in Appendix 3 of the addendum letter) acknowledging responsibility for the model. However, we recognise that we haven't yet been able to take you through the content and structure of the model, so you're not yet in a position to sign this.
>
> Therefore for now please could you, in your capacity as an official of both Bhs Group Limited and Bhs Limited, confirm to us by return email that you take full responsibility for the forecasts and the underlying assumptions, and that you undertake to complete the formal model handover process set out in paragraph 3.4 of the addendum letter as soon as is practicable. We require this confirmation from you before you send any forecasts to a third party. For the avoidance of doubt the Terms and conditions for Model development set out in Appendix 2 to the addendum letter continue to apply."

252. On 22 July 2015 Mr Hitchcock sent the Model to Mr Tola Odukomaiya of Wells Fargo who was assisting Mr Norton copying in Ms Morgan. On the same day he sent Mr Odukomaiya the extract from the July 2015 Turnaround Plan which he described as "a Grant Thornton worked forward looking balance sheet and support to at least give you a steer as to shape and size of the stock, receivables and other as appropriate". He also sent an email to Mr Topp stating that the business was at "heads of terms" with both Burdale and Wells Fargo for an asset backed lending facility and with Brockton for a property backed bridging loan.

253. By email dated 23 July 2015 Mr Odukomaiya wrote to Mr Hitchcock (with a copy to Ms Morgan) stating that he had looked at the Model and noted that it was based on the Target Business Plan and asked whether it was possible to get a similar model for the Base Case. Ms Morgan forwarded this on to Mr Crane and Ms Dale who responded as follows:

> "Having discussed with the business planning team, their understanding is that there is no base case, and if you wanted to share something to reflect

> that you and Darren would need to help them define that. The suggested response to Burdale would be that as the business has separated from Arcadia, it has needed to change and hence the Target Business Plan is the only plan and that there is no other scenario that has been considered. Let me know your thoughts on this, but may be worth discussing with Helen or Chris if you want a different scenario to send."
>
> "As per Matt s note, happy to discuss if needed. From my discussion with Darren, he was keen that both internally and externally the business plan was viewed as a single plan rather than a base case and a stretch case. Tagging something as a base case could be interpreted to implicitly suggest that the base is actually what management expects the business to achieve. Whilst the model has a base, those figures was reflective of management s base at that point in time. From later conversations, I suspect that it is no longer considered your base (by Darren at least) and releasing it as such could be detrimental if the intended messaging is not clarified. We are happy to help where we can but would just suggest that you have the conversation internally (with both Darren and with Michael H) to ensure a shared understanding of what Management considers its base position to be, prior to releasing this information. It may be that, clarifying that it is not a two-stage plan to the interested party, is sufficient."

254. Ms Morgan discussed this with Mr Hitchcock and by email dated 10 August 2015 she wrote back to Ms Dale stating that Burdale wanted a copy of the Base Case "so that we are being monitored against a more prudent view". It is apparent that GT had not run the Model for the Base Case at all because on 12 August 2015 Ms Dale replied:

> "In fairly short order we could agree and run a base case. We should just discuss what that needs to include as the base per the business plan is unlikely to be reflective of your current view on a base scenario. No huge effort required."

(ii) Tufton Oceanic

255. On 22 July 2015 Mr Morris also sent Mr Henningson a draft non-disclosure agreement for another lender, Tufton Oceanic Ltd ("**Tufton Oceanic**"), and on 23 July 2015 Mr Henningson exchanged emails with Mr Ted Kalborg of Tufton arranging to meet him the following Wednesday, 29 July 2015. Mr Henningson asked Mr Kalborg to sign the NDA giving the following reason: "The material we will send to you is quite detailed and since we are in a restructuring phase with Grant Thornton as advisor, it is essential that this material remains intact."

256. On 7 August 2015 Mr Morris wrote to Mr Kalborg thanking him for the meeting and enclosing the Bridge Funding Slides, valuation summaries provided by C&W and the

same extract from the July 2015 Turnaround Plan which Mr Hitchcock had sent to Wells Fargo. By email dated 10 August 2015 Mr Morris wrote to Mr Henningson bringing him up to date: "Here's the info that went to Ted late last week. I can discuss it with you/him at any time. Hope you are well mate. Lots of due diligence with lenders at the moment. Had Ernst & Young going all through GT's cash flows today. Was ugly!!"

(iii) Alteri

257. On 10 August 2015 Ms Jane Hughes of Alteri Partners LLC ("**Alteri**") sent Mr Morris an information request and a proposed term sheet for property bridging finance. On 25 August 2015 Mr Fraser Pearce of Alteri chased Mr Hitchcock for information and on the same day Mr Morris sent him GT's latest weekly cashflow update. He also sent Mr Pearce a slide containing a table of the "property collateral pool" of nine properties. The commentary on the slide stated that the group's valuations of the potential collateral pool available was £88.25 million. The table also stated that Liverpool was forecast to be sold for £17.14 million, Atherstone had now exchanged for £10 million and Carlisle had now exchanged for £4.92 million producing a total of £32.06 million (with transaction costs of £2.2 million).

258. On 25 August 2015 Mr Pearce wrote back to Mr Morris stating that a trust structure under which the BHS Group held the properties on trust for Alteri might be possible but that a loan structure would not work for the following reasons:

> "A loan structure I don t think works for us with or without a qualifying floating charge (QFC) simply unlike in the case of a trust, the properties would remain owned by BHS/BHSPL. If an administrator was appointed to one or both companies then a moratorium would prevent any exercise of security rights. If the Administrator was minded to stay in possession Alteri would obtain no benefit whilst they do so. That would defeat our economic objectives on any transaction and the risks of this are too great based upon LTV and holding costs and other considerations."

(iv) The DTZ Valuation Report

259. Under cover of an email dated 31 August 2015 Mr Morris wrote to Olswang enclosing a draft valuation report of the nine properties in the collateral pool prepared by DTZ Debenham Tie Leung Ltd ("**DTZ**") and dated 28 August 2015 to which I will refer as the "**DTZ Valuation Report**". They valued the nine properties at £89.195 million in

total and they gave the following individual valuations for each property (and I set out in brackets for comparison purposes the valuations in the table sent to Alteri on 25 August 2015):

(1) *Blackpool*: £0.8 million (£1.5 million).

(2) *Exeter*: £0.625 million (£1 million).

(3) *Carmarthen*: £1.16 million (£1.5 million).

(4) *Oxford Street:* £60 million (£50 million).

(5) *The Arndale Centre, Manchester*: £10.265 million (£14 million).

(6) *Milton Keynes*: £11.94 million (£15 million).

(7) *Scunthorpe*: £1.325 million (£1.5 million).

(8) *Sunderland*: £1.73 million (£1.75 million).

(9) *Taunton*: £1.35 million (£2 million).

Total: £89.195 million (£88.25 million)

(v) Other Lenders

260. Mr Hitchcock and Mr Morris were unable to persuade Wells Fargo and Burdale or Brockton Capital or Alteri to provide further finance. During the same period they also attempted to attract finance from M&G Investments Ltd and Park Street Advisers in each case without success. Indeed, in their opening submissions Mr Curl and Mr Perkins stated that between February 2015 and April 2016 the BHS Group was unable to secure finance from a total of 14 lenders (including Farallon).

(4) Atherstone

261. On 26 August 2015 BHSPL sold Atherstone to Aequitas Estates (Midland) Ltd, a company ultimately owned by Mr Ismailjee, for £17.9 million (which equated to £14.94 million plus VAT). The Joint Liquidators did not allege that this was a sale at an

undervalue and Mr Ismailjee gave evidence to the Insolvency Service that he had negotiated the sale with Mr Sherwood and denied that he received any favourable terms.

262. £6,157,588.24 of the proceeds of sale was used by BHSGL to repay ACE I which was secured on the distribution centre. £5,157,884 was the sum payable under the ACE I Loan Agreement (as amended by the Deed of Amendment and Variation) and £1,000,000 was the "exit fee" payable under the original terms. That exit fee was payable in full whether or not RAL repaid the debt earlier than the extended repayment date of 31 December 2015. I was not taken to any conveyancing documents or Olswang's ledger but normal practice would have been for Olswang to give an undertaking to use the proceeds of sale to discharge the ACE I Charge.

263. In their weekly cashflow update dated 22 August 2015 GT reported that £11.9 million was due to be received that week from the sale of Atherstone net of £60,000 fees and the £1 million exit fee but that the £11.9 million was inclusive of a payment of £3 million VAT which was due to be paid the following week. They also stated that they assumed that Atherstone had been leased back to the BHS Group from August 2015 at a rent of £770,000 per annum. By email dated 25 August 2015 Mr Shore of Olswang reported to Mr Morris that they were expecting to receive £11,342,337.30 that day and in their weekly cashflow dated 29 August 2015 GT reported that proceeds of £14.9 million had been received less the repayment of ACE I of £6.2 million and agency fees of £0.4 million. The inference which I draw from these documents is that Olswang paid Mishcon directly and then transferred the balance to BHSPL.

264. Mr Chandler's evidence in Chandler 1 was that the BHSGL board always understood that when Atherstone was sold and ACE I repaid, RAL would owe the same amount to the BHS Group and that this would increase the inter-company debt between them. He also said that he understood that this debt would be paid down in time from the fees due to RAL under the MSA. From early September 2015 onwards discussions took place to document this arrangement but RAL did not formally acknowledge the debt until 3 March 2016 when Mr Treacy signed the AOI Letter (as I have defined it below).

I. 8 September 2015 to 23 December 2015

(1) The Grovepoint Facility

265. On 1 September 2015 a meeting of the Board took place at which Mr Chappell, Mr Chandler, Mr Topp and Mr Henningson were present. They also record that Mr Crane was present for item 5 which was headed "Business Update". The minutes record that Ms Morgan reported that the cumulative EBITDA was –£63 million. They also record as follows under the sub-heading "cashflow":

> "MC reported:
>
> • cash flow for the previous week had closed at £8.6m;
>
> • cash flow would close at £6.9m this week which included LoCs;
>
> • whilst funds from the sale of Atherstone had been received they had not come in when expected and a significant amount of time had therefore been spent on cash flow management; and
>
> • the Board needed to ensure they were comfortable with the timing and quantum around assumptions.
>
> MH added that the business needed reliable assumptions and timelines. Until the business was comfortable with the assumption, it would need to assume the property transactions were not taking place so that there would be no reliance on the funds from a cash flow perspective. The Board discussed and recognised the additional work and anxiety for Directors and senior management that missing assumptions around timelines had. DCl added that for Atherstone, the sale had raised £3m more than other bids, despite the timeline.
>
> The Board noted that:
>
> • net proceeds from Atherstone, £11.3m, had now been received;
>
> • ACE had been re-paid, the majority of professional fees had been paid with only VAT outstanding. MH had a query over the fees for the agent which he needed to resolve before payment would be made;
>
> • MH and DC1 had reviewed the product categories and were agreed on which LoCs were required;
>
> • by 20 September, the cash balance would be -£2.9m, the peak funding requirement was forecast to be £31.5m;
>
> • SPG and Arcadia had confirmed they would provide financial support for the funding gap. DT had held similar discussions. The amount and their agreement to assist needed to be documented;
>
> • after discussion, it was agreed that Arcadia would be advised that £35m would be required;
>
> • in the event that this was not required it was further agreed it would be prudent to request a lower amount of £10m to provide a buffer from SPG; and
>
> • in the short term, the focus needed to be on releasing the LoCs, the sale of the targeted properties and repayment of ACE in December, restoring

> credit insurance facilities for which KS would provide a Lloyd's contact and securing stock and lease financing.

266. The minutes then record that Ms Morgan, Mr Crane and Mr Carver left the meeting and that Mr Sherwood joined it to provide an update on property negotiations before leaving the meeting. They then record that Mr Morris provided an update on the new financing round before the Board authorised a sub-committee to execute the relevant documents:

> "MM then provided an update on the current financing round which included the current position on each of the potential firms. MM outlined advantages with particular firms, along with disadvantages on some of the other potential firms and the security they were seeking. The Board considered these in detail and noted that MM expected to have clarity by Friday as to the final firm.
>
> MM then left the meeting.
>
> The Board then considered the process for agreeing the final documentation for the financing. KS proposed that a sub-committee of the Board be formed to provide final sign off, but that the whole Board should receive and consider the documentation. The Board agreed with this proposal and it was resolved THAT DCl and DC2 be approved to execute the final paperwork with the successful firm, subject to the whole board's consideration of the documentation. The Board also agreed that a PR needed to be lined up for release following the conclusion of this financing round to mitigate and address the issues faced with credit insurance and to counter negative media coverage.
>
> Action 4: OT and EP to arrange for Jonathan Hawker to draft press release
>
> The Board reflected on their discussions and information provided on the current trading update, cash flow, property and finance updates. The Board noted they had considered what the reasonable prospects were of the Company avoiding going into insolvent liquidation in their discussions and had identified factors that had a real prospect of materialising that would impact on that assessment. For all of these reasons the Board considered that there was a reasonable prospect that the Company would avoid going into insolvent liquidation. Furthermore, the directors considered that they were acting in the best interests of the Company's creditors."

267. On 3 September 2015 Mr Morris circulated the final draft of the Grovepoint Facility (as I define it below) to all of the members of the Board including Mr Henningson. In the covering email he stated that it was in agreed commercial form subject to minor drafting and typographical amendments. On 8 September 2015 three meetings of BHSL, BHSGL and Davenbush took place at 12.45 pm, 12.50 pm and 1 pm which Mr Chappell and Mr Chandler attended and at which they authorised the repayment of ACE II and entry into the Grovepoint Facility. Each set of minutes records as follows:

> "[I]n in considering whether the Company should enter into the Documents, each director needed to comply with his general duties to the Company. These included (without limitation) the duty to exercise reasonable care, skill and diligence and the duty to act in accordance with the Company's constitution and for each director to exercise his powers for the purposes for which they are conferred. Each director also had a duty to act in the way he considered, in good faith, would be most likely to promote the success of the Company for the benefit of its members as a whole and In doing so have regard (amongst other matters) to:
>
> 5.4.1 the likely consequences of any decision in the long term;
>
> 5.4.2 the interests of the Company's employees (if any);
>
> 5.4.3 the need to foster the Company's business relationships. with suppliers, customers and others;
>
> 5.4.4 the Impact of the Company's operations on the community and the environment;
>
> 5.4.5 the desirability of the Company maintaining a reputation for high standards of business conduct; and
>
> 5.4.6 the need to act fairly as between the members of the Company.
>
> It was noted that the list of factors was not exhaustive and, in having regard to these and any other relevant factors, the duty to exercise reasonable care, skill and diligence applied. It was also noted that:
>
> 5.4.7 the terms of the transaction and each of the Documents were fair and reasonable; and
>
> 5.4.8 In entering into the Documents and undertaking the other obligations contained in the Documents as part of the overall arrangements described above, the directors would be acting in the way they considered would be most likely to promote the success of the Company for the benefit of its members as a whole, as set out in section 172 of the Act.
>
> After careful consideration IT WAS RESOLVED that, in entering into the Documents and undertaking the other obligations contained In the Documents as part of the overall arrangements described above, the directors would be acting In the way they considered would be most likely to promote the success of the Company for the benefit of its members as a whole, as set out above;
>
> 5.5 IT WAS RESOLVED that the execution and delivery by the Company of each of the Documents, the performance by the Company of its obligations under each of the Documents and the terms and conditions of each of the Documents so far as they concern the Company be approved."

268. By a facility agreement dated 11 September 2015 (the "**Grovepoint Facility Agreement**") and made between BHSGL together with BHSL, BHSPL and Davenbush (defined as the "**Borrowers**") and Grovepoint Credit Funding 2 Ltd ("**Grovepoint**") as lender, agent and security agent, Grovepoint agreed to make available a total facility of

£62,436,500 (the "**Grovepoint Facility**"). The Grovepoint Facility Agreement provided as follows:

(1) The term "Borrower's Allocated Loan Amount" was defined with respect to BHSL as £52,097,500, with respect to Davenbush as £437,500 and with respect to BHSPL as £9,901,500 (section 1.1).

(2) The term "Make Whole Amount" meant (in relation to a pre-payment) the amount equal to the interest which a Lender should have received on the Termination Date from the date of the prepayment (section 1.1).

(3) The term "Margin" was defined as 15% (section 1.1).

(4) The "Termination Date" was stated to be 16 September 2016 (section 1.1).

(5) The purpose of the facility was to finance working capital requirements, refinance ACE I, ACE II and the ACE Loan Notes and to fund the payment of fees and costs (section 3.1).

(6) The Borrowers undertook to repay the loans on the Termination Date (section 6.1).

(7) Any prepayment under the facility was to be paid together with the Make Whole Amount relating to that pre-payment (section 7.9(h)).

(8) Interest was payable at the percentage rate which was the aggregate of the Margin and LIBOR (section 8.1).

(9) BHSGL agreed to pay to Grovepoint (as agent) a structuring fee of £1,248,730 (section 11.1).

(10) Each Obligor (as defined) entered into a negative pledge not to sell, transfer or otherwise dispose of its assets on terms whereby they could be leased to or re-acquired by an Obligor or enter into any arrangement under which money or the benefit of a bank or other account could be applied, set off or made subject to a combination of accounts (section 22.3)

269. The Grovepoint Facility was secured by a security agreement also dated 11 September 2015 (the "**Grovepoint Security Agreement**") under which, BHSL, BHSPL and

Davenbush granted first legal charges over 10 properties, namely, Oxford Street and its stores at the Arndale Centre, Manchester, Milton Keynes, Carmathen, Sunderland, Taunton, Blackpool, Exeter and Scunthorpe. Shortly before completion of the loan, C&W produced a residual valuation of Oxford Street at £60 million.

270. Olswang's completion statement for the Grovepoint Facility records that it received £62,436,500 on behalf of the BHS Group of which Grovepoint retained the structuring fee of £1,248,730, that £27,400,000 was transferred directly to Mishcon to repay ACE II, that Olswang paid £2,722,668.51 to Mishcon to repay the ACE I Loan Note and the first instalment of the ACE Loan Note III (below) and that Olswang paid £30,790,818 to BHSGL. This left £2,996,952 remaining in Olswang's client account which was ultimately paid to ACE. By email dated 16 September 2015 Mr Hitchcock sent Mr Budge a summary cashflow update which confirmed that the Grovepoint Facility had generated about £31 million of new money.

271. On 25 August 2015 Mr Turner of Olswang produced a memo headed "Trading advice to the Boards of BGL, BPL and BL". Olswang stated that the BHSGL was currently considering bridging finance for £65 million to repay ACE II and to provide working capital. Olswang also reminded the members of their duties and then raised a number of questions. These included the following:

> "There are a number of factors which each Board should consider when deciding whether it is in the best interests of creditors for this transaction to be entered into (and this is whether BGL, BPL and BL is borrower, guarantor, vendor and/or chargor). The primary consideration in the Board's deliberations is no doubt whether the financing allows the turnaround plan to be implemented (and that belief is reasonable), such that the position of the companies in the Group and their creditors becomes more secure and the companies return to a more stable footing. The position of the pension fund liability is a significant factor in any consideration of the unsecured creditor position. In addition, what other factors should be considered? Ultimately if is for each Board to ensure all relevant considerations have been taken into account but they may include the following:
>
> 4.1 The funding allows the ACE II facility to be repaid and replaced by a facility on more favourable terms.
>
> 4.2 It is contemplated that the facility will be repaid by the sale of the properties over which the funder will take security over the next 6 -12 months. Is that likely? In addition, bearing in mind that a number of these properties are currently unsecured (not subject to either fixed or floating charge security) and therefore any proceeds of sale would be available for

> unsecured creditors, to what extent are the relevant Boards comfortable that were the relevant companies in the Group to go into administration at any time after the financing is put in place, as opposed to today, the position of unsecured creditors would not have been prejudiced. Part of that assessment would be that the three most valuable properties, Oxford Street, Manchester and Milton Keynes are currently secured (to ACE and HSBC), so presently what value is there in those properties for unsecured creditors, and do the other proper ties to be charged have any material value?"
>
> "5. Inevitably the Board may feel it is necessary to balance a number of factors. The issue may centre around the reduced assets available for unsecured creditors due to the debt/sale terms and due to the security being granted over certain pieces of real estate which are currently unencumbered and therefore the prejudice (if any) that unsecured creditors may suffer in due course if the companies fail. This is to be balanced against the fact that the relevant Boards may feel that this financing will take the Group through to a position where its turnaround plan is implemented. Is it reasonable for the Boards to believe that that will be achieved, and therefore no unsecured creditors will suffer, whereas if the Group went into a formal process to day, there would be a shortfall for unsecured creditors. In assessing the position of unsecured creditors the position of the pension fund must, as mentioned, be considered."

272. By email dated 11 September 2015 and timed at 4.05 pm Mr Chandler wrote to Mr Roberts asking for a copy of the note which Olswang had prepared for the presentation on 9 April 2015. By email timed at 6.31 pm Mr Roberts replied enclosing three attachments. In his covering email he stated as follows:

> "Please find attached:
>
> 1) Original paper presented by Olswang
>
> 2) Recent memo prepared for boards for ACE II transaction
>
> 3) Memo from Ron prepared on pensions / directors duties issues which I have held back pending the meeting yesterday but now include"

273. The second attachment was Mr Turner's memo dated 25 August 2015. I am not certain why Mr Roberts described it as prepared for the "ACE II transaction" because there was no evidence before me that it was prepared any earlier than 25 August 2015 or that it was sent to the BHSGL board before 26 June 2015. It may be that Mr Roberts was confused or it may be that he referred to the ACE II transaction because ACE was to be repaid out of the funds drawn down under the Grovepoint Facility.

(2) The ACE Loan Note III

274. In order to enter into the Grovepoint Facility, BHSGL had to reach agreement with ACE to release its security over Oxford Street and the Arndale Centre in Manchester. By email dated 2 September 2015 and headed "subject to contract" Mr Dellal wrote to Mr Chappell stating that for ACE to exit its position in its entirety including the securities which it held over Oxford Street and Manchester, it would require BHSGL to pay £33 million by the end of September 2015 and £122,668.51 per month until December 2015. Over the next few days, however, he must have agreed to accept £30 million to discharge ACE II and £3 million payable in December 2015 with monthly instalments of £122,668.51.

275. On 10 September 2015 a BHSGL board meeting took place at which Mr Chandler and Mr Topp were present. The minutes of the meeting record that as part of the overall financing of the BHS Group ACE had agreed to surrender the ACE Loan Note II in exchange for a new loan for £3,490,674.04. In broad terms, this sum represented the balance due under the ACE Loan Note II and a sum required to buy out the ACE Profit Share payable under the ACE II Mezzanine Agreement, fees, interest and four months' rent for North West House. The minutes also record that the board resolved to issue a new series of notes to ACE upon it surrendering the ACE Loan Note II.

276. By letter dated 11 September 2015 and headed "Pay Off Letter" ACE wrote to BHSGL, BHSL and BHSPL stating that upon the payment of £30,122,668.51 and the issue of new loan notes to the value of £3,490,674.04, ACE agreed and acknowledged that all sums due under ACE Loan Note II would be paid and discharged and agreed to release the three Companies from their obligations under ACE II. By a deed dated 11 September 2015 (the "**ACE Loan Note III**") BHSGL agreed to issue a new series of loan notes for the principal sum of £3,490,674.04. Clause 5 provided that it was to be repaid in four equal instalments of £122,668.51 on 11 September 2015, 28 October 2015, 28 November 2015 and 28 December 2015 with a final payment of £3,000,000 also payable on 28 December 2015. On 11 September 2015 BHSGL issued a certificate recording that ACE was the registered holder of £3,490,674.04 unsecured loan notes.

277. Finally, by a deed of release dated 11 September 2015 ACE acknowledged that ACE Loan Note II had been released in full and it released BHSGL, BHSL and BHSPL from their obligations under ACE II and the legal charges over Oxford Street and Manchester. The first instalment of ACE Loan Note III which fell due immediately was paid out of

the proceeds of sale of Atherstone. There was no dispute that BHSGL redeemed the ACE III Loan Note and paid the sum due in full.

(3) The Hudson Facility

278. On 16 September 2015 a BHSGL board meeting took place at which Mr Chappell, Mr Chandler and Mr Henningson were all present. Mr Hitchcock reported that despite the Grovepoint Facility there remained a shortfall in cashflow and that Sir Philip Green had agreed to fund the shortfall so that an additional £10 million of cash would be in place by 20 September 2015. The minutes record that the board also discussed the following measures:

> "• the pre-funding requirement from HMRC and the subsequent impact on cash flow. MH intended to appeal but in the meantime the costs still had to be met;
>
> • alternative options to ease cash flow by delaying rental payments with the agreement of landlords;
>
> • the cash flow summary presented to the Board had been prepared by BHS and by the end of the month,
>
> • GT s involvement would have come to an end;
>
> • the cash flow summary provided both a short and long term view;
>
> • the pension levy had been significantly increased as a result of the Company's risk profile, to £2.9m for this year and double that the following year although there was potential to reduce the levy; and
>
> • VAT was due on 27 September; DC1 intended to explore whether the due date could be varied."

279. The minutes also record that Ms Morgan presented the business plan (which was a reference to the July 2015 Turnaround Plan). She stated that the planning process had started some months previously with the assistance of GT who had taken "a top down approach" whilst internally a "bottom up approach" had been used. She reported that the two plans "had not met in the middle" and that there was a challenge to meet the target EBITDA £20 million. Finally, she stated that each profit or loss driver had then been analysed and categorised into "pillars" with building blocks added to give incremental gains. Finally, the minutes show that no decision was taken to approve the July 2015 Turnaround Plan and the board agreed to consider it at a later meeting.

280. The BHS weekly cashflow update dated 17 September 2015 recorded that the Grovepoint Facility had generated a net receipt of approximately £31 million, that HMRC had declined to agree to a deferral of import VAT and that the BHS Group was required to pay it on an ongoing basis from the following week. It also recorded that "Mitigating cash flow levers of c.£5 million will be used if required" and that the PPF Levy of £2.9 million was to be appealed in the hope of agreeing a deferral. Finally, they recorded that discussions were ongoing to obtain an asset backed lending or "**ABL**" facility of up to £40 million. The headroom graph forecasted that the BHS Group would have negative cashflow of between £4 million and £12 million between 27 September 2015 and 22 November 2015.

281. By a letter dated 27 September 2015 Barclays agreed to grant an overdraft facility of £11 million to a company called Hudson Accounting (No 1) Ltd ("**Hudson**") at a rate of 1.75% above its base rate until 5 December 2015 (the "**Hudson Facility**") on condition that Arcadia provided a guarantee in form and substance acceptable to the bank. On 25 September 2015 Arcadia entered into a deed of guarantee for the Hudson Facility and by email dated 29 September 2015 Mr Carver wrote to Mr Hitchcock and Ms Morgan stating that the Hudson Facility was in place and available for drawdown. None of the loan documents to which I was referred suggest that any of the Companies was a party to the Hudson Facility.

282. On 14 October 2015 a BHSGL board meeting took place at which Mr Chappell, Mr Chandler and Mr Henningson were all present. Mr Morris reported that the Hudson Facility had not yet been drawn and Ms Morgan reported that the trading EBITDA was now –£67.8 million. Item 9 on the agenda was headed "i. Business Plan and Budget: for approval ii. Pillar Goals hierarchy" and the minutes recorded as follows:

> "MH circulated a paper which outlined the Pillar Goals hierarchy. The Pillar Goals hierarchy formed part of the Business Plan and provided granularity and laid out which member of the Operations Board was responsible for each Pillar. DT explained that on Wednesday 25 November, this Board along with the Operations Board were meeting offsite. The agenda for that meeting would include the turnaround plan in more detail, and in particular, how each Pillar would be achieved. MH explained that for all Pillars, a plan was in place to achieve savings or create new growth. Pensions had been left deliberately blank at this stage however, following a meeting with Grant Thornton, MH outlined a possible pension solution road map. MH circulated a summary. The Board

> meeting was then adjourned. The Board meeting was reconvened. MH left the meeting. The Board approved the Business Plan & Budget."

283. The BHS weekly cashflow update as at 30 October 2015 recorded that £9 million of the Hudson Facility had already been drawn to cover "end of month" payments. The headroom graph forecast that the BHS Group would still have negative cashflow until 22 November 2015 when it was forecast that there would be a significant sales receipt increase of £16 million for trading over the Black Friday weekend.

(4) Grovepoint brokerage fees

284. Under cover of an email dated 4 September 2015 Mr Roberts sent a copy of the MSA to Mr Chandler and Mr Morris. It is clear that he had been instructed that a fee was to be paid to RAL because he identified the following "Problem" and the following "analysis":

> "**Problem**
>
> Under the proposed loan, there is a restriction on the quantum of funds that BHS Group can pay up to RAL. At the last minute, BHS considered the payments under the MSA and have asked whether it would make sense to assign the agreement to one of the non-obligor companies in the group as the restriction on payments does not apply to such parties.
>
> **Analysis**
>
> I see that clause 8 permits BHS to assign its rights or obligations to another member of its group. On that basis, I see no reason why BHS Group could not assign the agreement to one of the non-obligor companies (for instance BHS Services Limited) who would continue to benefit from RAL's services (as all group companies benefit) and would then be obliged to pay RAL under the agreement – presumably by taking an intercompany loan from its parent BHS Group Limited.
>
> This would not affect the services that RAL provides, as they are provided to the entire group and it would not affect the employees who amended their employment contracts to be employed by RAL on or post completion, as I understand the deeds of variation they signed contained a separate guarantee from BHS to pay their salaries in any event."

285. On 8 September 2015 Mr Roberts sent Mr Chandler an email attaching draft minutes of a BHSGL board meeting to be held to approve the payment of a 4% "brokerage fee" to RAL for arranging the Grovepoint Facility. On the same day he sent a first draft of an amended and restated MSA. It was Mr Chandler's evidence (which the Joint Liquidators did not challenge) that before he had read this email Mr Roberts had called him and told

him that Olswang had been asked to transfer £2.7 million of the sum held on their client account to RAL on the instructions of Mr Chappell. Finally, it was also Mr Chandler's evidence that he then instructed Mr Roberts that the transfer should not be made until the BHSGL board had considered it and he confirmed this by email.

286. Under cover of an email dated 15 September 2015 and headed "Traffic Lights" Ms Georgina Roscoe, Mr Turner's PA, sent Mr Chappell and Mr Parladorio a memo on "Trading Advice to the Board of BHS Group Limited" the purpose of which was to identify the risks associated with paying a brokerage fee to RAL. Mr Turner identified the potential risks as follows:

> "Should the relevant BHS entity enter into administration or liquidation within two years of the date of the Transaction, the Transaction could be attacked by the administrator/liquidator as a transaction at an undervalue. The basis for any such application would be that pursuant to the Transaction RAL had provided significantly less consideration than that received. The administrator/liquidator would also have to show that the relevant BHS entity was unable to pay its debts at the time of the Transaction or became unable to do so as a result, although this will be presumed where the parties are connected, as in the present case. Furthermore, any Payment may be attacked as a preference by an administrator/liquidator if it could be shown that the Payment put RAL in a better position than it otherwise would have been on insolvent liquidation, and that when the Payment was made the relevant BHS entity was influenced by a desire to prefer RAL as opposed to arms-length commercial considerations (and a desire to prefer will be presumed where the parties are connected, as here).
>
> In addition, the directors themselves could find themselves liable for breach of duty if it could be shown that at the relevant time, due to the position of BHS, the directors owed duties to act in the best interests of creditors and that the Transaction and/or any Payment were not in the interests of creditors. Finally, allowing the BHS entity to enter into a Transaction/make a Payment which is subsequently set aside could be a ground for a misfeasance claim."

287. Mr Turner stated that two proposals had been put forward: first, deferring payment until 30 January 2016 and, secondly, deferring payment until the business was capable of affording it. He identified the first option as red or amber and the second as closer to green on the amber scale. He then stated as follows under the heading "Summary":

> "The potential challenges to the Transaction and any subsequent Payment mentioned above will only arise if the relevant BHS entity enters an administration or liquidation process within two years of the date of the

> Transaction or Payment, as the case may be. However, if the company does enter such a process, the Transaction is vulnerable to being found to be a transaction at an undervalue and/the Payment a preference, whether option one or two is followed. The difference in risk is predominantly that if option two is taken, it is less likely that the relevant BHS entity will enter administration or liquidation after the Payment is made, if the payment will only occur once the relevant BHS company has achieved a position of sufficient financial robustness such that the payment of the fee to RAL will not materially detrimentally affect the cash flow of the relevant BHS entity. Making the Payment in those circumstances is also likely to leave the directors less open to criticism and liability."

288. By email dated 24 September 2015 Ms Caroline Dodman of Olswang wrote to Mr Morris stating that she understood that there was a plan for BHSL to put £748,800 (i.e. £624,000 plus 20% VAT) into Lowland by way of share subscription and on 28 September 2015 Mr Joshua Swerner of Olswang sent a suite of documents designed to give effect to this plan. In the event, a decision was taken for BHSL to make a loan to Lowland instead of subscribing for shares.

289. On 25 September 2015 a RAL board meeting took place at which Mr Parladorio and Mr Chappell were present in person and Mr Henningson by telephone. The minutes record that Mr Parladorio explained that changes were necessary to the MSA and that it would be reviewed and tabled for final approval. Under the heading "Fees on re-financing (Michael Morris)" the minutes also record that the board agreed to pay a 1% fee to Mr Morris which was described as "low and therefore a good deal". By email dated 12 October 2015 Mr Topp also wrote to Mr Paul Martin of GT asking about introducer fees:

> "We are currently debating the fees which maybe payable to both Michael Morris and RAL for completing the transaction with grovepoint. So not inc the legals, property etc. I understand that Seaun [sic] introduced grovepoint to Michael and didn't charge an introducer fee? Could you provide some indicative costs of what appropriate fees could/would look like....."

290. On 9 October 2015 RAL raised an invoice to Lowland for £115,000 (ex VAT) or £138,000 (inc VAT). The narrative stated: "Management Service Fee on account (in relation to services in relation to Grovepoint deal)". On the same day Mr Parladorio sent the invoice to Mr Topp (copying in Mr Chappell, Mr Chandler and Mr Morris). There is no evidence that this email or the invoice were copied to Mr Henningson.

291. On 14 October 2015 Mr Topp reported back to Mr Parladorio on Mr Martin's advice that introduction fees were about 75 to 100 basis points. On 27 October 2015 a RAL board meeting took place at the Landmark Hotel at which Mr Parladorio, Mr Chappell and Mr Henningson were all present. The minutes record that they resolved to offer the post of CFO to Mr Aidan Treacy. They also record that Mr Parladorio provided an update on the MSA and that it was agreed that Mr Treacy and he would proceed with a benchmarking exercise.

292. By email dated 4 November 2015 Ms Dodman wrote to Mr Morris advising that it was possible for BHSL to make a loan to Lowland and for Lowland to pay RAL. Mr Chandler described this device in Chandler 1 as using Lowland as an "invoicing hub" for other group companies. By email also dated 4 November 2015 Mr Topp wrote to Mr Hitchcock stating that he wanted further advice from Olswang before the revised MSA was put in place. On 5 November 2015 Mr Topp and Mr Chandler spoke to Mr Roberts by telephone and Mr Chandler took detailed notes of the call.

293. On 5 November 2015 board meetings of Lowland and BHSL took place. No signed minutes of the meetings were in evidence but draft minutes of both meetings record that Mr Chappell, Mr Chandler and Mr Henningson were all present. Both sets of draft minutes also record that Mr Chappell and Mr Henningson declared that they had an interest in the proposed transaction which they were required to declare under section 177 of the CA 2006. Both sets of draft minutes then record:

> "It was noted that pursuant to article 7.6 of the Company's articles of association, a director may vote and form part of the quorum in relation to any proposed transaction or arrangement in which they were interested, subject to being so authorised by the other directors of the Company. Accordingly, DC2, acting alone, resolved THAT DC1 and LH be authorised to continue in their duties and each director remained entitled to vote and count towards the quorum on all business to be discussed at the meeting."

294. The draft minutes of the Lowland board meeting go on to record that the board had received an invoice for services provided by RAL for £138,000 but that it did not have funds to pay it but could raise the funds by requesting a loan from BHSL. The minutes then continue:

> "The Board considered the proposal to request a loan and noted that with income due of at least £3.5m, it had the means to re-pay a loan. The Board agreed to request a loan from BHS Limited in order that it could pay the invoice from RAL."

295. The draft minutes of the BHSL meeting record the same information, namely, that Lowland had received the invoice which could not meet its obligation to repay the loan. They then continue: "The Board resolved that it would provide a loan to Lowland for £138,000." It is common ground that on 9 November 2015 £88,300 was transferred by BHSL to Lowland and that £138,000 was transferred by Lowland to RAL.

296. On 4 December 2015 RAL raised a second invoice addressed to Lowland for the sum of £509,363 (ex VAT) or £611,238 (inc VAT). Again, the narrative stated: "Management Service Fee (interim second payment on account in relation to services re: Grovepoint deal)". RAL's reserve account bank statement records that on 9 October 2015 RAL received £138,000 from Lowland and on 7 December 2015 it received the balance of £611,238. It also records that on 10 November 2015 it paid £100,000 to Prime Capital Services and £45,000 to Mr Chappell and that on 10 December 2015 it paid £509,000 to an unidentified capital management account.

297. Mr Chandler accepted that there were no minutes of either Lowland or BHSL authorising the payment of the second invoice. His evidence was that he was not involved in the bank transfers and that he could not recall why there were two payments (although he suggested that there might have been some urgency about the first one). However, it was also his evidence that he was sure that the total payment of £624,000 (plus VAT) was approved at the board meetings on 5 November 2015.

(5) Project Vera

298. "**Project Vera**" was the code name which the new BHS management gave to their own solution to the pensions deficit and the successor to Project Thor. On 13 July 2015 Mr Chappell, Mr Topp and Mr Hitchcock met the Trustees and in advance of that meeting Mr Martin sent Mr Topp preliminary indications of the outcome of the Triennial Valuation. The accompanying slide indicated the basis of valuation and the deficit of each scheme. The text included the following bullet point:

> "Looking over a 20 year period and making some reasonable allowances for future administration expenses, we estimated that total annual deficit contributions of £25m would be required to make good a combined deficit on the gilts basis of £345m, broadly and the addition of £15m a year to the £10m pa currently being paid. This does not include PPF levies, which the Company pays in addition."

299. By email dated 14 July 2015 Mr Topp wrote to Mr Martin summarising the outcome of their discussions and a number of individual workstreams. In relation to the restructuring of the Schemes, Mr Topp stated as follows:

> "Grant Thornton and Olswang will draft a high level proposal for a possible consensual restructuring of the Schemes ('Project Vera'), outlining a possible structure and key process steps. This will be provided to the Trustees for consideration and comment prior to the end of July 2015."

300. By email dated 17 July 2015 Mr Martin replied thanking Mr Topp for his summary and stating that he looked forward "to receiving the straw man from GT in due course". In cross-examination Mr Martin confirmed that this was a reference to the high level proposal (above) and on 31 July 2015 Mr Topp sent this document to Mr Martin. It consisted of 10 slides and proposed that new schemes would be set up, an RAA would be agreed with the Pensions Regulator and that BHSL's obligations would be transferred to a new company.

301. Mr Martin's evidence in Martin 1 was that the period following July 2015 was relatively quiet and that he did not meet with members of the BHSGL board again to discuss Project Vera until December 2015. Mr Chandler's evidence was that he attended a meeting with the Trustees, their lawyers and accountants and the Pensions Regulator on 15 September 2015. After he had considered this evidence, Mr Martin made a second witness statement dated 3 March 2023 ("**Martin 2**") stating that he had no recollection of such a meeting and no record of doing so. I return to this issue below.

302. On 1 October 2015 Eversheds provided an Advice Note to the Trustees setting out their considered advice following the acquisition. In the Executive Summary they drew attention to the fact that Arcadia had a fixed charge over Cribbs Causeway and a floating charge over the BHS Group's non-real estate assets and that this "Debt Security Package" had a number of legal deficiencies. They also stated that they had engaged with the advisers for RAL and Arcadia with a view to obtaining their agreement to

remedy these deficiencies but without success. They also expressed the view that the BHS Group's long term survival appeared to be dependent upon the implementation of Project Vera.

303. On 7 October 2015 Mr Martin spoke to Sir Philip Green and the minutes of the meeting of the Trustees on the same day record that Sir Philip told him that "the proposed security support package will be held back until the position with the Regulator has been resolved". The minutes also record as follows:

> "The Trustees unanimously agreed that the best outcome for members of the Schemes at present is to continue to collect the Company's deficit contribution payments – which continue to be paid on time and in accordance with the Schedules of Contributions agreed at the outcome of the 2012 triennial valuations - and to pay members' benefits in accordance with the Schemes' Rules. The Trustees saw no merit or advantage to members in "forcing the pace" so far as the ongoing (March 2015) triennial valuations are concerned – particularly as the Scheme Actuary had confirmed (subject to continuing to monitor the position), that there wat no PPF "drift"."

304. On 15 October 2015 the Trustees met again. The minutes record that the Trustees had answered all of GT's information requests in relation to Project Vera during the first half of September 2015. They also record that there was some discussion about the increase in the PPF Levy and that the Trustees acknowledged that making a financial demand for reimbursement to BHSL would contravene "their recently-agreed stance of not precipitating BHS's insolvency or forcing a similar outcome, as this would not benefit members or be in the interests of the PPF".

305. On 4 November 2015 Mr Martin sent Mr Hitchcock the initial results of the Triennial Valuation exercise. He attached a slide deck called "Actuarial valuations as at 31 March 2015" and it showed a deficit of £231.4 million for both Schemes (an increase of about £20 million on the 2012 Triennial Valuation): see slide 6. It also stated that DRCs continuing at the current level would take more than 40 years to remove the deficit. The slides set out the following illustrative recovery plans (on slide 27):

> "Based on the deficits of £231m in the Bhs Pension Scheme and £20m in the SMS under the Technical Provisions bases shown on slide 4, we have carried out some calculations on deficit contributions. The current contribution levels would not be expected to remove the deficit within 40 years. Deficit contributions of £ 14.4m/£1.2m with effect from 31 March

> 2015 would be expected to eliminate the deficit by 31 March 2035 for Bhs Pension Scheme/SMS respectively. If the Trustees choose the gilts basis, deficit contributions of £18.0m/£1.9m with effect from 31 March 2015 would be expected to eliminate the deficit by 31 March 2035 for Bhs Pension Scheme/SMS respectively, assuming no asset outperformance.
>
> PPF levies are payable in addition. The 2015/16 levies are £2.8m/£0.12m for the Bhs Pension Scheme/SMS respectively. It is not possible to determine future levies, but, as an indication, it is likely that the 2016/17 PPF levy will be approximately £4.5m for the Bhs Pension Scheme if Bhs Limited remains in Experian Band 10, and there would be an increase in the SMS levy"

306. Mr Hitchcock prepared a pensions roadmap for Project Vera which he sent to Mr Chandler on 4 November 2015. It stated that the current funding gap would require a minimum future funding requirement of more than £25 million per annum plus £5 million for the PPF Levy. However, there was no discussion of the roadmap at the BHSGL board meeting that day. Indeed, they record only that Mr Chandler was continuing his research on pension investments and returns and would provide further information. By email dated 5 November 2015 Mr Hitchcock expressed his frustration to Mr Martin:

> "Chris, my main aim is to get to know you and share with you my unfettered, uncomplicated and completely independent view of life at BHS! Privately, I don't agree with the guarded and hidden messaging that appears to have taken place preceding my arrival, as I am very proactive and transparent and like to collaboratively work with the key stakeholders in any business to move it forward. I have built up my own, ie, not contaminated by emotionally driven owners and advisers, view of a way forward and would like to discuss it with you. Hope this helps."

307. On 9 November 2015 Mr Martin met with Mr Hitchcock and Mr Topp. His notes record that Mr Topp said that the revised DRCs were unaffordable and that "save for a successful refinancing the company would run out of cash in March and become insolvent". They also record that Mr Hitchcock told him that the current proposal was to enter into an ABL with Gordon Brothers backed by Well Fargo but in order to do so BHSGL had to demonstrate that there was a credible pensions solution. Finally, his notes record that he confirmed that the solution was Project Vera, that GT were preparing a proposal and that they suggested that the cost could be in the region of £100 million to £200 million.

308. On 1 December 2015 a meeting took place between Mr Martin, Mr Hitchcock, Mr Topp, Mr Parladorio, Mr Hinds and Mr Kevin Hollister of GT. For the meeting GT had prepared a slide deck called "Project Vera: High level initial proposal for the consideration of the Trustee". This document was so recent that it was still being printed when the meeting began. Mr Martin's notes of the meeting record that Mr Hollister ran through it and that Mr Martin noted that it excluded the PPF Levy which would have to be paid. Mr Martin also noted the following bullet points:

> "• Critically CM noted that there was no provision for equity to PPF and asked whether this had been considered by the shareholders. CM did not receive a clear response. CM went on to point out that if the alternative to giving up equity was insolvency when all of the equity would be worthless, presumably the shareholders could be persuaded that it was necessary to do so. KH took the point.
>
> • As the equity issue is so fundamental it was agreed that this would be the key action point for the BHS Team and GT to pursue directly with PPF.
>
> • CM agreed to discuss the proposal with his Board and advisors and to revert with a high level view.
>
> • Funding for Vera was discussed. Again, it was accepted that this could realistically only come from one source. No detailed discussions have been commenced in this respect.
>
> • There was a brief discussion around the nature of any funding support. KH and CM agreed that if this was by way of a loan to the company it was unlikely to satisfy any moral hazard objectives of tPR."

309. The slide deck consisted of 12 slides in total and acknowledged that without reaching agreement with the Trustee BHSL faced the prospect of insolvency. GT proposed that the Schemes should be wound up and new schemes established which would provide an uplift of 1% on the current benefits. They also estimated that the residual estimated deficit would be £113 million. Finally, they stated that this would be 100% funded and that BHSL would be "assisted by a one off third party contribution". This was obviously a reference to Sir Philip Green or Arcadia.

310. On 12 January 2016 Mr Martin met Mr Topp and Mr Hitchcock. His notes record that they told him that they remained confident that an ABL[1] could be put in place but that the lenders required some degree of confidence about the pensions situation and that there was a need for urgency if a third party was to fund Project Vera. On the same day

[1] Mr Martin's note records this as "AVL".

he met with Mr Chappell and Mr Parladorio as well as Mr Topp and Mr Hitchcock. His notes of the second meeting record as follows:

> "• CM recapped on the update provided by OT and MH and looked for an open discussion on a possible way forward for both the business and the Scheme.
>
> • DC responded vigorously that the business could stand alone and needed no support from its previous owner.
>
> • CM noted that wherever funding is to come from, if the business is going to propose a Vera type solution to the Trustees then it has to be credible, with a credible funder.
>
> • DC indicated that he could raise £120m and if necessary would sell off the businesses "crown jewels"."

311. Mr Martin's notes then record that he expressed surprise that the business would be able to fund this level of contribution towards Project Vera and his evidence in Martin 1 was that Mr Hitchcock and Mr Topp turned to Mr Chappell to point out the obvious that there were no "crown jewels" left to sell because everything had either been charged or sold.

(6) Darlington

312. On 8 October 2015 Knight Frank LLP ("**Knight Frank**") offered the freehold for sale of the BHS Group's Darlington Store at 60 to 64 Northgate Darlington DL1 1PR ("**Darlington**") on behalf of Landmaster Properties Ltd ("**Landmaster**") which had gone into administrative receivership. Knight Frank stated in their brochure that they had been instructed to seek offers in excess of £2,850,000. At the BHSGL board meeting on 4 November 2015 Mr Chappell proposed the purchase of Darlington because it made sense from a financial perspective to purchase the freehold. The minutes record that the board was in favour of the transaction.

313. Following the meeting Mr Sherwood was able to negotiate a price of £2.55 million. However, by email dated 10 November 2015 Ms Morgan set out a calculation to show that the annual financing cost would be £312,000 and expressed the view that the transaction did not make sense. Mr Sherwood responded to this email by asking Mr Hitchcock to confirm that the BHS Group could fund a purchase price of £2.55 million and he replied stating that he could not guarantee it. He also stated that "there is not a CFO in the land who would sanction this" and "We are a retailer, not a property

trading/investment company." Mr Topp became involved and later that day Mr Sherwood wrote to him as follows (copying in Mr Hitchcock):

> "DC does have a potential purchaser whom based upon a reduced rent and a 20 year lease would buy the freehold off us. The proposal would give us a circa £500k capital gain and an annual rental saving of circa £90k. We would still be acting like a property company and when I floated this concept in the property meeting there appeared to be little enthusiasm for it?"

314. Later that day Mr Hitchcock came back with a more positive response stating that the group would have the funds to purchase Darlington in six weeks' time. In a report dated 27 November 2015 Mr Toby Yates of Vail Williams gave advice in relation to the purchase. He advised that a building survey (which had been assigned to the BHS Group) suggested that repairs to Darlington were required in the medium to short term for a budgeted cost of £312,000. He also advised that a mechanical and engineering report (which had also been assigned to the BHS Group) referred to a number of items which were operating beyond their normal life expectancy and were scheduled for replacement at a cost of £1,096,870. However, based on a number of comparable transactions Mr Yates advised that £2,550,000 reflected the fair market value of Darlington for investment.

315. By email dated 26 November 2015 Mr Sherwood wrote to Mr Topp stating that exchange of contracts was imminent. On 30 November 2015 Mr Topp replied stating that the purchase of Darlington required board approval and that a full financial evaluation of the purchaser was required. It is clear that Mr Chappell and Mr Sherwood anticipated the onward sale of Darlington because Mr Sherwood responded by telling Mr Topp that: "The SPV is being set up now so the onward sale would be on the basis of selling the SPV which saves any double stamp duty. I will ask DC to confirm the purchaser details."

316. On 30 November 2015 a BHSGL board meeting took place at which Mr Chappell and Mr Chandler were present (but not Mr Henningson). The unsigned minutes of the meeting record that Mr Topp told the meeting that the ability to sell on the property at a profit before the end of March 2016 was critical to approving the proposal and that Mr Chappell and Mr Sherwood both said that it would be possible to achieve such a re-sale. The unsigned minutes then record that the purchase was approved.

317. Mr Chandler took handwritten notes of the meeting to which he referred in Chandler 1. His notes record that there was some discussion about a "proper document" and that Ms Morgan said that she had produced one. They also record that there was discussion about the figures. They do not record, however, that a formal resolution was passed to purchase Darlington although Mr Chandler's evidence was that the board approved the purchase at that meeting.

318. By email dated 1 December 2015 Mr Sherwood wrote to Mr Topp stating: "As agreed on the conference call we need to move £255,000 into the lawyers account today." Mr Topp replied stating that the money would be available. He also stated: "Thought it would be useful to lay out the key parts of the deal as I understood them and clearly agreed the transaction on that basis." He then set out the detailed terms as he understood them. Shortly afterwards Mr Sherwood replied correcting some of the details.

319. On 2 December 2015 a further BHSGL board meeting took place and this time Mr Chappell, Mr Chandler and Mr Henningson were all present. The board pack contained a one page note on the purchase of Darlington which Mr Chandler annotated: "DT – is good deal if we get it away. KS – issue is cash flow if we cannot flip it on. DC1 – we could get mtge on it if not selling it." Under the heading "Darlington" the signed minutes of the meeting record as follows:

> "DC1 reported that the offer had been accepted although MS continued to negotiate to reduce the sale price. KS noted the Board were to have had a paper prepared on this and upon enquiry a paper had been prepared. The Board required a greater level of detail than had been provided. MH was asked to follow this up with MS and KM.
>
> Action 6: MH to ensure MS and KM prepare a paper, including a Capital Expenditure Request, and a P&L for Darlington, for circulation to the Board.
>
> DC1 explained that Darlington was a good proposal which included potential office space that could be let. It may also be possible to take out a mortgage on the property. The Board agreed that subject to receipt of a written proposal and a reduction in price, they would hold a meeting by conference call to consider the purchase.
>
> Action 7: Board conference call to be held to consider Darlington as necessary."

320. Between 3 and 9 December 2015 all of the directors signed a written resolution to incorporate a subsidiary, Darlington SHB Ltd ("**DSHBL**"), and to appoint Mr Chandler

as the initial (and sole) director. On 9 December 2015 Mr Sherwood reported by email to Mr Chappell (copying in both Mr Topp and Ms Morgan) that the purchaser had agreed to reduce the price to £2.45 million and that Gordon Dadds LLP ("**Gordon Dadds**"), who were acting for DSHBL, needed to be put in funds by 21 December 2015.

321. Mr Chandler signed the contract for the purchase of Darlington on behalf of DSHBL and on 11 December 2015 DSHBL exchanged contracts with Landmaster to purchase the property for a purchase price of £2.45 million. The contract provided for payment of a deposit and completion on 21 December 2015. By email dated 22 December 2015 Mr Mino Themistocli of Gordon Dadds wrote to Mr Sherwood and Mr Carver confirming that completion had taken place that day and enclosing a completion statement, which confirmed that DSHBL had paid the purchase price in full (including £241.36 interest for completing a day late) together with legal fees and SDLT totalling £107,922.46.

322. The trial bundle contained an extract from BHSL's ledger confirming that on 3 December 2015 the sum of £255,000 was transferred from its Barclays account to Gordon Dadds' client account and that on 21 December 2015 the sum of £2,300,333.42 was also transferred from its Barclays account to Gordon Dadds' client account. In their Points of Defence Mr Chandler admitted that BHSL funded the purchase of Darlington but Mr Henningson did not admit this allegation. It is necessary, therefore, for me to determine whether BHSL funded the purchase and on the basis of the ledger I make that finding of fact.

323. By email dated 23 December 2015 Mr Topp chased Mr Sherwood for an update about the resale of Darlington and on the same day Mr Sherwood replied to Mr Topp (who copied the email to Mr Chandler). He stated as follows:

> "We are talking to a couple of different parties about the sale one of whom tells me they are working up an offer. Given the cash flow position I have been concentrating more on finding a buyer than holding out for a top price. Nothing more will happen now until next year as the market pretty much shut down yesterday."

324. On 30 December 2015 Mr Sherwood produced a very short board paper in which he summarised the transaction and asked for the BHSGL board's "retrospective support" for the purchase and also for a strategy of buying in the BHS Group's freeholds to reduce

the rents and seek an onward sale in order to release capital back into the business. He did not identify a potential purchaser but he described the opportunity as follows:

> "We have succeeded in agreeing terms to purchase the freehold for £2,450,000. Our intention is to extend the lease to a 30 year term; reduce the rent to circa £220,000 and then re market the property seeking to achieve a price in excess of £2,700,000. This improved price will reflect the enhanced lease term and the reduced rent that will be perceived as providing the opportunity for rental growth. An alternative to a sale of the asset may be to refinance (This depends upon the terms that are available)."

325. At the BHSGL board meeting on 27 January 2016 (below) Mr Chappell reported that a sale of Darlington had been agreed for £2.2 million (i.e. at a loss of £250,000) and that he expected the sale to be a 14 day process. But a sale did not materialise even at that price. It is common ground that on 2 October 2017 Darlington was sold for £975,000 and that on 22 January 2018 DHSBL went into creditors' voluntary liquidation. Finally, I was not taken to any documents to prove that the board ever gave its retrospective support to the transaction.

J. 14 January 2016 to 25 April 2016

326. On 14 January 2016 a BHSGL board meeting took place at which Mr Chappell, Mr Chandler and Mr Henningson were all present. The BHS weekly cashflow update in the board pack for that meeting showed that the BHS Group would have negative cashflow for the foreseeable future. The text noted that in the week commencing 9 January 2016 the group would have to pay the January payroll of £9.2 million (including PAYE) producing negative cashflow of £19.8 million. The minutes of the meeting record that Mr Carver told the meeting that Christmas trading had been disappointing and that certain merchandising payments had been misunderstood. They also record that "the Board noted the gravity of the situation".

(1) Project Pipe

327. By January 2016 Mr Hitchcock had been contemplating a CVA for some time. In early December 2015 he contacted Mr Will Wright of KPMG, who was an insolvency practitioner and restructuring expert and by email dated 4 December 2015 Mr Wright

wrote to him enclosing a proposal document. In the covering email he stressed KPMG's experience:

> "As you know we would bring a wealth and breadth of experience to bear with a blended team of property, retail and restructuring expertise. We have led numerous landlord focussed restructurings so have unrivalled experience of such situations and deep understanding of the [sic] both the attitude of the various landlords and range of potentially achievable outcomes having been there before on many different occasions."

328. On 18 January 2016 RAL instructed KPMG to act for it in relation to a possible CVA. Their engagement was known as "**Project Pipe**" and its scope was set out in Appendix 1 to their engagement letter dated 26 January 2016. This stated that the business had experienced challenging trading conditions, that a turnaround plan had been developed to address key issues one of which was to reduce its fixed costs base. Phase 1 of their work included the following:

> "■ Review the group and legal structure, store performance, lease and creditor position and advise on (alongside the Group legal advisors) the nature and scale of opportunities to renegotiate leases (with particular regard to the stores with marginal or negative store EBITDA) with emphasis on the feasibility of a company voluntary arrangement ("**CVA**");
>
> ■ Consider the feasibility. cost-benefit analysis. associated risks and benefits of a CVA and where relevant. advise on the potential level of support from relevant stakeholders;
>
> ■ If appropriate. outline the various potential CVA structures for consideration by Management. incorporating the legal structures and challenges thereof."

329. KPMG's engagement letter also included cash monitoring work within the scope of their engagement. In particular, they agreed to review and challenge the BHS Group's "cash generation initiatives" and assist it in the implementation of "agreed cash generation and preservation initiatives". However, it also stated that the directors of the Companies would be responsible for the preparation of forecasts and for determining which assumptions to use. Mr Curl also placed reliance on paragraph 12 of KPMG's standard terms which accompanied the engagement letter:

> "Where there is more than one of you this clause applies to each of you separately and collectively. Notwithstanding our duties and responsibilities in relation to the Services, you shall retain responsibility and accountability for managing your affairs, deciding on what to do after

> receiving any product of the Services, implementing any advice or recommendations provided by us, and realising any benefits requiring activity by you."

330. On 22 January 2016 RAL also instructed Weil to act for RAL in relation to Project Pipe. In their engagement letter of that date Mr Plainer recorded that Weil had been instructed to give general restructuring advice in relation to Project Pipe including (a) advising the boards of the Companies on their duties, (b) assisting the Companies and KPMG to implement one or more CVAs and (c) if required to advise in relation to the restructuring of the pension liabilities. Mr Wright's evidence was that Mr Fleming had recommended Mr Plainer and that he was very highly regarded in the market.

331. On 26 January 2016 a meeting took place at Weil's offices between the Trustees (and their advisers), RAL and BHSGL (and their advisers). Mr Mike Birch of the Pensions Regulator and Mr Kevin Dolan and Mr Malcolm Weir of the PPF also attended the meeting. Mr Hitchcock had produced an information pack which showed that there was an immediate funding requirement of £11.6 million in the week commencing 24 January 2016 (to meet the payroll costs of £10.2 million) and that it increased to £58.5 million in the week commencing 27 March 2016. It also recorded that an ABL Facility was dependent upon Arcadia giving up its priority as a QFC holder. Finally, it stated that it was critical for the BHS Group to find a solution to all pension issues. The information pack also disclosed that the group was contemplating a CVA.

332. Mr Martin's notes of the meeting record that the Trustees and the Pensions Regulator were told that the CVA proposal had to be announced in the first week of March 2016. They also record that RAL and BHSGL repeated the proposal for Project Vera but also stated that £110 million to £120 million of additional funding was required and set out a series of next steps which included the agreement of the Trustees and the Pensions Regulator to Project Vera. Mr Martin's notes then record that Mr Birch expressed the view that "it did not appear that the business was "broke, it had just had a bad Christmas" and that "the position looked better in Sept 2015, when the Grovepoint financing was secured". Finally, Mr Martin noted that after a breakout session the parties reconvened to sum up the key actions to be taken after the meeting:

> "a. TPR response to an RAA - MB said TPR needs to see a formal proposal and full information and to assess this in the context of other creditors; it does not have sufficient detail at this stage and cannot give an indication

> of its view in advance. From what has been said so far, it does not appear critical that TPR give a view this week - but when the information does come through, TPR will work through it with the CVA timeline in mind.
>
> b. SPG release of security on Cribbs - SGP/Arcadia hold this security; MB said TPR is not clear on who is being asked to give what? What assurances are being sought? It is in SGP's gift to release this security - subject to conditionality - TPR and the Trustees need to see full details in writing before opining-and will revert with a decision ASAP thereafter.
>
> c. Vera financing- if SPG were to fund the c£120m cost - what would be his/Arcadia's terms/conditions for doing so?
>
> d. TPR needs answers/further detail In relation to all the foregoing."

333. On 27 January 2016 Mr Martin wrote to Mr Hitchcock stating that the Trustees and the PPF operations team saw it as essential that a contingency plan was put in place with a third party administrator briefed and lined up at short notice. Mr Chandler also wrote to Mr Birch confirming that there were no "pensions-related" conditions attached to the release of Arcadia's first charge over Cribbs Causeway. On the same day a BHSGL board meeting took place at which Mr Chappell, Mr Chandler and Mr Henningson were all present. Mr Plainer and Mr Linton Bloomberg of Weil and Mr Wright and Mr Peter Crompton of KPMG also attended the meeting. The minutes of the meeting record discussion about Darlington (above) and an ABL Facility (below). They also record that Mr Hitchcock reported as follows:

> "MH reported on the cashflow and stated that the position was moving constantly and had changed since the cashflow update was produced. MH stated that the negative balance forecasted for Friday 29 January (£3.004m) would now be positive. MH stated that he was now stretching payments to suppliers by 3 weeks which, whilst not unusual amongst competitors, was not something which he believed should be pushed much further."

334. The minutes also record that under the heading "Present Financial Condition" Mr Plainer and Mr Wright both gave preliminary advice and that the board confirmed that no winding up petitions had been served or any formal action taken by creditors against the BHS Group:

> "6.1 AP advised the Directors that it was important that they all had the opportunity to consider the latest financial information available and ask any questions. AP noted that a note in relation to the duties owed by the Directors had been circulated and advised that, given the financial position of the Company, the Directors owed their duties to creditors.

> 6.2 The Directors confirmed that no winding up petitions had been served on the Company and, whilst there had been some noise from creditors, no creditors has taken any formal action or put any threat of formal action in writing. WW advised the Directors that they should put a formal internal process in place so that threats of action can be adequately monitored and flagged when necessary. WW stated that it was especially important to ensure that a winding up petition was not filed and served upon the Company. DT confirmed that a process was already in place as the issue was both legal and commercial.
>
> 6.3 The Directors confirmed that they were not intending to enter into any material new commitments and that any new commitments entered into were in the normal course of trade.
>
> 6.4 AP advised the Directors that they needed to consider whether there was a reasonable prospect of avoiding insolvency. He commented that:
>
> (a) from the financial information provided to the meeting it appeared that there was liquidity in the business and further that there was an opportunity to raise monies via the New Loan given the recent indications given by Arcadia;
>
> (b) that, following a presentation to the Pension Trustees, the PPF and the Pension Regulator (the " Pension Stakeholders") on 26 January 2016, the Pension Stakeholders had not stated that they were not prepared to support a restructuring of the Company;
>
> (c) Arcadia had not threatened to take their own enforcement action pursuant to their security but had, instead, indicated their willingness to release Bristol from their charge so that the New loan could be obtained; and
>
> (d) KPMG had been engaged to explore medium to long term solutions to right size the business.
>
> 6.5 WW updated the Directors on KPMG's workstream and stated that, whilst the workstream had only just commenced, he had not encountered any issues so far which would suggest that a medium to long term restructuring solution was not possible.
>
> 6.6 AP advised the Directors that, taking all matters into account, he saw no reason from a wrongful trading perspective why they should not continue to trade but this was a decision for the Directors and AP requested that should any Director have any different view that he should make this known to the meeting. No Director expressed a different view.

(2) Gordon Brothers

335. By the end of January 2016 the financial position of the BHS Group had, if anything, become even more severe. The BHS weekly cashflow update as at 29 January 2016 (which formed part of the board pack for the BHSGL board meeting on 4 February 2016) showed that there was a funding gap of £15 million at the end of that week rising

to £55 million by the beginning of April. The text also stated that the BHS Group was currently deferring £9.8 million of trade payments and £1.8 million of other costs.

336. Mr Chandler's evidence was that from the beginning of 2016 Mr Morris had been in negotiations with Gordon Brothers, a US investment and finance firm, for an ABL Facility of £60 million for which the BHS Group would principally use its stock as security. However, at the beginning of February 2016 Gordon Brothers also agreed to provide a bridging loan of up to £9.418,437.50 to be secured on Cribbs Causeway (the "**GB Bridging Facility**").

337. On 4 February 2016 a BHSL board meeting took place at which Mr Chappell, Mr Chandler and Mr Henningson approved the GB Bridging Facility. By a facility agreement also dated 4 February 2016 (the "**GB Bridging Facility Agreement**") and made between GB Europe Management Services Ltd ("**GB Europe**") and BHSL, GB Europe agreed to make available a term loan facility of £9,418,437.50 in aggregate for the purpose of general corporate and working capital purposes at an interest rate of 15% over the base rate of the Bank of England for a period of 60 days. BHSL was also required to pay an arrangement fee of £211,914.84. On 1 April 2016 GB Europe agreed to extend the loan for a further 60 days until 3 June 2016 in return for a further commitment fee of £105,957.42.

338. Clause 14.2 of the GB Bridging Facility Agreement provided that if BHSL did not enter into a "Refinancing Facility Agreement" on or before the termination date of the bridging facility, BHSL was to pay GB Europe a "break fee" of £1 million. The term "Refinancing Facility Agreement" was defined as an agreement on terms which were mutually consistent with those set out in a term sheet dated 16 January 2016. I understood this to be a reference to a term sheet signed on behalf of GB Europe and sent on 12 January 2016 by Mr Heinz Webber of GB Europe to Mr Hitchcock. On 15 January 2016 Mr Hitchcock replied stating that BHSL was happy to move forward subject to agreeing a commitment fee of 3% and the possible reduction in the amount of the third tranche of £20 million (below). I draw the inference that on 16 January 2016 Mr Webber agreed those terms and sent a final version of the term sheet to Mr Hitchcock (even though it had not made its way into the trial bundle).

339. The key terms set out in the term sheet which Mr Webber sent to Mr Hitchcock provided for a senior secured first loan of £60 million in three tranches of £30 million, £10 million and £20 million to finance working capital and for other general corporate purposes. The required security was a first secured interest in and liens or charges over all present and future assets of BHSL and its subsidiaries including all contract rights and intangibles, deposit and current accounts, receivables and all unencumbered property. It also provided for blocked receipt and income accounts to be controlled by GB Europe "with cash swept back to the company on a weekly basis subject to covenant compliance and borrowing base compliance".

340. The term sheet also provided for the interest rate on each tranche to increase from LIBOR plus 9.2% to LIBOR plus 12.0% to LIBOR plus 14%, a commitment fee of 3.25%, a LIBOR floor of 0.75% and an annual fee of £48,000 and a range of early termination fees. In relation to financial covenants, the term sheet stated as follows:

> "The Lender is considering the following covenants: minimum EBITDA and cashflow levels, minimum inventory levels, minimum liquidity levels and maximum capex. Covenant levels and equity cure mechanics will be finalized based on further review of business plan and review of the collateral profile. The Lender anticipates financial covenants to be based on a discount to an acceptable business plan."

341. Finally, the term sheet provided for a number of conditions precedent which included "Updated inventory approvals and field exam" and "receivables appraisal". Mr Curl and Mr Perkins calculated that the APR of the GB Bridging Facility was 94% (after taking into account the break fee of £1 million) and in answer to a question from me Mr Topp accepted that the terms of this ABL Facility were very onerous and he described it as a "loan to own" scheme. By this he meant that the financial covenants would be so onerous that a default would be triggered almost immediately and that the lender would be able to take control of the BHS Group's assets.

342. On 4 February 2016 Arcadia released Cribbs Causeway from the Arcadia Security Agreement and on the same day BHSL granted a first legal charge over the property to GB Europe. However, by letter dated 27 January 2016 Mr Budge wrote to the board of BHSGL on behalf of Arcadia stating as follows:

> "For the avoidance of doubt, the only reason we are prepared to release the security over the Property (the fixed charge) is because our floating charge

> under the Security Agreement will remain in full force and effect for the whole amount of the £40 million debt owed to Arcadia Group Limited by BHS Group Limited and the value of the assets covered by the floating charge is well in excess of the amount owed to Arcadia Group Limited under the Acknowledgement of Debt."

343. On 4 February 2016 two further board meetings of BHSGL and BHSL took place at which Mr Chappell, Mr Chandler and Mr Henningson were all present and Mr Plainer and Mr Fleming were in attendance. The purpose of these meetings was to consider contingency planning and discuss an upcoming meeting with the Pensions Regulator and the PPF. The minutes record that Mr Richard Fleming, who was KPMG's senior engagement partner, explained the benefits of contingency planning and Mr Plainer explained the directors' duties to creditors:

> "4.1 RF explained the benefits of contingency planning to the Board and why it was necessary to have a plan in the event that the worst outcome came to realisation. He explained that the vast majority of sales in an insolvency process were effected via a pre-pack administration and that, if this was to occur, it was necessary for any office holder to be able to demonstrate that they have complied with SIP16 requirements including those relating to marketing and that this was necessary In order to demonstrate that value to creditors has been maximised.
>
> 4.2 AP explained that the directors have a duty to act in the best interests of creditors including secured creditors such as Arcadia. Arcadia has indicated that they were expecting the directors to have undertaken contingency planning. In the event that the CVA was not proposed, or was not approved, AP explained how the mechanics of any sale would ultimately be determined by the requirements of the purchaser. As a result therefore the Board should authorise KPMG to commence the contingency planning
>
> 4.3 DC1 said that it may be preferable for the Company to be the party that obtains valuations and undertakes discrete marketing however AP explained that in order to demonstrate that they have complied with their SIP16 obligations, KPMG would need to be involved.
>
> 4.4 The Board resolved that KPMG be instructed to commence contingency planning."

344. On 5 February 2016 a further BHSGL board meeting took place at which Mr Chappell, Mr Chandler and Mr Henningson were again present and Mr Plainer and Mr Wright were in attendance. One of the purposes of the meeting was to review the latest trading and cashflow position, receive updates on property and restructuring and consider the correspondence with the Pensions Regulator and PPF. The minutes of the meeting

record that Mr Carver reported that the £9 million from Gordon Brothers had now been received allowing critical payments to be made. The minutes also record that Mr Wright asked about Oxford Street, Mr Plainer gave advice which was very similar to the advice which he had given at the first meeting on 27 January 2016 and Mr Wright also confirmed his view that the CVA could go ahead:

> "5.5 WW asked for an update on progress with Oxford Street. DC1 explained that he had spoken to Lancer the previous day and received confirmation that they were ready to proceed. A meeting with lawyers had been scheduled for next week. DC1 estimated that completion could take place in 5 days. DC1 explained that the terms involved surrender of the lease, to be replaced by the issue of a new 10 year lease at the same rate. The Company would receive £75m for surrender of the lease. WW asked for confirmation which DT provided that the business would be able to operate until the end of February but at the current time, to continue to the end of March would be challenging."
>
> "6.1 AP advised the Directors that it was important that they all had the opportunity to consider the latest financial information available and ask any questions. AP asked whether Directors were aware of any legal action taken against the Company or winding up petition served on the Company.
>
> 6.2 The Directors confirmed that no winding up petitions had been served on the Company and no creditors has taken any formal action or put any threat of formal action in writing. MH advised that he held regular meetings to review payments due to suppliers.
>
> 6.3 AP advised that discussions had been held with the floating charge holder who was supportive of a restructuring. There were meetings due to be held the following week with TPR, the PPF and pension trustees who, to date, had not said that they opposed a restructuring.
>
> 6.4 AP advised the Directors that that they needed to consider the cash flow and whether there was a reasonable prospect of avoiding insolvency. DC1 explained that there potential lines of funding being pursued and he believed he could secure the cash required for the business. DT believed the business could safely trade to the end of February without onerous withholding of supplier payments. DC1 asked whether the business could commit to orders. AP explained that providing the orders were in the ordinary course of business, then the orders could be placed. Commitments outside the ordinary course of business needed however to come to the attention of the Board for further consideration and advice.
>
> 6.5 The Directors confirmed that they were not intending to enter into any material new commitments and that any new commitments entered into were in the normal course of trade.
>
> 6.6 AP advised the Directors that, taking all matters into account, he saw no reason from a wrongful trading perspective why they should not continue to trade but this was a decision for the Directors and AP requested

> that should any Director have any different view that he should make this known to the meeting. No Director expressed a different view."
>
> "7.1 WW advised that work continued with pace and, at present that there appeared to be no "showstoppers" as to why a CVA could not be proposed. Finding a solution to the pension issue was obviously important as was considering the viability of the Company post CVA."

345. On 9 February 2016 KPMG produced a draft CVA feasibility review for discussion purposes which consisted of 50 slides. Its "headlines" were that CVAs of both BHSL and Davenbush appeared to be feasible and would generate savings of between £49.6 million and £70.7 million over three years depending on whether certain stores were re-let. On a slide headed "Key Issues" they identified a number of concerns: see slide 9. In particular, they stated that they did not consider that a CVA of BHSPL was feasible and they raised the following concerns about feasibility more generally:

> "— We understand a business plan is currently being prepared that will include central costs savings and other initiatives that, in conjunction with the CVA savings, could return the business to profitability. We received a first draft of the profit and loss forecast on 4 February and understand the forecast cash flow, balance sheet and funding requirements are currently being progressed. Further work is required to conclude on post-CVA viability.
>
> — Funding for the business plan is an important consideration as CVA creditors will expect the Group to demonstrate that it has sufficient resources to carry out its business plan post-compromise.
>
> — In addition to the business plan, the Group must find a solution to the Group's underfunded defined benefit pension schemes if the business is to be viable in the long term. This will be a key corner-stone of messaging to landlords and other creditors to support any proposed CVA."

346. KPMG repeated this text on slide 25 and stated that key issues remained outstanding in respect of future profitability, funding and the pension scheme deficit and that they had yet to complete their work in this area. Finally, on slide 33 KPMG stated as an assumption that Arcadia was a floating charge creditor: "Floating charge creditor following the release of its fixed charge security over Cribbs Causeway (see note 1 above), Arcadia's loan of £35.8m is now secured solely by its floating charge."

347. Under cover of an email dated 16 February 2016 Mr Wright also sent Mr Hitchcock a summary of key issues and a workplan which contemplated the implementation of the CVA by the end of March 2016. These included a division of responsibility under which

the BHS Group was to prepare an initial cash flow and balance sheet, prepare sensitivities and update the profit and loss account and then KPMG were to "review base case and management's stress tests/sensitivities to take a view on viability".

348. On 16 February 2016 Mr Wright sent a letter headed "Variation Letter – Project Pipe" in which he set out a variation to KPMG's engagement letter to add an additional workstream headed "Contingency Options". It required KPMG to advise on methods, tactics and timetable to explore the sale options available and the most appropriate approach for RAL to adopt to financial investors, potential trade investors and alternative lenders. On 17 February 2016 a BHSGL board meeting took place at which Mr Chappell, Mr Chandler and Mr Henningson were present and Mr Plainer and Mr Wright in attendance. The minutes record that Mr Plainer advised the board that CVA planning was progressing in the right direction and Mr Wright advised that he had not encountered any issue that would prevent a CVA. They also record as follows:

> "6.1 DC2 requested an amendment be made to the funding and pension section of the CVA proposal, which WW agreed to. DC2 asked whether the pension negotiations needed to be fully settled if the Board decided to proceed with the CVA. AP advised that the future funding of the business needed to be evidenced, even if the pension discussions were not finalised.
>
> 6.2 MM asked whether he should request a revised term sheet from Gordon Brothers for the facility agreement. AP advised yes and that if a CVA were to proceed the Directors needed to have comfort over the future funding as they would need to be confident this was available.
>
> 6.3 WW said that this was an element required of KPMG too as there needed to be a reasonable chance of the CVA being successful."
>
> "9.1 DC1 advised the Board that he had spoken to lancer in respect of Oxford Street earlier that day and would provide a written update tomorrow. 9.2 DC1 was considering other options for Darlington as a result of some complications with leasing to Matalan. DT noted that the board would need to approve the transaction. 9.3 DC1 reported that Manchester was progressing and being managed by MS."

349. By email dated 29 February 2016 Mr Wright also wrote to Mr Eli Appelbaum of GB Europe asking him to confirm that it was in "detailed discussions" with BHSL to provide a £60 million working capital facility secured against its stock. He also stated that he understood that the facility was not formally agreed but that subject to final negotiation there was a desire to conclude arrangements either just before or immediately after the

creditors' meeting. By email also dated 29 February 2016 Mr Appelbaum replied stating that he was happy to confirm that this was the case.

350. On 1 March 2016 Mr Morris sent Mr Mike Pink, a partner of KPMG who later became one of the nominees, the current mark-up of the facility agreement. By email dated 2 March 2016 Mr Pink wrote to Mr Morris asking him whether there was any uncertainty about the aggregate facility of £60 million. He also asked: "Also, as you highlight, at least £10m would be only utilised to repay the existing GB facility, so the "net" new money would be £50m. Has that been factored in to your cash forecasts?" By email dated 2 March 2016 Mr Morris replied to Mr Pink copying in Mr Chandler. He stated as follows:

> "Copying DC2 as he's holding the pen on the proposal draft. The wording states up to £100 million of funding from the various sources and should continue to state that. DC2 I would suggest adding in 25.8b the facility of approximately £60 million"
>
> Mike, re. Tranche C, we (BHS) have the third tranche square bracketed currently because we will not be sure what the total stock levels will be in years 2 & 3 of the facility until the position of the Red/Amber stores becomes clear. Our borrowing base (stock levels) will be reduced when the relevant stores close - and the tranches are based on borrowing base availability. We will almost certainly have sufficient stock to draw the full Tranche C (£20m) in Year 1. however, we did not want to commit to paying the interest on the full Tranche C for years 2 & 3 before we can determine what the stock levels / borrowing base availability will be at that point. Gordon Brothers are on board with this approach and are committing £60 million subject to what portion of Tranche 3 we have the stock levels to draw on in Years 2 & 3.
>
> The current intention is for the Bristol loan to be rolled in to the Gordon Brothers facility from the outset (raising Tranche A to £39m)."

(3) The Pensions Deficit Offer

351. On 2 February 2016 Mr Paul Newman QC was instructed by Weil to give advice in consultation to RAL and BHSL and on 8 February 2016 he settled a note of his advice. His instructions were that there were three possible pension solutions: first, BHSL could enter into a CVA with a prior RAA and the implementation of the restructuring plan contemplated in Project Vera; secondly, BHSL could enter into a CVA and implement Project Vera; or, thirdly, BHSL could enter into a CVA and the Schemes would enter into the PPF by agreement. Mr Newman expressed the view that the first option was

"close to impossible" and that the second option involved a series of legal limitations which the Pensions Regulator and the PPF could not do much to overcome. In relation to the third option, Mr Newman explained that in January 2016 the PPF had published guidance for insolvency practitioners and that any deal would involve two elements which I set out below together with his summary of the position:

> "First, the PPF will request an up-front lump sum payment to the Schemes. Leading Counsel was not aware of any cases where the PPF has done otherwise. as the PPF's aim is to maximise its potential return if the alternative is insolvency (this condition would apply in the case of either a consensual deal on a CVA involving PPF entry or a Project Vera). Leading Counsel emphasised that this condition would therefore require something significantly better than if BHS as sponsoring employer went into insolvency and the Schemes were treated as an unsecured creditor (albeit this would still be less than the full buy-out cost) and this payment will probably be required to be made as a lump sum up-front payment. so that the assets made available to the Schemes did not diminish due to the competing claims of other creditors.
>
> Second, the PPF will seek an "anti-embarrassment" stake in the new business going forward - this would be a 10% stake if the business is owned by new investors, (i.e. investors completely unconnected to the current shareholders and management team) and 33% if the business continued to be owned by the existing shareholders. Leading Counsel was not aware of any circumstances where the PPF had departed from these principles. The PPF would also need to be satisfied that any settlement reached was a better outcome for the Schemes than if tPR exercised its anti-avoidance powers to secure additional financial support."
>
> "In summary, Leading Counsel was of the view that a deal with the PPF involving consensual PPF entry was the neatest solution. as this would avoid the timing and difficulties associated with a RAA and allowed tPR to pursue Arcadia/Taveta with its moral hazard powers separately. The key issue would however be to first source and then agreeing the appropriate level of funding for the Schemes to enable PPF entry as part of a CVA. In that scenario, Leading Counsel made the point that it would simplify matters if the BHS management team had complete control over the source of funding. Leading Counsel also advised that we may of course still wish to seek clearance and it may be that an equity investor would insist on clearance in any event."

352. On 5 February 2016 Mr Hinds called Mr Martin who recorded his notes of the call in an email dated 7 February 2016. He recorded that Mr Hinds had also called the PPF and the Pensions Regulator and was trying to manage expectations ahead of a meeting which was to take place later that week. His notes continue:

> "The company will propose a CVA at the meeting and if it isn't possible to execute this in the first week in March then BHS will go into administration (same timescale). KH confirmed that planning for the administration is underway.
>
> One of the determining factors for a CVA will be Arcadia agreeing to release/subordinate its floating charge so that post CVA ABL can be put in place.
>
> Others [sic] factors will include PPF agreeing to vote in favour and 33% of Bhs equity plus cash mitigation will be offered (no mention of the source or quantum of the cash).
>
> In order to release its floating charge Arcadia/SPG, will want tPR to drop its investigation. CM expressed his doubt that this was going to happen and questioned whether a meeting was even worthwhile.
>
> Regardless of whether it is a CVA or an Administration there will [be] no Vera proposal and so the Schemes will enter PPF in early March.
>
> CM expressed his frustration at the approach of KH's client in terms of the trustees' contingency planning, KH understood the point and said he would raise it with his client."

353. On 9 February 2016 the meeting between BHSL, the Pensions Regulator and the PPF took place. Mr Chandler did not deal with it in evidence and I could find no record of the meeting in the trial bundle or the offer which was subsequently made. However, a draft letter which Mr Bloomberg circulated on 23 February 2016 shows that BHSL made an offer to the PPF to make a cash payment of £18 million to the Schemes, to issue a £10 million loan note repayable over 10 years with a 24 month holiday and a 33% equity stake in the BHS Group after the CVA. Mr Bloomberg described this as the "**Pensions Deficit Offer**".

354. On 10 February Mr Chandler reported to a meeting of the BHSGL board, at which both Mr Chappell and Mr Henningson were also present, that the Pensions Deficit Offer had been made to the Pensions Regulator and the PPF on the day before:

> "The Pension Offer that was made at the Meeting was as follows:
>
> 1. £18m cash payment up front to the Pension Schemes;
>
> 2. £10m unsecured loan note repayable over 10 years with a 24 month payment holiday commencing on the date the CVA becomes effective; and
>
> 3. 33% equity stake in all relevant BHS companies post-CVA.
>
> The directors of the Company will have to provide an update in the CVA proposal in relation to its attempts to compromise the Pension Schemes deficit. We appreciate that part of your decision with regard to the Pension Deficit Offer may be linked to separate and independent discussions that

> The Pension Regulator may be having with Arcadia, the holder of a qualifying floating charge over the Company's business and assets. We have no visibility over the progress of those discussions however, as you know, the long term re-finance that has been offered for the Company post-CVA is conditional upon Arcadia's floating charge being subordinated. In view of the above, we look forward to hearing from you as soon as possible."

355. The minutes of the meeting also record that KPMG's feasibility study was put before the board and that the BHSGL board resolved to instruct Weil and KPMG to begin drafting a CVA proposal. Finally, the minutes record under the heading "Present Financial Condition":

> "7.1 AP advised the Directors that they needed to consider the wrongful trading test and whether there was a reasonable prospect of avoiding insolvency. He commented that:
>
> (a) the Company had received the presentation from KPMG which showed that there was every chance of a successful restructuring through a CVA;
>
> (b) negotiations with Pension Stakeholders to resolve the pension deficit were ongoing;
>
> (c) the Company had the support of the floating charge holder order to propose a CVA;
>
> (d) the Company was making good progress with its restructuring; and
>
> (e) the Company nor its subsidiaries were in default on any loan payments.
>
> 7.2 AP advised the Directors that, taking all matters into account, he saw no reason from a wrongful trading perspective why they should not continue to trade but this was a decision for the Directors and AP requested that should any Director have any different view that he should make this known to the meeting. No Director expressed a different view.
>
> 7.3 AP advised that in respect of suppliers, there was no suggestion of compromising them in the CVA proposal as they would receive full payment of their invoices. Stretching creditor payments so that full payment could be made, albeit later, was providing them with a better position than they would otherwise be in if the business were to go into liquidation. A script would be a useful tool for a handful of senior managers so that a consistent message was passed on to suppliers."

356. There was no immediate response to the Pensions Deficit Offer. However, on 16 February 2016 Mr Neville Kahn, who was a Deloitte partner, called Mr Martin who made a note of that call in an email the following day. He recorded as follows:

> "We spoke late yesterday. SPG asked Neville to call. Not too many surprises. A structure of settlement has been proposed to tPR. TPR has

> written back with what Arcadia considers to be a very unhelpful letter. Arcadia hadn't put forward [a] number but has suggested releasing its security plus the balance of the £15m. Neville [sic] personal view but not tested with SPG is that they might go up to the Thor number. There is no way they will go beyond and would not support the level of payment required for a Vera. It seems Arcadia sees the CVA as the next outcome now it protects more of the jobs. I explained that the trustees are out of the loop in terms of negotiations with tPR given the company's position that the schemes will enter the PPF either way.

357. On Wednesday 24 February 2016 a BHSGL board meeting took place at which Mr Chappell, Mr Chandler and Mr Henningson were present. Mr Wright, Mr Brian Green and Mr Pink, who were to be appointed the Joint Nominees, were present too. The minutes record that Mr Chappell said that he had spoken to Lancer the previous evening, that they were aware of the CVA and that the parties were expecting to agree on a figure of £75 million as the sale price for Oxford Street. He also said that Lancer needed to consult their client and assess the tax implications but that he expected them to confirm by the Friday how long this process would take.

358. I should explain the reference to Lancer. The Lancer Group were asset managers who managed the freehold of Oxford Street on behalf of the landlord, Oxford & City Holdings Ltd ("**O&C**"), which was ultimately owned by a Middle Eastern group of companies. As Mr Sherwood explained in evidence, the BHS Group's leasehold interest in Oxford Street was unusual. It was a long lease of 61 years with 46 years of the term unexpired. It also had onerous terms and a sitting tenant which made it less attractive to a third party purchaser. O&C had an obvious interest in buying out the group because of the marriage value of the two interests and BHSGL had been negotiating with Lancer on and off since Day One.

359. The minutes of the meeting also record that Mr Plainer summarised the current position on the pensions negotiations. He reported that the PPF were considering the offer and it was proposed that a letter be sent to the PPF (and copied to the Pensions Regulator) later that week repeating the offer. He also reported that discussions between the Pensions Regulator and Arcadia were ongoing. Under the headings "CVA Update" and "Present Financial Condition" the minutes then record:

> "7.1 WW advised that planning for the CVA was now in an advanced state and, assuming that the Board were comfortable that there would be some

> form of pension solution, WW saw no reason as to why a CVA could not be launched for BHS Limited.
>
> 7.2 WW advised that a decision was yet to be made for BHS Properties Limited ("Properties"). AP said the business needed to focus on whether a CVA was appropriate for Properties. DT reminded the Board that excluding Properties left a £3m hole in the P&L so it was preferable for it to be included. There was a consensus amongst directors to exclude Davenbush Limited.
>
> 7.3 WW said that KPMG had now been formally engaged by the Board and commenced the Contingency Planning workstream. The distressed M&A preparatory work was also being advanced and there was a meeting scheduled later in the day to discuss further.
>
> 7.4 DT asked when the CVA would be ready. AP explained that a draft could be sent to major creditors this week, with a final version ready by 4pm on 1 March when it would be filed at court. Copies had to be sent to all creditors on 1 March.
>
> 7.5 WW sought confirmation which was provided, that MM would lead on communications with financial stakeholders, whilst MH would lead on discussions with Worldpay. DT and DC1 would speak to Arcadia."
>
> 8.1 AP advised the Directors that they needed to consider their directors' duties, the best interests of creditors and the wrongful trading test as to whether there was a reasonable prospect of avoiding insolvent liquidation. He commented that: (a) it appeared the cash flow position was sufficient; (b) negotiations with the pension parties continued; (c) discussions with the floating charge holder continued; (d) KH intended to discuss the position with the PPF; and (e) there were no winding up petitions against the Company or other litigation received.
>
> 8.2 AP advised the Directors, that taking all matters into account, he saw no reason from a wrongful trading perspective why they should not presently continue to trade but this was a decision for the Directors and AP requested that should any Director have any different view that he should make this known to the meeting. No Director expressed a different view.
>
> 8.3 KS asked all Directors to confirm whether they were confident that the business could continue trading along the lines set out by AP. All Directors confirmed they were confident of this.
>
> 8.4 KS also asked the RAL Directors to confirm the same. AT, EP and DC1 confirmed they were confident the business could continue to trade."

360. By letter dated 29 February 2016 Ms Claire Boorman of the Pensions Regulator wrote to Mr Chandler responding to the Pensions Deficit Offer. She recorded that on 29 February 2016 the parties had met again and that Mr Chandler had confirmed the Pensions Deficit Offer in writing and set out its terms (as above). She stated: "The Regulator has no comment to make on the Offer, as these are matters for consideration by the PPF." She then continued:

"2. Meeting with Arcadia

As you are aware we have already had meetings with Arcadia or representatives of Arcadia and a further meeting took place with, amongst others, members of the Arcadia board after we met with you on 29 February 2016. At that meeting the Regulator was presented with an offer from Arcadia ("the Arcadia Offer"), which included release or subordination of the floating charge security, but was subject to certain conditions, including the Regulator closing its moral hazard investigation and providing clearance to various Arcadia/Taveta group companies and individuals ('the Conditions'). The Regulator has at all times made clear its view that the release or subordination of the floating charge is a matter for Arcadia and not the Regulator, however we have also been open in considering any potential solution to this matter. Having given the Arcadia Offer careful consideration, and in light of the Conditions, the Regulator is of the view that the Arcadia Offer is an insufficient settlement and does not provide a reasonable outcome for the Schemes so that the Regulator could consider it appropriate to cease its moral hazard investigation. The Regulator's view is that, in the current circumstances, an appropriate outcome would be an offer which enabled the Schemes to reach self-sufficiency, as this would enable the Schemes to pay members' benefits as they fall due without reliance on ongoing covenant support. The Regulator has already confirmed our position to Arcadia.

3. Implications for the CVA

The outcome of our meeting with Taveta and Arcadia representatives has implications for the CVA being proposed by the directors of BHS. This is particularly the case given the stated importance of agreeing a resolution of the pensions' liabilities for the success of the financial restructuring as a whole. As such, we consider that you may wish to reconsider the viability of the CVA proposal. In the event that you consider that the proposal remains viable then, while we remain open to further discussions regarding pensions, you may wish to redraft certain aspects of the CVA proposal to more accurately reflect the current position in relation to pensions, for example paragraph 3.15 which states that the Directors believe that there is a reasonable prospect of the pension settlement discussions being successful.

4. Clearance

We also note that you indicated at our meeting that BHS and Retail Acquisitions Limited ("RAL") now intend to seek clearance from the Regulator; however, you have not specified if this will form part of your Offer or whether this will be a separate matter. The Regulator would consider any application for clearance based on the information presented and available at that time. Your advisers will be able to explain the clearance process and how applications can be made in accordance with the Regulator's clearance guidance. We would however remind any parties seeking clearance that if further information or evidence came to light which altered our view then any clearance may fall away and the Regulator may consider that it is appropriate to take steps to exercise its moral hazard powers. It would have to be reasonable for the Regulator to take such a

> view but to suggest otherwise goes beyond the scope of the clearance function."

361. Mr Martin summarised the position at it stood by the end of February 2016 in Martin 1. His evidence was that in January 2016 Mr Chandler wanted an indication from the Trustees, the Pensions Regulator and the PPF that Project Vera was viable and worth pursuing but that no such indication was forthcoming because it had not been developed to a level at which they were able to comment. It was also his evidence that the various conversations and meetings which took place in February 2016 did not go anywhere very quickly and that Mr Hinds had told him on 5 February 2016 that whether BHSL entered into a CVA or administration, there would no longer be a restructuring of the Schemes and that the intention was for them to transfer to the PPF. None of this evidence was challenged.

(4) The Amended MSA

362. By email dated 27 August 2015 Mr Hitchcock had written to Mr Topp stating that the inter-company balance between RAL and the BHS Group was £15.7 million and that RAL owed the group £15.8 million. He stated: "I cannot see how this will ever get repaid and technically RAL could therefore be seen as bust interesting!" Under cover of an email dated 26 November 2015 Mr Carver revisited the inter-company balance and sent Mr Treacy a summary together with a number of supporting documents.

363. The summary showed that RAL owed the group in total £8,466,564. The summary stated that RAL owed Lowland £7,000,000 in respect of North West House and contained the following narrative against the payment of £521,976: "RAL Grant Thornton Fees paid by BHS". It also recorded the balance of the arrangement fee paid on 26 June 2015 as: "Repayment as part of ACE II transaction". Finally, it also suggested that RAL might be entitled to set off £1,075,000 payable under the ACE Loan Note 1 (although Mr Carver was waiting for a reconciliation).

364. By email dated 29 November 2015 Mr Treacy replied stating that he was "on the case with the RAL VAT return". He also stated that he would sort out the £2 million arrangement fee and that it was likely that RAL would issue BHSGL an invoice and that it would be asked to pay the VAT. Finally, he stated that he understood that no

invoices had been raised by RAL to ease pressure on cashflow and because a long term MSA was to be agreed by the BHSGL board.

365. By email dated 4 December 2015 Mr Treacy wrote to Mr Carver again stating that this time he had accounted for the £2 million arrangement fee paid to RAL as a loan. On 19 October 2016 Mr Treacy was interviewed by the Insolvency Service and he gave the following explanation for this treatment:

> "And my job was to account for it. So it came from Olswang, it was on one of the transactions, the property transactions. I believe that the reason we haven't got absolute clarity is there wasn't a finance person overseeing this transaction. Uhm, the accounting treatment I've adopted is that it was an additional loan by BHS. Uhm, and that's essentially where it ends up. So, uhrn, yeah I mean I probably won't even recall all of the different versions I was told on that transaction. But essentially it's money owed by RAL to BHS."

366. On 18 December 2015 Mr Parladorio sent Mr Hitchcock a briefing paper prepared by Mr Treacy in relation to the inter-company loan. The minutes of the BHSGL board meeting on 2 December 2015 record that the inter-company position was discussed in the context of approving the minutes of the meeting on 29 July 2015. They record as follows:

> "DT's view had been that on 29 July he had only agreed to the original management services agreement on the basis that RAL would invoice for the cost of labour plus a 30% fee of the labour fee, with a guaranteed 75% of that charge being used by RAL to repay loans due from it to BHS. EP's view, as the shareholder's representative, was that that charge would be made, with 75% of that charge used to repay loans from BHS, save that if there were good reasons to depart from that principle in any given month, then RAL would explain the reasons why and reasonably consult with the Company in that regard, with the intention that both RAL and the Company should act reasonably and in good faith on any such occasion. Also with the proviso that RAL should first be allowed to build up a sensible reserve for future contingencies."

367. Over the next month Mr Treacy revised his paper and on 13 January 2016 Mr Parladorio sent the revised version to all of the BHSGL board members. Mr Treacy stated that the inter-company loan was £8,354,564 as at 31 October 2015. He also stated that RAL's intention was to enter into a formal loan agreement with the BHS Group for £6 million which would be repayable over five years leaving a balance of £2.35 million which would be repaid in part out of the anticipated proceeds of the MSA. Mr Treacy then

turned to the MSA. He stated that it had been signed on 13 March 2015, that a revised version was drafted in October 2015 which had extended the parties to include group subsidiaries and he set out the agreed fees in a schedule. He also enclosed a revised draft together with a draft budget.

368. In his paper Mr Treacy proposed that the BHS Group should pay a fixed management charge of 30% of RAL's salary costs (and he indicated that this had been applied on an interim basis between May and August). He also proposed that RAL should charge 2% for raising finance, that an interim invoice of 1% (£0.63 million) had been raised for Grovepoint and that an additional invoice for £0.63 million and £0.5 million plus VAT would be raised in respect of both the Grovepoint Facility and ACE II. Mr Treacy also stated that RAL intended to charge for property services and, in particular, £0.6 million on the sale of Oxford Street plus 10% of any increase above £60 million. Finally, Mr Treacy stated that RAL intended to charge for "transformative" and "ad hoc" services.

369. During January 2016 the MSA was the subject of emails between Mr Parladorio and Mr Topp. In summary, they continued to disagree about the amounts which RAL would be entitled to retain and whether RAL should be entitled to a fee of 2% for arranging the ABL Facility when it was completed. For example, in emails dated 24 and 27 January 2016 Mr Parladorio argued that substantial sums should be paid to RAL rather than set off against its existing debt.

370. On 28 January 2016 Mr Chandler instructed Edwin Coe to advise on the terms of the MSA and by email dated 29 January 2016 Mr David Kinch of Edwin Coe gave detailed advice to Mr Chandler. Most of the points which he made were sensible drafting points although he stated that it was important to make it clear whether fees should be payable only by the group company and not by the BHS Group as a whole. On 15 February 2016 Mr Chandler circulated a revised draft reflecting this advice and raising some of Mr Kinch's points for discussion.

371. By email dated 22 February 2016 Mr Smith wrote to Mr Chandler saying that he wanted to take advice about the MSA and by email dated 23 February 2016 Mr Bloomberg of Weil gave advice to BHSGL on the question whether it was appropriate at this time to enter into the MSA (as amended) together with a number of ancillary documents. He stated that he had not seen any previous documents evidencing its terms but pointed out

that there was no impediment to memorialising existing arrangements provided that the drafts accurately reflected the terms previously agreed. He continued:

> "As we have previously advised, at the time when the Companies are in the zone of insolvency the duty of the directors is to act in the best interests of all creditors and to minimise loss to creditors as a whole. English law requires that creditors are looked at on a company by company basis.
>
> In determining whether the Draft Documents should be entered into, the relevant directors need to consider their duties and whether the terms of the Draft Documents accurately reflect the previously agreed position. As the directors are aware, any subsequently appointed office holder (whether administrator or liquidator) has a duty to review any transactions entered into within a relevant time (being 2 years ending with the onset of insolvency). In addition, the directors of BHS Limited and BHS Properties Limited have a statutory obligation to disclose any transactions which may be deemed to be, inter alia, either a preference or a transaction at an undervalue in the CVA proposals.
>
> The board should also consider whether the provision of services under the Draft Documents are actually required at this time, and whether various payments required under the Draft Documents are commercially acceptable to the board. The important consideration for the board relates to section 239 of the Insolvency Act 1986 (Preferences)…"

372. On 27 February 2016 RAL submitted an invoice for £600,000 plus VAT to Lowland. The narrative stated: "Management Charges re ACE refinancing as agreed". At meetings of the BHSGL board and BHSL board on 2 March 2016 at which Mr Chappell, Mr Chandler and Mr Henningson were present, both companies were authorised to enter into the restated and amended MSA and also to enter into what was described as the "Acknowledgment of Indebtedness" letter (the "**AOI Letter**"). The execution copy of the MSA (as amended) stated that it was originally made on 11 May 2015 and that the parties to it were not just RAL and BHSGL but RAL, the Companies, BHSPL, Carmen and BHSJL (who were defined as the "**Target Companies**"). The minutes of the meeting also record that Mr Chandler and Mr Topp had now become employees of RAL. It appears that their contracts of employment had been novated with effect from 1 July 2015 in order to support the level of management fees paid to RAL.

373. The MSA (as amended) provided that the Target Companies had requested that RAL should provide additional services in three categories: fundraising services, real estate services and material benefit services (see clause 3) for the agreed fees set out in Schedule 3 and the additional fees (see clause 4). Schedule 3 provided that from the date

of the MSA until 29 February 2016 the agreed fees to which RAL would be entitled were the actual costs of providing the relevant services plus an uplift of 30% and that from 1 March 2016 the agreed fees would be calculated by reference to a budget.

374. Attachment 1 to the MSA was headed "Additional services record – financing" and it recorded (or purported to record) that from 1 June 2015 it had been agreed that the BHS Group had agreed to pay RAL 2% of the total funds available under ACE II, the Grovepoint Facility, the GB Bridging Facility and the ABL Facility. Attachment 2 was headed "Additional services record – Real Estate Services" and it purported to record fees which had been agreed for property sales. In particular, in the second paragraph it recorded a fee of £160,000 for Atherstone and the following fee for Oxford Street:

> "ii) In relation to the sale of Oxford Street – (as this is critical to fund the cash flow of the business in 2016 and has a high level of complexity) agreed fee as follows:
>
> • 1 % of £60m (being the estimated value as advised by DTZ/Cushman) where £60m represents the net sale proceeds after Transaction Costs (where Transaction Costs shall mean any marketing or professional costs directly associated with the relevant sale).
>
> • 10% of any realisation (after transaction costs) above £60m"

375. On 3 March 2016 Mr Treacy signed the AOI Letter on behalf of RAL and Mr Smith and Mr Chandler signed it on behalf of BHSGL. It bore the date "December 2015" but Mr Chandler accepted in cross-examination that he executed it on 3 March 2016 and on the day before the CVA Proposal (below) was circulated to creditors. In the AOI Letter RAL acknowledged that it had received a loan of £6,177,000 from BHSGL and the parties agreed that £1 million would be repayable in 20 equal quarterly instalments and the balance of £5,177,000 on 31 December 2020. It expressly stated that the loan would not bear interest although it provided that default interest of 4% above the base rate of Barclays would be payable if RAL failed to make any payment.

376. Finally, on 3 March 2016 all of the Directors including Mr Chappell, Mr Chandler and Mr Henningson signed a memorandum prepared by Mr Parladorio in which they acknowledged or agreed to pay management fees of costs plus 30% of which 75% would be set off against the existing debt (apart from the first £300,000). They also agreed to a number of other arrangement fees:

> "1. Uplift at 30% agreed. This system to continue to end Feb 2016 then new system takes over. A 75% so called 'flow back' (for RAL to pay off loans from BHS) to operate. In this regard subject to the same not applying to the first £300,000 earned by RAL from the MSA Schedule 3 Agreed Fees (to 29/02/20l6). For the avoidance of any doubt it was also discussed and agreed that from 1/3/16 the 75% "flow back" would then cease to have effect."
>
> 5. Oxford Street lease ("MSA Att 2 fee- due if and when sale executed). It has been previously discussed and agreed that on the sale of the Oxford Street lease (given its inherent complexity and the potential upside to BHS of achieving a sale in excess of the estimated pre-RAL-acquisition value (circa £30m approx) the following shall apply in place of the "MSA Attachment 2" agreed formula:
>
> 1% commission on any net sale proceeds up to and including £60m (where net sale proceeds shall for these purposes mean the contracted sale price less any professional costs associated with the sale);
>
> • An additional 10% commission on net sale proceeds above the combination of (i) net sale proceeds of £60m plus (ii) the costs paid by BHS to buy out the interest of ACE in the property as part of the ACE loan entered into mid 2015."

377. In preparation for the Creditors Meeting (below) KPMG pulled together information to explain the inter-company balance. On 17 March 2016 Ms Rachel Bryan sent the KPMG a breakdown of the balance of £8,354,564. The explanation which KPMG recorded for the payment to Swiss Rock of £521,976 on 16 April 2015[2] was "RAL Grant Thornton Fees paid by BHS" and the explanation for the balance of the arrangement fee of £1.5 million which had not been repaid was: "Repayment as part of ACE II transaction".

(5) The Deed of Rectification

378. Mr Chandler gave evidence that he had identified some inconsistencies in the BHS Loan Agreement and the Framework Agreement. On 1 July 2015 a BHSGL board meeting took place at which Mr Chappell, Mr Henningson and he were all present. The minutes of the meeting record:

> "DC2 explained that under the re-financing arrangements last week, RAL had injected £8.5m to BHS Group and the cash flow would need to be amended to reflect that. There were some inconsistencies with the agreements signed last week when compared to the SPA. DC2 expanded on these but the board noted the relevant parties had agreed amendments

[2] The email erroneously recorded the date of payment as 13 April 2015.

> should be made to reflect the SPA. DC2 also highlighted that under those loan arrangements, RAL had made a short term loan to BHS Group in the sum of £1.5m. That £1.5m loan had been repaid by BHS to RAL immediately on draw down of the facility. DC1 confirmed that it was RAL's intention to re-invest that £1.5m into BHS within the next six months."

379. Mr Chandler's evidence was that the BHS Loan (or the "**Tina Green Loan**" as it was known) should have been made to RAL and not BHS and that BHSGL owed RAL £1.5 million because it had paid £6.5 million to subscribe for shares but there were only £5 million of BHSGL shares unissued and no new share issue had taken place. It was also his evidence that this analysis was unconnected with the £2 million payment which Olswang made to RAL on Mr Chappell's instructions and he was not attempting to justify RAL's retention of £1.5 million which it was unable to repay.

380. On 1 July 2015 Mr Roberts, Mr Chappell and Mr Chandler exchanged emails about these issues. Nothing further was done at that stage. However, by email dated 6 September 2015 Mr Roberts wrote to Mr Chandler suggesting that it might be necessary to rectify the Loan Agreement but that it was unnecessary to rectify the Framework Agreement:

> "I have been through my files this evening and attach the correspondence on this issue - where I proposed a Steps Note which was to cover the relevant accounting steps that occurred around the time the Noah II Tranche B was refinanced. The key step was to ensure that the Tina Green loan was to RAL and not to BHS. That appears to have been agreed by Linklaters. The other point related to the £1.5m which we were informed post completion was being retained by RAL. The correspondence below sets out some accounting steps (between RAL and BHS) which the BHS and RAL boards agreed would best characterize how the accounting entries would be. In the end, these are all internal accounting steps and I would argue, the Framework Agreement provisions do not need to be amended to nuance these steps. In order for the refinance to have occurred, Arcadia sent the £10m it owed to HSBC directly and BHS sent £5.9m (which it received from the ACE II refinance loan of £25m). Given that the steps below that the BHS and RAL board agreed upon are internal, I think that the FA can remain as it currently provides."

381. On 7 September 2015 Mr Turner confirmed that Linklaters had no objection to adding some suggested wording but no steps were taken to rectify the relevant agreements until the following year. By a deed of rectification dated 12 February 2016 and made between BHSGL, RAL, Arcadia and Taveta (the "**Deed of Rectification**") the parties agreed to

rectify the SPA, the Framework Agreement and the BHS Loan Agreement. They agreed to rectify the SPA by substituting a new definition of the term "BHS Loan" and to impose an obligation on RAL to make the proceeds available to BHSGL. They also agreed to rectify the BHS Loan Agreement by substituting a new agreement entirely this time made between RAL and Arcadia. Finally, they agreed to rectify the Framework Agreement by replacing the references to the BHS Loan and BHS Loan Agreement with references to the "RAL Loan" and the "RAL Loan Agreement".

(6) Management Information

382. Mr Wright's evidence was that for the purposes of Project Pipe Mr Treacy provided his team with three year forecasts which the BHS Group revised and updated regularly and that on 3 March 2016 when the CVA Proposal was filed with the Court his team received a cashflow forecast dated 25 February 2016. He referred to this forecast as the "**Management Forecast**" and I adopt this term. The trial bundle contained a native version of the Management Forecast and I have checked Mr Wright's evidence against it for accuracy. I am satisfied that it was accurate but it is easier for me to quote the relevant paragraphs in his witness statement dated 24 January 2023 (footnotes omitted):

> "16.2 The Management Forecast showed that the BHS Group could achieve a projected EBITDAE[3] loss of £14 million in the 12-month period ending 26 February 2017 and positive EBITDAE of £6.5 million and £13.3 million in the 12-month periods ending 25 February 2018 and 24 February 2019 respectively. We understood that the Management Forecast was prepared on the basis that the CVAs were approved, and the Operational Restructuring, defined in the CVA proposals, was fully implemented.
>
> 16.3 The Management Forecast showed a peak (post capex) funding requirement, before new finance, of £56.6 million in October 2016. My team was informed by Michael Hitchcock and Dominic Chandler on 2 March 2016 that additional finance of up to £100 million from various sources was to be made available. I also received confirmation from Gordon Brothers by email confirming they were in advanced negotiations with BHS Group in relation to a new facility of up to £60 million.
>
> 16.4 The Management Forecast reflected the expectation that the Gordon Brothers facility would be available in three tranches, the first in March 2016 (£30 million), the second in July 2016 (£10 million) and the third in September 2016 (£20 million). According to the Management Forecast, even if the Gordon Brothers loan was received in full at the relevant points, an additional funding requirement of £7.8 million would still arise in May 2016.

[3] Earnings before interest, tax, depreciation, amortisation and exceptional items

> 16.5 However, the Management Forecast also included an additional source of funding of £23.8 million to be achieved by May 2016 through the refinancing of certain properties. I was aware that these properties were subject to a legal charge in support of a £62.4 million loan facility that BHSL, BHS Properties and Davenbush Limited had entered into with Grovepoint Credit Funding 2 Limited, an investment management firm (the "**Grovepoint Facility**"). The Management Forecast showed the Grovepoint Facility being repaid, together with accrued interest of £9.7 million, from the sale of BHSL's property at 252/258 Oxford Street, London (the "**Oxford Street Property**") which was shown as being completed by the end of March 2016 at a price of £75 million (i.e. more than the £72.1 million required to discharge the Grovepoint Facility at the amount then outstanding). The Management Forecast showed that once the Grovepoint Facility having been repaid in full (including interest) it would have resulted in the release of the charge over the other properties, allowing the additional £23.8 million finance to be included in the Management Forecast in May 2016. I therefore understood at the time that, based on the Management Forecast, the sale of the Oxford Street Property within a few months of the CVA was an important component of any restructuring plan and the viability of the business."

383. Ms Hilliard took Mr Wright to the Management Forecast in cross-examination and he confirmed that £75 million was forecast to be raised from property transactions. Mr Shaw, the Joint Liquidators' accountancy expert, also gave evidence that management provided KPMG with two sets of management accounts which showed an EBITDA loss for the 12 month period to August 2015 and a positive EBITDA of £5.1 million for the four months to December 2015 but did not, however, provide KPMG with management accounts for the five months to January 2016 and the six months to February 2016 which showed a very different picture. Those management accounts showed an EBITDA loss of £27.2 million for the half year. Mr Curl put it to Mr Chandler that those management accounts became available on 15 March 2016 although he was unable to confirm whether this was correct.

(7) The CVA Proposal

384. By an engagement letter dated 2 March 2016 Mr Wright wrote to the board of BHSL setting out the basis on which Mr Green, Mr Pink and he agreed to act as Joint Nominees (the "**Nominees**") for the purpose of the CVA. He drew attention to the fact that a misstatement of BHSL's assets and liabilities could constitute a "material irregularity" for the purposes of section 6 of the IA 1986 and that it was a criminal offence for

directors to make false representations for the purpose of obtaining the approval of creditors. He continued as follows:

> "Once the proposal document is prepared and reviewed by Weil, we will forward it to you for your comments, alterations etc. It is important that the board go through this in detail and understand it in its entirety. My staff will explain any matters on which you or the board require further clarification. I strongly advise that the directors seek legal opinion from Weil on the contents of the proposal as appropriate. I would stress that the document is the directors' proposal and the directors alone are responsible for its accuracy."

385. There was an issue about the date on which Mr Wright and his partners were appointed and whether it was 3 March 2016 or 4 March 2016 but nothing turned on this. Mr Wright pointed out in his witness statement that it was his role as one of the Nominees to consider whether the CVAs had a reasonable prospect of being approved and implemented and that his team reviewed the funding requirements set out in the Management Forecast and sought evidence from management that initiatives were in place to cover the forecast funding requirements. It was also his evidence that the Nominees concluded that it was not certain whether the funding initiatives which the BHS Group was pursuing would be concluded by the date on which the CVA Proposal (below) was circulated and it was agreed that the wording would reflect the fact that efforts to secure the required funding were on going.

386. By email dated 3 March 2016 and timed at 6.12 am Mr Plainer circulated Ms Boorman's letter dated 29 February 2016 to Mr Chappell and Mr Chandler and the teams at Weil and KPMG. He suggested a conference call at 11.45 am that day. Under cover of an email timed at 4.34 pm that day Mr Mark Lawford of KPMG circulated copies of the final proposal for the CVA of BHSL (the "**CVA Proposal**"), the Nominees' report (the "**Nominees Report**") and the Statement of Affairs.

387. The CVA Proposal was signed by Mr Chappell and dated 4 March 2016 in anticipation of its issue the following day. Page ii contained a notice from the Nominees, which identified them and then continued:

> "In accordance with section 2 of the Insolvency Act 1986, the Nominees have reviewed the Proposal and reported to the Court that, in their opinion: (a) the CVA Proposal has a reasonable prospect of being approved and implemented; (b) meetings of BHS Limited and of its CVA Creditors

> should be summoned to consider the CVA Proposal; (c) the meeting of the CVA Creditors of BHS Limited to consider the CVA Proposal should be held at Novotel London West, One Shortlands, London W6 8DR at 10:30 on 23 March 2016; and (d) the meeting of the Shareholder of BHS Limited to consider the CVA Proposal should be held at Novotel London West, One Shortlands, London W6 8DR at 12:30 on 23 March 2016.
>
> The Nominees are unable to warrant or represent the accuracy or completeness of any information contained within this document, or any information provided by any third party. The Nominees have not authorised any person to make any representations concerning the CVA Proposal, and if such representations are made, they may not be relied upon as having been so authorised."

388. Pages iv to ix contained a summary and began by setting out the background to the BHS Group (which I have largely adopted in introducing the business). It then stated that management had devised a turnaround plan which included the following key components:

> "i. Compromise of pension liabilities. BHS Limited sponsors two occupational defined benefit pension plans, the BHS Pension Scheme and the BHS Senior Management Scheme, which are closed to new entrants and future accrual. The Directors are currently engaged in discussions with the Pension Protection Fund, the Pensions Regulator and the Trustees of the schemes in respect of a deficit in the pension schemes. The Directors believe that there is a reasonable prospect of those settlement discussions being successful, and therefore anticipate an agreement being reached. The effect of the compromise would be that the schemes would enter the Pension Protection Fund and BHS Limited, post-CVA, would have no further liability in relation to either the deficit or ongoing funding requirements of the schemes. While the CVA facilitates the entry of the schemes into the Pension Protection Fund, the compromise will be effected by a separate agreement.
>
> ii. Funding. In order to address BHS Limited's cash flow deficit in the short term and repay existing borrowings, BHS Limited also obtained a short term £62.4 million secured facility with Grovepoint Credit Funding 2 Limited ("Grovepoint") in September 2015 and a £9.4 million secured facility from GB Europe Management Services Limited ("Gordon Brothers") in February 2016. However, additional funding is required to enable BHS Limited to continue to trade beyond 25 March 2016.
>
> The Directors are therefore also engaged in efforts to raise funding of up to £100 million from three primary sources: (i) up to £60 million funding from an asset based lending facility secured against the stock and debtors within the business with a term of 3 years, after which point if the facility is not renewed it is intended it will be refinanced by an alternative asset based facility, (ii) up to £30 million from property funding and disposals, and (iii) up to £10 million of funding from the release of funds tied up in

> letters of credit and/or security deposits held with suppliers of goods not for resale."

389. The proposal then stated in bold type that the turnaround plan and short term funding to date were not in isolation sufficient to restore the future viability of BHSL unless its retail arm underwent a significant restructuring. It stated that the objective was to rationalise BHSL's leasehold obligations and that the proposal compromised its liabilities in respect of two categories of leases and other property liabilities and inter-company debts to BHSPL, Davenbush and Lowland. The remainder of the summary identified a number of categories of leases and other property debtors and the way in which those debts were to be compromised. Finally, it stated that proposal would become effective if it was approved at the meetings of creditors and shareholders on 23 March 2015.

390. It is unnecessary for me to set out the material terms of the detailed proposal and enough for me to identify those passages to which Ms Hilliard put to Mr Wright. He was taken to page 8 on which it was stated that the CVA would continue until the proposed supervisors had supervised its implementation, that it was not possible to state with any certainty its proposed duration but that the anticipated date of completion is 24 June 2016. He was also taken to page 54 which stated that the total fees which were estimated to be paid to KPMG amounted to approximately £1 million and that the total fees to be paid to the Nominees amounted to £450,000. Finally, he was taken to the list of CVA creditors which included the pension scheme deficit at £571 million. Ms Hilliard pointed out to Mr Wright that if the PPF had voted against the CVA, this would have been sufficient to prevent it taking effect.

391. The Nominees' Report was also signed by each of the Nominees and dated 3 March 2016. It stated that on 26 January 2016 KPMG had been instructed by RAL to consider the feasibility of the CVA and disclosed the fees which KPMG would be paid both for the engagement and also for the three individuals to act as Nominees. It also stated that an estimate of fees for acting as supervisors was £200,000. It then continued:

> "5. The Nominees have satisfied themselves: a) that the Company's true position as to assets and liabilities is not materially different from that which is represented to the creditors; b) that the Proposal has a reasonable prospect of being approved and implemented in the manner represented in

> the Proposal; and c) that there is no unavoidable prospective which is already manifest."
>
> "7. The Nominees make the following comments in respect of the Proposal: a) The Nominees have carried out limited investigations into the Company's circumstances to enable them to assist the Directors in their preparation of the Proposal and report to the Court under section 2(2) of the Insolvency Act 1986. b) The business and assets of the Company as a whole have not been professionally valued. The realisable asset values contained in the statement of affairs have been estimated by the Directors based on book values adjusted for available current market information. The Nominees have reviewed the asset values for reasonableness, although no detailed audit has been carried out. c) The Nominees are not aware of any reason to believe that the information provided by the Directors in relation to the estimate of the liabilities of the Company cannot be relied on by the creditors and shareholders of the Company. On that basis, the Nominees consider that reliance can be placed on such estimate. d) The Directors have been totally co-operative and has provided the Nominees with all necessary information… k) The Nominees are not aware of any claims which might be capable of being pursued by a liquidator or administrator of the Company if one were appointed."

392. Finally, the Statement of Affairs was signed by Mr Chappell and Mr Chandler and also dated 3 March 2016. It stated that the Directors had prepared it as at 23 January 2016 and that the shortfall due to unsecured creditors based on book value was £500.4 million and in liquidation was £1,322.6 million. On 3 March 2016 a BHSL board meeting took place at which Mr Chappell, Mr Chandler and Mr Henningson were present. Mr Plainer and Mr Bloomberg and all three Joint Nominees attended the meeting. The minutes record that the CVA Proposal, the Nominees Report and the Statement of Affairs were tabled and that the board resolved to approve them. They also record that Mr Plainer gave the following advice:

> "4.2 AP advised that: (a) the CVA proposal is a proposal by the Directors; and (b) that the contents should be true to the best of the Director's knowledge and belief.
>
> 4.3 AP advised that should any Director have any further queries on the terms of the CVA or should they not believe that the contents are true to the best of their knowledge and belief then they should make their views known.
>
> 4.4 AP advised that in view of the update provided in relation to the recent communications with the Pension Stakeholders, Arcadia and landlords, he saw no reason why the Directors could not take a view that the CVA has a reasonable prospect of being approved and implemented however requested that should any Director have any different view that he should make this known to the meeting. No Director expressed a different view."

393. On 10 March 2016 BHSGL and BHSL board meetings took place at which Mr Chappell, Mr Chandler and Mr Henningson were present as were Mr Plainer and the Nominees. The minutes of both meetings record that Mr Hitchcock reported on the cashflow position as follows:

> "4.1 A cash flow forecast for the period from week 27 to the end of week 31 was distributed to the Board.
>
> 4.2 MH reported on cash flow and explained that the forecast assumed all outstanding payments had been caught up with to the value of £8m, however to get a sense of cash flow, £8m needed to be added back in for other payments that would become due.
>
> 4.3 MH highlighted key items that needed to be paid between now and 24 March, which included payroll, a payment to DHL and VAT to HMRC. Whilst paying HMRC late was regrettable, MH intended to make payment immediately after the Easter weekend.
>
> 4.4 MH said that the ABL funding of £30m was required by 24 March as payments for rent and rates, the suppliers mentioned above and merchandise payments became due on that date.
>
> 4.5 KS asked for a progress update on securing ABL financing which MM confirmed was in advanced stages.
>
> 4.6 There was a brief discussion as to the possibility that Arcadia could make up the shortfall currently being sought from Gordon Brothers. Arcadia were fully briefed on the current cash flow position of the business.
>
> 4.7 MH said that he would need to make some payments to suppliers identified as critical and intended to use £8m held back thus far."

394. Both sets of minutes also record that a meeting was to be held the following day with the PPF to consider the CVA Proposal but that Mr Pink and Mr Chandler were not prepared to hold discussions beyond the CVA at the meeting. They also recorded that Mr Plainer reported on the negotiations as follows:

> "6.1 A meeting was due to be held the following day with the PPF to consider the CVA proposal. MP and DC2 were not prepared to hold discussions beyond the CVA at the meeting. MP reported that the PPF had so far indicated some concern at the removal of a termination date. 6.2 The Board discussed the position on the issue of a scheme failure notice. It was noted that a QC had been engaged and that his advice would provide the clarity required to allow the Board to better understand the Impact of Issuing a scheme failure notice. 6.3 AP stated that since the last Board meeting, the PPF had now rejected the Company's offer. The TPR had also stated that discussions with Arcadia had not yet come to a resolution. Both

> letters from the PPF and TPR had suggested that they remained open to further discussions with the Company."

(8) The Oxford Street sale

395. On or shortly before 21 March 2016 BHSL agreed to sell its long leasehold interest in Oxford Street to the freeholder, O&C, for £50 million. Mr Curl took Mr Chandler to a long email chain passing between Edwin Coe (who were acting for BHSL) and Eversheds (who were acting for the freeholder) to which Mr Sherwood, Mr Parladorio and he were copied. This email chain showed that over the course of the next three days the parties agreed a completion date of 24 March 2016, that VAT was payable, that the terms of the relevant documents had almost been agreed and that Edwin Coe were pressing Eversheds for confirmation that they were in funds to complete.

396. On 22 March 2016 a meeting of the BHSL board took place at which Mr Chappell, Mr Chandler and Mr Henningson were all present and at which the board concluded that the sale was in the interests of creditors and that it should proceed. Mr Plainer attended the meeting by telephone. The minutes record that the meeting had been convened to consider the sale of Oxford Street and then continue as follows:

> "DC1 explained that following many months of protracted negotiations with the Landlord of the Property, a price had been agreed for the surrender of the lease. That price was £52.5m +VAT. The Company would continue to occupy the Property, paying normal rent, until 31 January 2016. As was known by the Board, the Property has been loss making for many years, and it has always been the intention of the business to exit the Property once a suitable deal had been agreed. The Board reminded itself that a sub-lease had been signed with LPP, and that it was a part of the proposed deal under consideration that LPP would agree the deal. The deal is neutral for the Company in relation to LPP. LPP have confirmed that they agree the deal.
>
> The Board reminded itself that it had received formal valuations of the Property which ranged from £25m (from Savills) to £60m (from DTZ). The £60m valuation was on the basis of a fully sub- let Property at a value of £7.7m per year, and on the basis of a sale of that income stream. The Board recognised that it had attempted to reach agreements with tenants which would provide the £7.7m per year rental value but this had not been achievable. Whilst the valuations were approximately 5 and 6 months old, the Directors were of the view that retail valuations had only deteriorated and the proposed deal with the Landlord was a very good deal."

397. The minutes also record that Grovepoint was keen for the transaction to proceed and that Mr Chappell confirmed that the deal would be concluded and that the VAT element would be in BHSL's account that day. They then state: "As a result of the transaction, £50m would be repaid to Grovepoint which would enable other properties to be released from the Grovepoint security which would, in turn, provide the Company with an opportunity to raise finance as envisaged in the CVA proposal." Finally, they record that Mr Plainer advised the BHSL board to consider whether this was a sale at an undervalue and whether it was in the interests of creditors:

> "1. The Board should consider, in the circumstances in which the Company presently found itself, whether the transaction could be said to be at an undervalue. Given the valuations obtained, the history of the negotiations, the position of Grovepoint, and the experience of the Board, it may be that the Directors could conclude that the transaction was at a fair price and was not an undervalue;
>
> 2. The Board should also consider the best interests of its creditors. AP noted that the CVA document made reference to the need for the Company to raise finance through Property transactions and disposals, and that there was also a need to bring liquidity into the business. In all the circumstances it may be that the Directors could conclude that the transaction, as presented to the Board, was in the best Interests of creditors. AP pointed out that it was for the Directors to form their own views based on the above."

398. Mr Bloomberg made a manuscript note of the meeting (or the discussions immediately preceding it) and his notes record that Mr Chappell gave the following update which was not reflected in the minutes (or not fully reflected in them):

> "Oxford St – in legals £52,500,000 + VAT → Stephen Brawer email confirming acting cd be tonight. DC2 – more likely tomorrow. Completion poss tonight/cd be tomorrow – LPP to sign 2 clauses.
>
> MK – in legals £18m + VAT. Lawrence Stephens email confirmed acting for BHS. CP- CVA Hermes exchange planned Thursday.
>
> TOTAL £70,500,000 Hoping GP accept that instead of £72m
>
> | | | |
> |---|---|---|
> | | ALL NET | |
> | Trying to do | (Caernavon [sic] £1.6m (1.16) | |
> | All by Thursday | (Manchester £10m | → + £2m VAT |
> | | (Scunthorpe £1.3m | |
> | All to | (Sunderland £2.35m | |
> | Sports Direct | (Taunton £1.35m | //£16.185m |
> | | (UNDER OFFER | |

S.D. (Darlington £2m
(Bristol £10.5m → Pay £10m to GB
(£12.5m"

(9) The Creditors Meeting

399. By letter dated 17 March 2016 the PPF had written to the Joint Nominees objecting that the CVA was unfairly prejudicial to the Schemes in the event that no agreement could be reached in relation to the pensions deficit. They explained that the reason for this was that the CVA would prevent the Schemes from continuing to receive the Annual Contributions under the Recovery Plans. The PPF proposed that it would be prepared to agree not to vote against the CVA or to challenge it if BHSL continued to make its recovery plan contributions and to pay the PPF Levy.

400. By letter dated 18 March 2016 Mr Chandler wrote back to the PPF directly and between 18 and 22 March 2016 the parties were able to negotiate the terms of an agreement. On 23 March 2016 they entered into a binding agreement and by its terms the PPF agreed not to vote against the CVA or to challenge it on any basis whatsoever and to refrain from exercising its powers under section 124 of the PA 2004 until 30 September 2016 or such later date as might be agreed in writing. In return BHSL agreed to make payments of £600,000 per month to the PPF. At the meeting later that day, therefore, the PPF did not vote.

401. On 23 March 2016 the creditors meeting took place to approve the CVA (the "**Creditors Meeting**"). The minutes record that Mr Green chaired the meeting and that Mr Topp and then Mr Chandler made presentations. Mr Chandler informed the meeting that the PPF had agreed not to vote at the meeting and that: "The ongoing discussions are complex and sensitive and he is not able to comment any further on this issue." He then made some comments about letters of credit before addressing funding:

> "As set out in the CVA proposal, the directors are actively engaged in obtaining up to £100 million of funding from three sources:
>
> • Up to £60 million from a new Asset Based Lending facility. This agreement has passed final credit approval with the lender. There are some conditions to be met namely in respect of intercompany lending and the existing charge-holder subordinating its security.
>
> • Up to £30 million from property sales. Good progress is being made on the various property sales. These are needed to, and indeed are anticipated

> to, exchange and complete in the coming days, and whilst the directors are confident it is not without risk.
>
> • Up to £10 million from release of funds tied up in Letters of Credit and security deposits held with suppliers. It not intended that any new Letters of Credit will be provided when the existing ones fall away.
>
> Intercompany position
>
> There has been some press about the intercompany loan between BHS and Retail Acquisitions Limited "RAL". To clarify the position, there is a loan from BHS Limited to RAL in the sum of around £500,000 but it's understood that there is interest in the wider inter-company position between RAL and the BHS group.
>
> RAL spent a very considerable amount of time and money in its acquisition of BHS. As part of that process it engaged professional advisers who needed to be paid. In addition, each of the Directors of RAL invested significant amounts of time and effort in preparing for and concluding the acquisition, in circumstances in which they were not certain of the transaction being successful.
>
> It is commonplace in such circumstances for the Company which is the subject of the acquisition to assume the costs of that acquisition. It would not have been unusual for the acquired Company to have assumed the costs and for no intercompany loan to have been created. The Directors of RAL have taken on that liability and put in place an intercompany loan. That loan covered costs associated with the acquisition of the business.
>
> As has also been reported in the press, that loan has been partially repaid, and has reduced to a current level of around £6.9 million. However, to reiterate, there is a debt of £500,000 which is relevant to the Company in respect of which we are meeting today."

402. The version of the minutes of the Creditors Meeting which Ms Hilliard put to Mr Wright recorded that Mr Green invited questions but that none were raised. They then continued by stating that Mr Green announced that there had been no modifications to the CVA proposed and that creditors totalling £200,611,000 had voted for the CVA, £3,439,000 had voted against it and £5,156,000 had abstained. Finally, they recorded that he then announced that the CVA and the appointment of the Nominees as supervisors had been approved.

403. In their closing submissions, however, Ms Hilliard and Ms Earle relied on a different version of the minutes which recorded that Mr Green had also received a number of questions from creditors, that the following questions were asked and that the following answers were given:

> "Q There are no forecasts attached to the proposals. Have the nominees seen the forecasts? Will the company be viable going forward? A Yes, we have seen some forecasts and they show that the company will be viable. We have looked at 3 years to fund the business and ensure sufficient cashflow. Assumptions put in forecasts are no sales growth in year 1, 1% in year 2 and 1% in year 3. We believe the forecasts are prudent."
>
> "Q There are 4 secured creditors, have they made any comment with regards support for the proposals? A Yes, Arcadia are fully supportive of the CVA. Others have not made any objections and have had waivers where requested. The monies due to the secured creditors are not compromised in the CVA, they are unaffected."
>
> "Q Of the £30m property transactions, how many stores are involved? What turnover will that lose? What will be the impact on P & L? A Not going into detail about the amount of properties that will raise that money. Buying power will not be affected as we are reducing lines but will be buying better quality. If sales growth at same rate will be broadly neutral in Year 1, minimum change in Year 2 and in Year 3 will be £2.5m profit."

(10) The proceeds of the Oxford Street sale

404. By a transfer dated 31 March 2016 BHSL transferred Oxford Street to O&C for £50 million plus VAT. On 1 April 2016 RAL issued an invoice to Lowland for £500,000 plus VAT of £100,000. The narrative described the fee as "additional Management Services Fee reference Oxford Street sale" and on the same day Mr Chappell gave instructions to Edwin Coe to pay £9,400,000 to BHSL's account and £600,000 to RAL's account. Mr Topp gave evidence that Mr Morris had issued a winding up petition for unpaid consultancy fees and he accepted that perhaps part of the £600,000 might have been required to pay the debt.

405. However, when he became aware of the instructions which Mr Chappell had given to Edwin Coe, Mr Topp objected strongly. By email dated 1 April 2016 he wrote to Mr Parladorio and Mr Chappell threatening to resign if the money was not repaid by the following Monday, which was 4 April 2016. On 5 April 2016 a BHSGL board meeting took place at which Mr Chappell and Mr Henningson were present but which Mr Chandler did not attend because he was on leave. The minutes record that Mr Topp told the meeting that there were inappropriate and unapproved allocations of VAT in relation to the sales of Sunderland and Oxford Street. He also objected to the Sunderland transaction itself. Under the heading "Oxford Street" the minutes record:

> "• The sale of the Oxford Street store concluded on 1/4/16 for a fee of £50m + VAT. DT had approved this transaction.
>
> • DT was aware that £50m would be paid straight to Grovepoint and BHS would receive the £10m VAT monies, minus some legal fees of around £90k which was as per an email he had received the previous evening.
>
> • When the VAT monies. arrived they totalled £9.3m. DT had asked HC (Head of Treasury) to follow up with the solicitor who said £600k had been paid to "another party" on DC1's instruction.
>
> • DT immediately phoned DC1 and said he was very unhappy and that it required board approval.
>
> • DC1 had assured DT on Saturday, Sunday and again on Monday that the money would be back in the BHS account: the money was still not back on Tuesday 5th April 2016.
>
> • DT stressed to the Board that this was not acceptable. If RAL was owed money it must invoice BHS and in the current circumstances, the Board must approve payment after proper consideration. BHS currently had £30m of unpaid creditors. DT did not think paying RAL was appropriate."

406. The minutes record that Mr Chappell said that he had given instructions for the return of the money and that the meeting ended on the basis that both BHSGL and RAL would take advice. On 5 April 2016 Mr Parladorio instructed Mr Plainer and on 6 April 2016 he produced a note of advice which was headed "Project Pipe Note Prepared for BHS Limited (the "Company")". His advice in relation to the payments to RAL was as follows:

> "1. Given the financial position of the Company, the directors should properly consider all material payments being made to creditors whether to RAL or otherwise;
>
> 2. Where appropriate, the Board should consider at a duly constituted board meeting whether payments should be made and the decision, together with any other considerations taken into account, should be documented in the minutes of the board meeting;
>
> 3. There is no requirement for RAL to be subordinated behind other unsecured creditors. As long as due consideration is given to the payment, there is no prohibition on the Board authorising payments to RAL pursuant to the MSA;
>
> 4. Optically, the Board may consider that it is appropriate to pay RAL on the same terms as other non-landlord creditors which we understand is currently on 60 day terms."

407. In the covering email Mr Plainer suggested that a board meeting should take place so that the RAL payment could be ratified (if thought appropriate) and any further

payments to RAL. He also stated that "pre-60 day RAL invoices could be made immediately if thought appropriate, but see paragraph 4 of our Note for our views on recent invoices". On 8 April 2016 Mr Parladorio circulated a "Note to BHS Board" in which he stated that BHS owed RAL £1,595,297.33 and argued that the BHSGL board should ratify the payment to RAL on the basis that RAL used it to pay professional fees.

408. On 8 April 2016 a conference call took place between Mr Plainer and Mr Parladorio, Mr Chandler and Mr Topp. Mr Plainer's note of that meeting records that he advised them that the "better route is to put £600,000 back into the BHS company, however, if the BHS board ratify then optically doesn't look as good but if long outstanding then up to BHS board".

409. On 10 April 2016 Mr Chandler sent this note to Mr Smith, Mr Henningson and Mr Topp asking them to agree to four resolutions: (A) to ratify the payment of £600,000 to RAL and also payments of £350,000 to Mr Morris and £150,000 to Manleys, (B) that the payments should be made on or before 12 April 2016, (C) that the outstanding loan of £741,280 from RAL to BHS should be paid by setting off outstanding invoices and (D) that the payment of remaining invoices should be deferred. In the covering email he stated:

> "I attach a note prepared in relation to payments proposed under the MSA. It was discussed at length between myself, DT, EP and Adam Plainer. Can I please ask that you each look at the note ASAP and if appropriate, signal your approval. The primary purpose of the payments is that they are urgent, and so please do let me know - today if possible. Note that I have not included DC1 who has confirmed his conflict."

410. Later that evening, Mr Henningson replied stating: "Let's do A and B and discuss the rest on Tuesday. We has [sic] to have a conclusion on this sooner than later." There was no evidence that Mr Smith or Mr Topp replied although Mr Topp gave evidence that he now felt comfortable ratifying the payment to RAL. It was common ground that no board meeting took place to ratify the payment of £600,000 made by Edwin Coe to RAL on Mr Chappell's instructions.

(11) Administration

411. By email dated 7 April 2016 Mr Roberts wrote to Linklaters updating them about the outcome of the Creditors Meeting and raising the question of subordination. He stated

that whilst Arcadia might have been hesitant to subordinate its interests in the past, he hoped that "the landscape" was much clearer now. He set out a number of reasons why it was in Arcadia's interests to subordinate before making a formal request for it to do so:

> "Taking all of the above into account, the BHS board respectfully requests that Arcadia agrees to subordinate its £40 loan and debenture as well as provide the relevant consents required to allow the ABL facility to co-exist with the existing facilities and address any breaches caused by the CVA. Similar consents are being given by Grovepoint."

412. Mr Roberts also stated that the BHSGL board had been advised that it would be in the interests of the BHS Group's creditors to try and take steps to compel Arcadia to subordinate the QFC and that they had been advised to give this active consideration. On the same day Mr Turner prepared and sent a memorandum of advice in relation to the ABL Facility. He pointed out that the funds drawn down had to be paid into a "Collection Account" controlled by GB Europe. He then stated as follows (and he used the term "BL" to refer to BHSL):

> "BL, as Borrower, will only be able to withdraw funds from the Collection Account provided that it can demonstrate that the value of its Inventory and Receivables, as determined under the Facilities Agreement, exceeds the outstanding Loans, accrued interest and costs…Should there be insufficient funds in the Collection Account to make up that shortfall (being a Borrowing Base Shortfall) then there will be an obligation on BL to pay funds into the Collection Account to make up that Borrowing Base Shortfall. We understand that £10,000,000 to £15,000,000 per week should be paid into the Collection Account from Remittances (including trading receipts) each week. Therefore the Inventory and Receivables borrowing base would have to be at least that much less than the Term Loan Obligations before BL would be required to pay additional funds into the Collection Account."
>
> "As will be noted from the summary of the key terms of the Transaction set out at Schedule 1, the Facilities Agreement includes a broad range of Events of Default. Furthermore, each Obligor, including BGL and BL, has granted security such that Gordon Brothers is the holder of a qualifying floating charge from each such Obligor company for the purpose of the Insolvency Act 1986. It is not unusual that a lender in this situation would seek qualifying floating charge security. Therefore, following the occurrence of any Event of Default, Gordon Brothers would have the ability if it so chose to appoint an administrator to each Obligor company.
>
> Accordingly, each Board should understand that this power arises on the occurrence of any Event of Default, whether material or not. Despite trying to negotiate such, Gordon Brothers have been unwilling to agree any

> materiality threshold for Events of Default and have only agreed limited grace periods for certain defaults before an Event of Default arises. Furthermore, notwithstanding the significant work that has been undertaken to mitigate the risk, it is likely that if Gordon Brothers chose to do so, in the real world they could identify an Event of Default at any time as a basis for enforcing their security and appointing an administrator.
>
> Thus, the commercial reality is that if Gordon Brothers wishes to work with the Obligors as a responsible lender, then it will do so and will not look to enforce on the basis of minor Events of Default but only where there are genuine concerns in making a full recovery (usually in the case of non-payment or insolvency). However, if Gordon Brothers' motive is to gain control of the BHS business then, as mentioned above, as it is difficult to ensure there are no defaults outstanding, it would be difficult to prevent them doing so once the Transaction is implemented."
>
> "We understand that BL has approached more than ten other possible ABL lenders each of which was not prepared to enter into a transaction for various reasons, including the size of the loan, the borrowing base being weighted heavily towards Inventory and the fact that it was too early in the turnaround plan. Therefore, we understand that BL is of the view that the Transaction represents the best opportunity for BL to raise finance in the current situation, and the terms of the Transaction reflect that reality."

413. On 11 April 2016 Mr Chandler attended a meeting with GB Europe at which Mr Chappell and Mr Topp were present. On 13 April 2016 a BHSGL board meeting took place at which Mr Chappell, Mr Chandler and Mr Henningson were all present too. The minutes record that Mr Carver told the meeting that the GB Europe covenant "would be onerous for the business and would require the business to hold between £3 million and £5 million more than shown on the cashflow graph so that they could make weekly draw downs".

414. Mr Chandler's evidence in Chandler 1 was that the purpose of the meeting with GB Europe was to seek comfort that it did not intend to use the ABL Facility as a "loan to own" device and immediately seek to enforce its security. However, by email dated 12 April 2016 Mr Chandler wrote to Mr Plainer raising a concern that Mr Chappell had misled GB Europe at the meeting. Mr Chandler's evidence was that these misleading statements might trigger an immediate Event of Default.

415. It was common ground that in order to enter into the ABL Facility, it was necessary to persuade Arcadia to subordinate its QFC to rank behind GB Europe's security and in early April 2016 Olswang raised the issue with Linklaters. On 18 April 2016 a meeting took place between the board of BHSGL and Arcadia to resolve this issue. Mr

Chandler's evidence was that in advance of that meeting the BHSGL board met to decide whether the ABL Facility would provide the BHS Group with sufficient funds to enable it to continue to trade. Mr Chandler's evidence about that meeting was as follows (footnotes removed):

> "246. Mr Morris set out the terms of the facility which was intended to release £30 million of cash into the business immediately, with further drawdowns planned for later in the year, up to a maximum of £60 million. I remember that, over the course of the discussion of the terms, I understood that there were a number of potential concerns. First, the amount of cash released into the business was not going to be £30 million, which the business required, but was more likely to be around £25 million because a certain amount of the loan had to be retained in the provider's account. Secondly, the process for making requests for a draw down was unsuitable because of the systems we had on stock monitoring. And thirdly, the events of default terms were very strict and so there was a risk that any minor event could allow the debt to be called in.
>
> 247. At the meeting, various views were expressed. My own view was that the facility was insufficient on its own: at best it would allow the business to limp on for a few more weeks, and it would replace Arcadia with a new loan provider with whom we had no relationship and whose interests were (in contrast to Arcadia) better served by the Companies failing rather than succeeding. I therefore made it clear that I would not support the signing of the facility. Mr Topp also voiced the same view.

416. The subsequent meeting with Arcadia was attended by Mr Chappell, Mr Topp, Mr Parladorio, Mr Treacy, Mr Sherwood, Mr Morris and Mr Chandler on behalf of RAL and the BHS Group together with Mr Roberts. It was also attended by Sir Philip Green, Baroness Brady, Mr Budge, Ms Hague, Mr Chris Harris and Ms Siobhan Forey on behalf of Arcadia. Mr Chandler's handwritten notes of the meeting record that Mr Chappell presented the cashflow forecast and that Sir Philip Green questioned Mr Morris closely about the ABL Facility.

417. Mr Chandler's notes also record that Mr Topp said that the BHS Group required £30 million immediately and comfort for £20 million and that Sir Philip Green expressed the view that there was no money in the business and that GB Europe were "rottweilers not lenders" and that the ABL Facility required "£100k per week in costs on the money" and "20% plus". Later, Mr Chandler made the following notes of what Sir Philip Green said:

> "→ asking Arcadia to give up £40m

 never see it again

 we have pensions issue (they know you're not going to give money) → we're trying to find settlement figure

 Nothing I'm hearing is a commercial rational [sic] to do that

 we've offered them the £40m note – the trustees said no thanks"

"Not a buyer

→ probably trading whilst insolvent

 it doesn't work

 no credibility

 where it all blows up

 try to find a sensible closure process buy 100 stores

 controlled way, sensible administrator

 no one gets injured too badly"

418. There was a difference between Mr Chandler and Mr Topp about the reason why Sir Philip Green refused to subordinate Arcadia's QFC to rank behind the ABL Facility. Mr Chandler's evidence was that Sir Philip Green considered the question to be academic because Mr Topp and Mr Treacy considered its terms to be unsuitable. Mr Topp's evidence was that the BHS Group needed a bigger injection of cash and Sir Philip Green was not prepared to provide the necessary support. But both agreed that at the meeting on 18 April 2016 Sir Philip Green refused to agree to subordinate Arcadia's QFC and the BHS Group lost its remaining source of funding.

419. Mr Chandler and Mr Topp also gave evidence that on 18 April 2016 Mr Chappell gave instructions for £1.5 million to be paid to a bank account in the name of BHS Sweden and that they both spoke to Mr Chappell and challenged this payment. I will refer to this as the "**Swedish Payment**". By email dated 19 April 2016 Mr Chappell wrote to board members suggesting a meeting the following day and it is clear that he wanted to dismiss both Mr Topp and Mr Chandler for gross misconduct. On 20 April 2016 a BHSL board meeting took place. The minutes record that at the end of the meeting the board approved the engagement letter to Duff & Phelps Ltd ("**D&P**") as administrators and that Mr Chappell asked the board to approve payments totalling £1 million including £560,000 to Olswang and £300,000 to RAL. They continue:

"**5.2 PAYMENT TO RAL**

> 5.2.1 DC2 then referred to the payment to RAL. EP said £300k was owed to RAL and providing that the payment could be lawfully made, he requested it be done. 5.2.2 AP explained that the analysis that had applied to the LS and Olswang invoices also applied here. 5.2.3 EP confirmed he understood that it was for the administrator to decide whether the payment was appropriate.
>
> **5.3 RETURN OF MONIES**
>
> 5.3.1 DC2 asked whether the monies sent to Sweden had been returned. LH said that he had been in contact with the bank and would confirm the instruction to return the monies once the meeting had closed. 5.3.2 DC2 summarised that all payments would need to have the agreement of D&P, but that the monies from Sweden needed to be returned before such payments could be made. 5.3.2 DC1 said he wanted the payments made otherwise he would divert money to pay people, he did not want the decision to be conditional on the monies being returned from Sweden. 5.3.3 KS asked whether the Board could reach agreement that the invoices be paid provided D&P were in agreement. DC2 was not able to come to this agreement. 5.3.4 DC1 confirmed the monies held in Sweden would be returned today. 5.3.5 DC2 said the Board could consider two resolutions: i. That the money would be sent back from Sweden today on a personal undertaking from D&P; ii. That in the meeting scheduled with D&P for the afternoon, payment would only be made on their advice. 5.3.6 DC1 said he wanted the Board to recommend the payment. DC2 concluded that it was not possible for the Board to reach an agreement and should move to the next agenda item."

420. Finally, both Mr Chandler and Mr Topp gave evidence (which was not challenged) that Mr Chappell returned (or D&P were able to recover) most of the £1.5 million apart from about £50,000. On 21 April 2016 BHSGL and BHSL board meetings took place at which Mr Chappell, Mr Chandler and Mr Henningson were present at which the board of each of the Companies resolved to enter administration. The minutes record that Mr Plainer gave the following advice before they took the decision to do so:

> "3.1 AP confirmed that, as per previous advice. Directors should be mindful of their duties to creditors. As of yesterday, all efforts of the Directors, which had been considerable, in order to find the financing required pursuant to the CVA had been finally exhausted. AP understood that DCl, DC2 and DT had attended a meeting with Arcadia Group Limited ("Arcadia"), the qualifying floating charge holder, on 20 April 2016, whereby Arcadia reviewed the future cash flow forecast of the business and concluded that they were not prepared to support the business going forward whether by the provision of letters of credit facilities for delivering of essential supply in September 2016 or otherwise. Additionally, the facilities offered by Gordon Brothers, which the Directors had worked hard to put in place, were inadequate given the cashflow requirements of the business.

> 3.2 AP understood that additionally the Company had received a seven day winding up notice from HMRC on 15 April 2016, the balance of which outstanding was £2,671,808 which the Company could not meet. Given this, together with the fact that that the Company was dependent upon BHS Limited for funding and the BHS Limited Board had passed a resolution to file for administration, there was no likelihood of future financing being available to the Company, and therefore there appeared to be no reasonable prospect of the Company avoiding insolvent liquidation. The Directors, however, should take their own views. If the Directors agreed then they should take steps to put the Company into administration in short order. AP invited any Director who disagreed with the above, or wished to make any further comments, to do so. No Director had any comments."

421. On 25 April 2016 Mr Philip Duffy and Mr Benjamin Wiles of D&P were appointed as joint administrators and on 7 June 2016 they filed their statement of proposals. On 13 June 2016 they filed their report to creditors with the Court. In it they stated that after the meeting with Arcadia on 18 April 2016 Arcadia contacted Duff & Phelps, that they met the BHSGL board on 19 April 2016 and that the BHSGL board told them that they had no choice but to put the BHS Group into administration. They also stated that on 21 April 2016 the RAL board was contacted by a UK retailer with a view to rescuing the group, that negotiations took place over the weekend of 23 and 24 April but these negotiations failed and on Monday 25 April 2016 the board finally resolved to put the group into administration.

422. By email dated 28 April 2016 Mr Henningson wrote to Mr Norman Strong of BSG Valentine, a firm of accountants, stating that in March 2015 Mr Chappell had asked him to set up a company in Sweden to control the name and brand and that their intention was to open two stores. He then stated (my emphasis):

> "I have since March 2015 been occupied with everything within BHS UK and hasn't got the time to start to expand within the Nordic countries. I was the head of BHS International department and we started to build up contacts within China. Thailand, Indonesia and Kenya. We are also on our way to start up in Iran again. The company has just been invoicing twice and both of the invoices has gone to BHS. One has been paid in April 2015 and the other one sent in I think August 2015 hasn't been paid at all and I just told Dominic to pay it but he has forgot it as usual.
>
> The reason to send as much as M£1,5 to Sweden was to protect all the invoices coming in from Olswangs and some other of the necessary advisers to the board of BHS. M£1,45 was sent back to BHS the day after after [sic] discussions with the CEO and the rest of the board. **At the time when the money was sent Dominic and one other director could send all of the money in BHS everywhere in the world if we want. The only**

> **reason to send it to BHS Sweden was that they were still in the control of us in the board.** I have copies of some of the invoices sent to me at the same time from Olswang etc etc. Anyway now they are screaming to me to send all the money back and its still more ore [sic] less £41000 at the account of BHS Sweden and part of it has gone to our accountants and advisers."

423. Under cover of a letter dated 24 October 2016 Mr Ring sent the Insolvency Service Mr Henningson's answers to a number of questions which had been put to them. In paragraph 42 he dealt with the Swedish Payment (again my emphasis):

> "The BHS board approved payments to a number of parties, principally professional advisors who had been working and were continuing to work to save the companies and bring in cash. There were property sales still being organised and a deal to sell approximately 50% of the stores to SDI. **DC moved £1.5m to BHS Sweden of which I was one of the directors. I was asked to hold this money on the basis that it may need to be disbursed from the BHS Sweden account to make payments for the benefit of BHS companies.** All BHS board directors were advised on the day of the transfer (19 April 2016) that DC acted to ensure that the BHS group was able to pay professional services in order to pursue its continuing strategy that had been agreed by the board. I was advised that funds must be used in a way consistent with the boards adopted strategy and, subsequently, I was requested by the Administrators to transfer the money back. It did so."

K. Subsequent Events

424. The collapse of the BHS Group was a high profile event and a number of investigations were undertaken by a number of bodies and interested parties. Where the evidence given to them or their findings are relevant to the issues which I have to decide, I have set them out in the narrative above or in my determination of the issues and I do not propose to set out a chronology of those investigations in what is already a very long recitation of the facts. For present purposes it is enough to identify some individual events which took place after the Companies went into administration. There was also no dispute that both ACE and Grovepoint were repaid in full.

(1) The Pensions Settlement

425. On 2 November 2016 the Pensions Regulator issued warning notices to Sir Philip Green, TIL, Taveta, RAL and Mr Chappell. They were over 300 pages long and supported by 13,000 documents (which gives me some comfort about the length of this judgment).

The Pensions Regulator proposed to issue a CN for a contribution from Sir Philip Green and Taveta and to issue an FSD for financial support from TIL and Taveta. In the TPR Intervention Report the authors made it clear that the Pensions Regulator had turned down an offer in March 2016 because it lacked sufficient detail and more fundamentally because it was insufficient to ensure that the new scheme could continue on an ongoing basis with little or no supporting covenant.

426. In October 2016 a further offer was made but it was also rejected. However, on 28 February 2017 the Pensions Regulator entered into a settlement agreement with Sir Philip Green and all relevant parties to stop the regulatory action. The authors of the TPR Intervention Report summarised its terms as follows:

> "£343m has been placed in a fully independent escrow account to fund a new scheme. An additional amount of up to £20m is being held in other accounts to cover expenses and the costs of implementing the voluntary member options and the new scheme.
>
> Existing members of the schemes now have three options: to transfer to the proposed new pension scheme, to opt for a lump sum payment if eligible and to remain in their current scheme (which is expected to eventually transfer to the PPF) The lump sum payment option will be available to members with small pots of up to £18,000 in total value. Those who choose not to take a lump sum and opt to transfer to the new scheme will be entitled to the same benefit structure as all other members. The new scheme will also be eligible for the PPF.
>
> The starting pension (on transfer to the proposed new scheme) will be the same as with the original BHS schemes. Members under 60 who transfer to the proposed new scheme will therefore not be subject to the 10% reduction in their starting pension that applies to members in the PPF. Benefits payable in retirement and built up before April 1997 will increase at 1.8% per year. This compares to nil increases for pre-1997 benefits provided within the PPF.
>
> Each member will be notified by the BHS schemes trustees about the options available to them. In order to support members facing potentially difficult financial decisions, we insisted on a free helpline offering members support with their options.
>
> If the proposed new scheme structure cannot be implemented within 15 months, £343m will be transferred to the original BHS schemes. This amount is expected to be sufficient for the trustees to purchase annuities for all members at a level in excess of the PPF compensation."

(2) Disciplinary Action

427. The settlement did not extend to Mr Chappell. In January 2018 Mr Chappell was convicted of an offence under section 77 of the PA 2004 for refusing to provide information required by The Pensions Regulator and on 15 January 2018, the Determinations Panel of the Pensions Regulator determined that a CN should be issued to Mr Chappell for £9,542,985.33 under section 38 of the PA 2004. In October 2019 Mr Chappell was disqualified as a director for a period of 10 years.

428. Mr Henningson was not the subject matter of a CN or FSD by the Pensions Regulator. He was, however, the subject of disqualification proceedings brought by the Insolvency Service in relation to the Swedish Payment. Shortly before the trial Mr Henningson gave an undertaking not to act as a director for a period of five years. On 14 January 2020 the Insolvency Service gave notice of his disqualification and described the relevant conduct as follows:

> "BHS 1 On 19 April 2015, one day after the potential appointment of an administrator for BHS had been discussed by the BHS board of directors, Lennart Henningson breached his fiduciary duty owed to BHS by causing a payment of £1.5m to be made from BHS to BHS Sverige AB, without the knowledge of the BHS board of directors. 1.1 On 23 March 2016 BHS had entered into a CVA and was therefore in insolvency proceedings; 1.2 On 18 April 2016, the potential appointment of an administrator for BHS was discussed at a meeting of the Arcadia Board, BHS Board and RAL Board; 1.3 On 19 April 2016, he caused a payment of £1.5m to be made from BHS to BHS Sverige AB (BHS Sweden) without the knowledge of the BHS Board; 1.4 At the time of the payment he was a director of BHS and also the sole director and shareholder of BHS Sweden; 1.5 The payment was made in breach of BHS's bank mandate and with no documentation put in place to protect BHS s position; 1.6 On 19 April 2016, a co-director demanded the return of the payment of £1.5m; 1.7 Following that demand, on 22 April 2016, a sum of £1,450,310.22 was returned to BHS; 1.8 On 22 April 2016, a resolution was passed for the appointment of an administrator for BHS; 1.9 As at 25 April 2016, the date of BHS being placed into Administration, £49,689.78 was still outstanding from BHS Sweden."

(3) RAL: winding up

429. On 7 September 2016 Mr Wiles and Mr Duffy issued a winding up petition against RAL based on a demand of £5,981,871.65. On 3 May 2017 Mr Registrar Briggs (as he then was) rejected RAL's defence that it had a substantial cross-claim under the MSA and it entered into compulsory liquidation: see *BHS Group Ltd v Retail Acquisitions Ltd*

[2017] 2 BCLC 472. He held that RAL was both cashflow insolvent and insolvent on a balance sheet basis.

(4) Other Settlements

430. By a settlement agreement dated 17 April 2020 and made between Sir Philip Green together with a number of other former directors and the Joint Liquidators on behalf of the Companies, Sir Philip Green agreed to pay the Joint Liquidators the sum of £8 million and in return the Joint Liquidators agreed to enter into a general release of claims against him and the other Relevant Directors and Relevant Persons (as defined). The Relevant Persons included Mr Topp because he was a member of the management team before the acquisition. Sir Philip Green negotiated the widest possible release for them presumably in order to avoid any risk of ricochet claims.

431. By a settlement agreement dated 16 June 2023 and made between Mr Smith and the Joint Liquidators on behalf of the Companies Mr Smith agreed to pay the Joint Liquidators £3.5 million in return for a general release of claims. It follows, therefore, that the Joint Liquidators have recovered £11.5 million from former directors of the Companies (or some of them).

(5) The S75 Debt

432. On 7 July 2017 Mr Dolan of the PPF submitted proof of debt forms for the Main Scheme of £621 million and for the Senior Scheme of £58 million as at 2 December 2016. In support of the proof he relied on the report of the Schemes' actuary, Mr Ben Pullen FIA of Barnet Waddingham LLP, dated 6 July 2017 in which Mr Pullen had calculated the S75 Debt at this figure. The Joint Liquidators admitted the debt to proof. But I was also referred to solicitors' correspondence in which Olephant challenged whether the PPF was entitled to prove in the liquidation after the settlements with Sir Philip Green and Jones Day stated that the PPF was entitled to prove for the S75 Debt in full.

III. The Evidence

L. Witnesses of Fact

433. The Joint Liquidators called Mr Martin, Mr Wright and Mr Bourne to give evidence of fact. I have described both Martin 1 and Martin 2 above. Mr Wright made a single statement dated 24 January 2023 and Mr Bourne made a single statement dated 15 August 2022 which was largely confined to proving his notes. Mr Lightman cross-examined Mr Martin and Ms Hilliard cross-examined Mr Wright and Mr Bourne. The Joint Liquidators also called Mr Sherwood under a witness summons and had served a witness summary on his behalf. Mr Curl asked a few questions in examination in chief and Mr Lightman cross-examined Mr Sherwood.

434. Mr Chandler gave evidence in chief in Chandler 1, his second witness statement dated 3 August 2023 ("**Chandler 2**") and his third witness statement dated 10 November 2023 ("**Chandler 3**"). Mr Lightman also called Mr Topp who made two witness statements dated 19 January 2023 ("**Topp 1**") and 2 August 2023 ("**Topp 2**"). Mr Curl cross-examined both witnesses. Mr Henningson did not give evidence but I must nevertheless consider what weight to give to his witness statements.

(1) Mr Martin

435. In their written closing submissions Ms Hilliard and Mr Lightman challenged the evidence of Mr Martin. Ms Hilliard described him as uneasy and reluctant and Mr Lightman described him as unreliable. Both placed reliance on the fact that he corrected the word "inevitable" in Martin 1 and substituted the words "likely" and "highly likely". Mr Lightman also submitted that Jones Day had placed words in his mouth when he used the word "obfuscation" and submitted that he went out of his way to criticise Mr Chandler.

436. I reject the criticisms of Mr Martin's evidence. He was a measured and straightforward witness and his evidence was almost entirely supported by the documentary evidence and the notes which he carefully kept at the time. Moreover, Mr Martin was fully aware of the significance of his use of the word "inevitable" but it was evidence of both his honesty and his fair-mindedness that he changed his evidence in cross-examination to assist the Respondents. Finally, as I find below, I consider that the word "obfuscation" was a fair reflection of the conduct which Mr Martin described whether or not it was a word which he ordinarily used and that he was justified in making criticisms of Mr Chandler (if that is what they were).

(2) Mr Wright

437. Both Ms Hilliard and Mr Lightman accepted that Mr Wright was an honest witness but submitted that it was of limited assistance to the Court. In particular, Mr Lightman submitted that it was unclear why the Joint Liquidators had called him. The answer was a simple one, namely, to answer a defence to the Wrongful Trading Claim advanced by both Mr Henningson and Mr Chandler and I found his evidence to be useful in assessing what weight to attach to the CVA. Mr Lightman submitted that he was cautious in answers and sought to avoid exposing KPMG to any criticism. I consider this fair. But I am satisfied that he was a reliable witness attempting to help the Court where he could.

(3) Mr Bourne

438. Both Ms Hilliard and Mr Lightman accepted that Mr Bourne was an honest and straightforward witness. I agree. This case is an unusual one because it involves a Wrongful Trading Claim against directors almost from the moment they took office. I found Mr Bourne's evidence useful in assessing how an experienced corporate finance professional would have approached appointment and what they could have expected on Day One. I also found his notes useful and Ms Hilliard and Mr Lightman did not challenge them.

(4) Mr Sherwood

439. Ms Hilliard and Mr Lightman both submitted that Mr Sherwood gave honest and credible evidence and was doing his best to assist the Court. In general terms, I accept that submission although I found Mr Sherwood to be defensive and a witness who tried to downplay his own involvement in the events which I have described. Nevertheless, I accepted his evidence without qualification on the key points which I identify in section V (below).

(5) Mr Chandler

440. Mr Chandler was subjected to a searching cross-examination by Mr Curl over three days. It is unnecessary for me to explore his evidence in detail in this section because I analyse it in considerable detail below. My overall assessment of Mr Chandler is that he was an honest witness trying to assist the Court and willing to answer Mr Curl's

questions fully and fairly. There were occasions where he tried to reconstruct events or present the facts more positively and where he did so, I rejected his evidence in the light of the documents and other witness evidence. But they were few in number I am satisfied that he was not deliberately trying to mislead the Court.

441. Mr Curl put a number of questions to Mr Chandler which went to credit only. In particular, he put to Mr Chandler the email which he sent to Mr Davis on 10 March 2015 and also the Atherstone plan. Mr Curl suggested that these examples showed that he deliberately preferred the interests of Mr Chappell and RAL to the interests of the Companies. I do not accept that Mr Chandler deliberately preferred RAL's interests which would have been dishonest (or bordering on dishonesty).

442. However, what these and other examples which Mr Curl put to him demonstrate is that Mr Chandler was heavily influenced or even manipulated by Mr Parladorio who was his principal at Manleys and responsible for his appointment to the Companies' boards. Mr Parladorio attended most BHSGL board meetings as a "shareholder representative" and fully participated in the decision-making process. But he owed no loyalty to BHSGL or the other Companies and was clearly motivated by personal loyalty to Mr Chappell and his own personal interests.

443. In my judgment, the clearest example of this influence or manipulation was the attempt by Mr Chandler to ratify the management fee of £600,000 in early April 2016. I have considered carefully whether Mr Chandler's conduct and his explanation should have led me to the conclusion that he was prepared to act dishonestly to give effect to Mr Parladorio's wishes and I have come to the conclusion that he was not dishonest although he was willing to do what Mr Parladorio asked of him.

444. I have already dealt briefly with Mr Chandler's evidence about the Creditors Meeting. In my judgment, the questions which Mr Curl put to Mr Chandler were not unfair. They arose out of Chandler 1 and clearly went to the accuracy of his written evidence and Mr Chandler's credibility more generally. However, they did not go to a pleaded issue and if the Joint Liquidators had wanted to allege that Mr Chandler deliberately misled creditors in a way which would have entitled them to set aside the CVA, they ought to have pleaded this case. This was, therefore, a classic example of a collateral issue which the Court should not decide since it was heavily disputed but went to credibility alone.

I make it clear, therefore, that I have attributed no weight to these questions in assessing Mr Chandler's credibility even though I am satisfied that his answers had some relevance to the issue which the Joint Liquidators had pleaded, namely, whether KPMG and Weil were misled.

445. Finally, Mr Chandler's heavy reliance on Mr Parladorio can be explained by his own lack of experience. He was a criminal barrister by training and had no experience as a corporate lawyer. As Mr Curl put to him, he was clearly out of his depth. He frankly admitted that he did not know what a QFC was and whilst I accept that he would not necessarily be familiar with the finer drafting points or the relevant sections of the IA 1986, experienced corporate counsel would have understood the effect of the Arcadia Security Agreement and how it impacted on the Companies' future ability to raise finance. I also find it extraordinary that Mr Chandler took no advice about the ABL Facility and whether its terms were acceptable until after the CVA. This can only be explained by his lack of experience.

(6) Mr Topp

446. Both Mr Henningson and Mr Chandler relied very heavily on the evidence of Mr Topp. Ms Hilliard and her team described his evidence as "frank and impressive" and Mr Lightman and his team described Mr Topp "uniquely placed to provide evidence" and "an extremely impressive witness". I accept that Mr Topp was an honest, straightforward and engaging witness and I accepted his evidence. However, his evidence had significant limitations, as Mr Curl and Mr Perkins submitted. His experience was retail and he had been promoted to become CEO after the acquisition and he was not involved in any of the attempts to raise finance which give rise to the Joint Liquidators' claims. Indeed, he admitted to having very little visibility in relation to any of them.

447. Ms Hilliard and Mr Lightman treated Mr Topp as the litmus test of a reasonable director. But I do not accept that decisions which Mr Topp took or supported can be automatically treated as reasonable. His judgment was questionable at times and he was influenced by his relationship with Sir Philip Green. On 16 April 2015 he approved the payment to Swiss Rock after speaking to Sir Philip Green and a year later he was prepared to ratify the £600,000 payment to RAL. Moreover, I also found his support for the July 2015

Turnaround Plan over-optimistic. It was always dependent upon the group obtaining a sustainable working capital facility and BHSGL never achieved this. Finally, I have to bear in mind that Mr Topp was not a defendant but only because he was a Relevant Person under the settlement agreement with Sir Philip Green.

(7) Mr Henningson

448. I accept that Mr Henningson has had cancer and had a good reason for not giving evidence in these proceedings. I would be the first to accept that litigation may lose all importance in the face of serious or even terminal illness. Although Ms Hilliard did not adduce satisfactory medical evidence to show that Mr Henningson could not give evidence or could not do so remotely or with reasonable adjustments, I accept that he had a good reason not to give evidence and I do not reject his evidence for that reason.

449. Nevertheless, I was unable to attach any weight to either Henningson 1 or Henningson 2. I was unable to do so primarily because I am satisfied that he deliberately lied about the Carlwood Payment of £300,000 which he received for introducing ACE to the purchase of North West House. But even if I had found that the did not receive that commission, I would have attached almost no weight to his witness statements. He gave a very partial and misleading account about his involvement with the BHS Group which was at odds with answers he had given in the course of the investigations after its collapse. He also omitted to deal with key events without any explanation and those omissions can only be explained on the basis that they were deliberate.

450. In particular, Mr Henningson did not address the Swedish Payment at all in either of his witness statements. In my judgment, it is clear from the admissions which Mr Henningson made in the email dated 28 April 2016 and in Mr Ring's letter to the Insolvency Service dated 24 October 2016 that Mr Henningson was a party to an attempt by Mr Chappell to defraud creditors of £1.5 million immediately before the BHS Group went into administration and that he was prepared to give undertakings to the Insolvency Service not to act as a director for five years to avoid disqualification.

451. In general, however, I have not been willing to make findings of fact about Mr Henningson's participation in events or his knowledge without clear documentary evidence to support those findings. Indeed, this is another good reason for undertaking the task in section V. On 30 May 2017 Mr Ring submitted Mr Henningson's answers to

a number of questions asked by the Insolvency Service. In his second answer Mr Henningson stated this:

> "I believe that the Minutes of BHS would be the best guide to what was happening at a senior level within BHS on a regular basis. I do not have copies of the BHS minutes, but these will be available from the Administrators of BHS."

(8) The Minutes

452. I agree with Mr Henningson that the best guide to the findings of fact which I have to make are the minutes of the meetings of the boards of BHSGL and the other Companies. Where those minutes are clearly intended to be a contemporaneous record I have relied upon them. Mr Chandler accepted that it was his responsibility to ensure that they were accurate and shortly after his own appointment, he appointed Ms Emma Reid as company secretary to take and keep the minutes. I have given less weight to minutes which have obviously been prepared in advance by lawyers to approve a particular transaction. I have also given much less weight to language or statements which were drafted by Olswang and repeated at every meeting.

453. There are only three occasions on which I have rejected what is recorded in the minutes as an accurate record. The first occasion is the 17 April Board Meeting where it is common ground that Mr Turner of Olswang added wording to the minutes after the meeting. But in the event I am not satisfied that this made any difference. The second occasion is 8 May 2015 when the minutes were clearly false and intended by Mr Chappell to lay a false paper trail for third parties. The third occasion is 1 September 2015 where I am not satisfied that there was any consideration of the interests of creditors. The minutes use the same formula which Mr Turner introduced in April 2015 but contain no discussion of the interests of creditors at all. Moreover, neither Mr Chandler nor Mr Henningson placed any reliance on those minutes at all.

M. Expert Witnesses

(1) Accountancy Evidence

454. The Joint Liquidators called Mr Mark Shaw, a partner and head of business restructuring at BDO LLP, to give expert accountancy evidence and Mr Henningson and Mr Chandler called Mr Michael Pilgrem, a senior managing director in FTI Consulting's economic

and financial consulting practice. Both were chartered accountants by professional qualification and both were very experienced practitioners and expert witnesses. The only professional difference between them was that Mr Shaw was an insolvency practitioner and Mr Pilgrem's expertise was primarily the valuation of companies. Ms Hilliard cross-examined Mr Shaw and Mr Perkins cross-examined Mr Pilgrem.

455. The critical issue to which the accountancy expert evidence was relevant was the IND. It is a testament to their independence and expertise that Mr Shaw and Mr Pilgrem were able to agree the relevant figures. Their evidence on other issues was less important and Mr Lightman and his team rightly accepted that the determination of the Wrongful Trading Claim did not depend on the expert evidence:

> "30. It is important to keep in mind the assistance that can – and cannot – properly be derived from the expert accountancy evidence in this case. As Mr Pilgrem rightly acknowledged, neither accountancy expert can answer the question that the Court must answer in order to decide the Wrongful Trading Claims, namely: whether the Notional Director knew or ought he to have concluded at any of the Knowledge Dates that insolvent liquidation of the Companies was inevitable.
>
> 31. As regards the Wrongful Trading Claims, the accountancy expert evidence can assist the Court in understanding the relevant financial information that was available to the directors at the time and how it was presented to them. But that is as far as it goes. The Court must ultimately view the relevant question through the lens of what the Notional Director knew or ought to have known and, as is explained more fully below, the Notional Director as regards the claims against Mr Chandler in this case is not an accountant, let alone a licensed insolvency practitioner."

456. I agree. I found the expert accountancy evidence most useful as background reading and then as providing the answers to very detailed financial questions which I had. The only issue on which I found it necessary to decide between the evidence of the experts was on the question whether the Companies were insolvent at each of the Knowledge Dates. However, even this was not an ingredient of the cause of action for wrongful trading and only a cross-check against the findings on the facts which I had to make. The other key issue on which I accepted Mr Shaw's evidence was in relation to the "degenerative effect" of the facilities which the BHS Group accepted to continue trading. I accepted his evidence and adopted his language. But this seemed to me to be largely a matter of common sense and Mr Pilgrem accepted this when it was put to him.

457. Nevertheless, Mr Lightman and his team sought to argue that Mr Shaw's evidence was unhelpful and Ms Hilliard and her team embarked on a sustained attack on his evidence to demonstrate that he was an unreliable witness and had gone well beyond the remit of an expert. I found these criticisms unjustified and unrealistic. I make it clear that I found Mr Shaw to be reasonable, fair-minded and independent witness who was doing his best to assist the Court in what was a difficult exercise for an expert. He was subjected to a very detailed cross-examination and he answered Ms Hilliard's questions both carefully and thoughtfully and made concessions where he considered it necessary to do so.

(2) Pensions Evidence

458. The Joint Liquidators called Mr Bob Scott FIA, the senior partner of Lane Clark & Peacock LLP, to give evidence on the pensions issue. Mr Henningson and Mr Chandler called Mr Gary Squires, a senior adviser in Cardano Advisory Ltd's pensions restructuring and litigation support practices and put in evidence a report by Mr Martin Potter, a scheme actuary and owning partner at Hymans Robertson LLP. Mr Lightman cross-examined Mr Scott and Mr Curl cross-examined Mr Squires. Both were experienced expert witnesses and the professional difference between them was that Mr Scott was a scheme actuary and able to calculate the pension deficit on various assumptions.

459. Again, the principal issue for the pensions expert was the amount of the pensions deficit on each of the Knowledge Dates and since they fed this figure into the IND figures calculated by the accountancy experts and since those figures were finally agreed, their other evidence was of very limited value. Indeed, I found it unnecessary to rely on their expert evidence in relation to any of the other issues which I had to decide. This was largely because both Mr Martin and Mr Shaw accepted that it was highly unlikely that the Trustees would ever have issued a winding up petition or attempted to put the sponsoring employer into administration or liquidation.

(3) Property Evidence

460. The Joint Liquidators put in evidence two reports by Ms Victoria Seal MRICS, a chartered surveyor and senior director of BNP Paribas Real Estate. Mr Henningson and Mr Chandler put in evidence reports by Mr Andrew White MRICS and Mr Gerard Finn FRICS, both chartered surveyors, and Mr Henningson also put in evidence a report by

Mr Nick Powell MRICS FCIArb. In the event, the Joint Liquidators did not call Ms Seal to give evidence about the value of Darlington and Ms Seal and Mr Powell agreed that the value of North West House on Day One was £40.5 million shortly before Ms Seal was due to give evidence.

IV. The Law

N. Wrongful Trading

461. Section 275 of the Companies Act 1929 introduced the concept of fraudulent trading and it created both a power to grant a civil remedy and a criminal offence. Section 332 of the Companies Act 1948 re-enacted that provision and it remained in force until the law was reconsidered by the Review Committee on Insolvency Law and Practice (which included not only Sir Kenneth Cork but also Peter Millett QC and Muir Hunter QC). In their final report (1982 Cmnd. 8558) known as the "**Cork Report**" the committee recommended that the law be reformed as a matter of urgent necessity. They stated at §1776 to §1779 and §1805:

> "1776. Section 332 not only creates a civil and personal liability, it also creates a criminal offence. The constituent elements of the two are identical. As a result the Courts have consistently refused to entertain a claim to civil liability in the absence of dishonesty and, moreover, have insisted upon a strict standard of proof. It is the general experience of those concerned with the administration of the affairs of insolvent companies that the difficulty of establishing dishonesty has deterred the issue of proceedings in many cases where a strong case has existed for recovering compensation from the directors or others involved.
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> 1777. It is right that it should be an offence to carry on a business dishonestly; and right that, in the absence of dishonesty, no offence should be committed. Where, however, what is in question is not the punishment of an offender, but the provision of a civil remedy for those who have suffered financial loss, a requirement that dishonesty be proved is inappropriate. Compensation ought in our view to be available to those who suffer foreseeable loss as a result, not only of fraudulent, but also of unreasonable behaviour.
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> 1178. Accordingly, we recommend the whole of section 332 should be repealed so far as it provides a civil remedy, and that it should be replaced by an entirely new section under which civil personal liability can arise:
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> (a) without proof of fraud or dishonesty; and
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> (b) without requiring the criminal standard of proof.

> 1779. We recommend that the phrase 'fraudulent trading' should in future be reserved for trading which is of such a nature that it constitutes an offence under what is left of section 332, while the kind of trading which may give rise to personal liability under the new section should be called 'wrongful trading'."
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> "1805. A balance has to be struck. No one wishes to discourage the inception and growth of businesses, although both are unavoidably attended by risks to creditors. Equally a climate should exist in which downright irresponsibility is discouraged and in which those who abuse the privilege of limited liability can be made personally liable for the consequences of their conduct."

462. Section 15 of the Insolvency Act 1985 introduced the civil remedy of wrongful trading for the first time. It was almost immediately repealed and replaced by section 214 of the IA 1986 which came into force on 29 December 1986. Section 214 ("**S.214**") now provides as follows:

> "**214.— Wrongful trading**.
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> (1) Subject to subsection (3) below, if in the course of the winding up of a company it appears that subsection (2) of this section applies in relation to a person who is or has been a director of the company, the court, on the application of the liquidator, may declare that that person is to be liable to make such contribution (if any) to the company's assets as the court thinks proper.
>
> (2) This subsection applies in relation to a person if— (a) the company has gone into insolvent liquidation, (b) at some time before the commencement of the winding up of the company, that person knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation or entering insolvent administration, and (c) that person was a director of the company at that time; but the court shall not make a declaration under this section in any case where the time mentioned in paragraph (b) above was before 28th April 1986.
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> (3) The court shall not make a declaration under this section with respect to any person if it is satisfied that after the condition specified in subsection (2)(b) 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 (on the assumption that he had knowledge of the matter mentioned in subsection (2)(b)) he ought to have taken.
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> (4) 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 the company, and (b) the general knowledge, skill and experience that that director has.

> (5) The reference in subsection (4) to the functions carried out in relation to a company by a director of the company includes any functions which he does not carry out but which have been entrusted to him.
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> (6) For the purposes of this section a company goes into insolvent liquidation if it goes into liquidation at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the winding up.
>
> (6A) For the purposes of this section a company enters insolvent administration if it enters administration at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the administration."

463. The Joint Liquidators had to satisfy three conditions before the Court's discretion under S.214(1) was engaged: first, they had to establish that the Companies had gone into insolvent liquidation. Secondly, they had to establish that Mr Chandler and Mr Henningson were directors at the time when the third condition is satisfied. Thirdly, they had to establish that at some time before the commencement of the winding up, Mr Chandler or Mr Henningson "knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation or entering insolvent administration". I follow Edwin Johnson J in *Chandler v Wright* and refer to this third condition as the "**Knowledge Condition**". I have already defined the relevant date at which the condition must be satisfied as the "**Knowledge Date**".

464. In *Chandler v Wright* Edwin Johnson J also adopted the analysis of His Honour Judge Jack QC (as he then was) in *Re Sherborne Associates Ltd* [1995] BCC 40. He had to decide whether a wrongful trading claim survived the death of the director and also whether the normal rules of pleading applied. In answering these questions he described a wrongful trading claim as a cause of action in the traditional sense. He said this at 46B-F:

> "I will however for completeness consider whether a liquidator may have a cause of action under s. 214 within the meaning of s. 1(1) of the 1934 Act. A cause of action is traditionally defined as a set of facts which give rise to a right of action: thus 'every fact that it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court' - per Lord Esher in *Read v Brown* (1888) 22 QBD 128. This definition was provided in the course of considering where a cause of action arose. In *Sugden v Sugden* Denning LJ distinguished rights which can be enforced and mere hopes or contingencies. He accepted that a party may have a cause of action even though the remedy is discretionary.

> Section 214 provides in effect that if a liquidator can establish a factual situation he may request the court to declare that the director should make a contribution to the company's assets, the amount of which is in the court's discretion. Here the factual situation which the liquidator seeks to establish in respect of each respondent director is that he should have concluded that there was no reasonable prospect that Sherborne would avoid going into insolvent liquidation. I accept that the line may be difficult to define but in my view this right plainly amounts to a cause of action. The position is that the liquidator has to establish a factual situation defined by the Act and he may then ask the court to exercise its discretion in his favour. That discretion will be exercised in accordance with the principles which are being established by the decided cases in so far as they are peculiar to this new section. The position is not very far removed from that where a plaintiff asked the court to grant him an equitable remedy. The family law cases lie on the other side of the line in that there are no facts to be proved, no factual situation to be established, defined by the law beyond the status of husband, wife or child, before the applicant can ask for relief."

465. The Joint Liquidators could satisfy the Knowledge Condition by proving that Mr Chandler or Mr Henningson had actual knowledge in the sense that they subjectively concluded that the Companies had no real prospect of avoiding insolvent liquidation or insolvent administration. But they could also satisfy the Knowledge Element by showing that one or both of them should have concluded that this was the case after an objective evaluation of the facts which they knew or the information which was provided to them at each Knowledge Date.

466. In deciding whether Mr Chandler or Mr Henningson should have known that the Companies had no real prospect of avoiding insolvent liquidation or administration, S.214(4)(a) requires the Court to apply the standard of a reasonably diligent person having both the general knowledge, skill and experience reasonably expected of a person carrying out the same functions but also the general knowledge, skill and experience of Mr Chandler and Mr Henningson themselves. In his oral submissions in opening Mr Lightman described this standard as the "**Notional Director**" test and I adopt that expression as shorthand for the statutory test. I begin with some general propositions which were not in dispute:

(1) The Notional Director test is to be applied to each individual director and not to the board of directors as a whole: see *Re Continental Assurance plc* [2007] 2 BCLC 287 (above) at [385] to [386] (Park J). I must, therefore, consider the individual

allegations against Mr Chandler and Mr Henningson separately by reference to their own knowledge and against the different functions which they carried out.

(2) The Court's enquiry into the functions performed by each director will go beyond the mere consideration of his title and will "examine the substance of what they actually do or did": see *Re Langreen Ltd (in liquidation)* (Registrar Derrett, unreported, 21 October 2011) at [92]. In that case the registrar found that two non-executive directors soon stepped over the line and became executive directors and should be judged by that standard.

(3) The standard to be expected of the Notional Director will also depend on the size and sophistication of the company. In *Re Produce Marketing Consortium Ltd* [1990] BCC 569 Knox J stated this principle at 594G-595A:

> "Two steps in particular were taken in the legislative enlargement of the court's jurisdiction. First, the requirement for an intent to defraud and fraudulent purpose was not retained as an essential, and with it goes the need for what Maugham J called "actual dishonesty involving real moral blame". I pause here to observe that at no stage before me has it been suggested that either Mr. David or Mr. Murphy fell into this category. The second enlargement is that the test to be applied by the court has become one under which the director in question is to be judged by the standards of what can be expected of a person fulfilling his functions, and showing reasonable diligence in doing so. I accept Mr. Teverson's submission in this connection, that the requirement to have regard to the functions to be carried out by the director in question, in relation to the company in question, involves having regard to the particular company and its business. It follows that the general knowledge, skill and experience postulated will be much less extensive in a small company in a modest way of business, with simple accounting procedures and equipment than it will be in a large company with sophisticated procedures."

(4) Further, in determining what a director ought to have known, the Court is not limited to consideration of the material available to the director during the relevant period but its consideration may extend to material to which the director could with reasonable diligence have access. In *Re Produce Marketing Consortium Ltd* (above) Knox J stated this principle at 595D-E:

> "The knowledge to be imputed in testing whether or not directors knew or ought to have concluded that there was no reasonable prospect of the company avoiding insolvent liquidation is not limited to the

> documentary material actually available at the given time. This appears from sec. 214(4) which includes a reference to facts which a director of a company ought not only to know but those which he ought to ascertain, a word which does not appear in sec. 214(2)(b). In my judgment this indicates that there is to be included by way of factual information not only what was actually there but what, given reasonable diligence and an appropriate level of general knowledge, skill and experience, was ascertainable. This leads me to the conclusion in this case that I should assume, for the purposes of applying the test in sec. 214(2), that the financial results for the year ending 30 September 1985 were known at the end of July 1986 at least to the extent of the size of the deficiency of assets over liabilities."

(5) Likewise, a director is expected to obtain sufficient financial information to monitor the company's solvency. In *Re Nine Miles Down UK Ltd* [2010] BCC 674 Kitchin J (as he then was) identified this as a component of the Knowledge Condition:

> "Thirdly, the requirement of subs.(2)(b) is satisfied if the applicant establishes that, as of that date, the director knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation. As for the latter, a director is expected to have provided himself with adequate accounting information to monitor the solvency of the company, and the standard to be applied in considering what conclusion a director should have drawn is that of a reasonably prudent businessman acting without unwarranted optimism and on a realistic factual basis."

(6) A director is not liable simply for permitting a company to continue to trade at a time when they know that the company is insolvent either on the balance sheet test or the cashflow test. In *Re Hawkes Hill Publishing Co Ltd* [2007] BCC 937 Lewison J (as he then was) stated this at [28]:

> "It is important at the outset to be clear about the relevant question. The question is not whether the directors knew or ought to have known that the company was insolvent. The question is whether they knew or ought to have concluded that there was no reasonable prospect of avoiding insolvent liquidation. As Chadwick J. pointed out in *Re C S Holidays Ltd*; *Secretary of State for Trade and Industry v Gash* [1997] BCC 172; [1997] 1 WLR 407 (at p.178; 414): "The companies legislation does not impose on directors a statutory duty to ensure that their company does not trade while insolvent; nor does that legislation impose an obligation to ensure that the company does not trade at a loss. Those propositions need only to be stated to be recognised as self-evident. Directors may properly take the view that it is in the interests of the company and of its creditors that, although insolvent, the company

> should continue to trade out of its difficulties. They may properly take the view that it is in the interests of the company and its creditors that some loss-making trade should be accepted in anticipation of future profitability. They are not to be criticised if they give effect to such view."

(7) The principle that directors may properly take the view that the company should continue to trade at a loss has been accepted many times. Where, for instance, the directors properly take the view that they can trade out of difficulty or overcome the company's cashflow deficiency, they are not liable for wrongful trading. In *Re Ralls Builders Ltd (in liquidation)* [2016] EWHC 243 (Ch) Snowden J (as he then was) had this to say at [168]:

> "As an initial observation, it is important to note that the fact that a company is insolvent (on a balance sheet or cash-flow basis) and carries on trading does not mean that a director (even one with knowledge of that fact) will be liable for wrongful trading if the company fails to survive. Many companies show a balance-sheet deficit from time to time, but nevertheless have every real prospect of trading out of that position or otherwise recovering from the deficiency and thereby avoiding an insolvent liquidation: see e.g. *BNY Corporate Trustee Services Ltd v Eurosail-UK* [2013] Bus LR 715. Likewise, trading companies often suffer cashflow difficulties and fail to pay their creditors on time, but are able to overcome that cash-flow insolvency by (for example) selling an asset or raising external finance on the security of their assets."

(8) The decision to put a company into liquidation is a difficult one and the Court should be slow to encourage directors to put a company into liquidation or administration at the first sign of trouble. Park J described the dilemma which directors often face in *Re Continental* (above) at [281]:

> "An overall point which needs to be kept in mind throughout is that, whenever a company is in financial trouble and the directors have a difficult decision to make whether to close down and go into liquidation, or whether instead to trade on and hope to turn the corner, they can be in a real and unenviable dilemma. On the one hand, if they decide to trade on but things do not work out and the company, later rather than sooner, goes into liquidation, they may find themselves in the situation of the respondents in this case – being sued for wrongful trading. On the other hand, if the directors decide to close down immediately and cause the company to go into an early liquidation, although they are not at risk of being sued for wrongful trading, they are at risk of being criticised on other grounds. A decision to close down will almost certainly mean that the ensuing liquidation will be an

> insolvent one. Apart from anything else liquidations are expensive operations, and in addition debtors are commonly obstructive about paying their debts to a company which is in liquidation. Many creditors of the company from a time before the liquidation are likely to find that their debts do not get paid in full. They will complain bitterly that the directors shut down too soon; they will say that the directors ought to have had more courage and kept going. If they had done, so the complaining creditors will say, the company probably would have survived and all of its debts would have been paid. Ceasing to trade and liquidating too soon can be stigmatised as the cowards' way out."

(9) For this reason (if no other) the Court should be very careful to avoid hindsight in scrutinising directors' decisions. Lewison J counselled against hindsight in *Re Hawkes Hill* at [41] and [47]:

> "41. However, there is a crucial stage in the analysis that is missing. 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…47. Of course, it is easy with hindsight to conclude that mistakes were made. An insolvent liquidation will almost always result from one or more mistakes. But picking over the bones of a dead company in a courtroom is not always fair to those who struggled to keep going in the reasonable (but ultimately misplaced) hope that things would get better."

(10) Nevertheless, if directors appreciate that the company is insolvent but reach the conclusion that they can trade out of insolvency, there must be a rational basis for that conclusion. For example, in *Re Kudos Business Solutions Ltd* [2012] 2 BCLC 65, Ms Sarah Asplin QC (as she then was), sitting as a Deputy Judge of the High Court, held that a director was liable for wrongful trading on the following basis:

> "[60] As Lewison J pointed out in the *Hawkes Hill Publishing Co* case [2007] All ER (D) 422 (May), the real question is whether Mr Stevenson knew or ought to have concluded that there was no reasonable prospect of avoiding insolvent liquidation. In my judgment as a result of the matters referred to above, he ought to have known that there was no prospect. This is not a case of a director properly taking the view that it was in the interests of the company and its creditors that it should be allowed to trade out of its difficulties. Given the level of the pre-payments by DX creditors in comparison with the company's

> turnover and profit from other sources and the level of payments made to Mr Ramsden, Mr Stevenson and Mr Darcy, the only way in which insolvency was likely to be avoided was if there were a real prospect that the DX contracts would be fulfilled, something which I have found not to be the case.
>
> [61] As Lewison J put it the answer to the question of whether a director knew (or ought to have concluded) that there was no reasonable prospect that the company would avoid an insolvent liquidation depends on rational expectations of what the future might hold. Directors are not required to be clairvoyant. In this case, the way in which Mr Stevenson put it was that the company would not have been insolvent if Mr Ramsden had returned. However, given the state of the company's finances of which he ought to have been aware, the fact that I am unable to accept his evidence that he understood the DX contracts to be otherwise than with the company and my finding that there was nothing upon which Mr Stevenson could properly have based a belief that arrangements had been entered into in order to fulfil the DX contracts at the outset, in my judgment, the rational expectation on 17 March 2006 could not have been other than that there was no reasonable prospect of avoiding insolvent liquidation."

(11) Likewise, there must be something more than blind optimism or micawberism (meaning the unfounded and naïve belief that something will turn up in the future to conquer financial adversity) for a director to justify the company continuing to trade whilst insolvent. In *Roberts v Frohlich* [2011] 2 BCLC 625 Norris J found two directors liable for wrong trading. He described their state of mind at [112]:

> "What drove Mr Frohlich and Mr Spanner at this stage was wilfully blind optimism; the reckless belief that, provided they did not inquire too deeply into the figures, provided ODL did not let on to FCL that there was no funding and did not let on to HBoS that there was no fixed price contract, then something might turn up (if only because FCL and HBoS could be sucked into the development to such a degree that, in order to salvage something, they would crack under pressure and would 'share the pain'). But the hope that 'something might turn up' was on any objective view groundless and forlorn. Insolvent liquidation was all but inevitable."

467. A number of the authorities also provide guidance as to how the Court should approach the Knowledge Condition in factual circumstances which resemble the present case. In *Re Ralls Builders Ltd* (above) Snowden J found that the directors knew the company was insolvent by July 2010 and also the scale of the insolvency. He also found that at no relevant time after that date was there any basis for believing that the company had a realistic prospect of trading out of insolvency. He decided, therefore, that the real issue

was whether there was a real prospect of completing a deal with a new investor. After a detailed analysis of the evidence, he concluded that it should have been obvious by the end of August 2010 that there was no longer any reasonable prospect of the investor providing the necessary funds. He set out his conclusion at [216]:

> "I caution myself against the application of hindsight, and remind myself that I should not too readily criticise the directors' contemporaneous actions from the comfort of a courtroom. None the less the lack of any progress with Mr James and his repeated failures to produce the moneys that he indicated would be available during August ought in my judgment to have led the directors to conclude by the end of August 2010 that there was no longer any reasonable prospect of Mr James providing the necessary funding in time to save the company. Although Nicholas Ralls's evidence was that he was still being assured by Mr James that he was going to make an investment, and it seems that the directors still had some faith in Mr James, I think that this can only have been based on hope and optimism. By the end of August 2010 I do not think there was any longer a rational basis upon which to expect that he would provide the necessary money that the company urgently needed. In my view, a realistic assessment at the end of August 2010 should have led the directors to conclude that Mr James could not be relied upon, and that there was no reasonable prospect of the company avoiding an insolvent liquidation."

468. In *Rubin v Gunner* [2004] BCC 684 the fact pattern was similar. Etherton J (as he then was) held that although the company was insolvent by April 1998 the directors had a reasonable belief that a third party would provide sufficient funding to enable it to avoid going into insolvent liquidation before October 1998. However, he also held that by 15 October 1998 they should have concluded that there was no reasonable prospect of avoiding insolvent liquidation. He summarised his reasons at [101]:

> "The evidence shows that letters were written on October 27, 1998, by Mr Stables to Mr Scrope concerning the BIL facility and the discounting of the bonds, but, on the respondents' own evidence, these were no longer relied upon by the respondents as a likely source for saving RGO from insolvency. In any event, I conclude, on the basis of the facts and matters I have set out, that, by October 15, 1998, at the latest, neither the sale of Mr Stables' interest in ICC, nor raising of funds from the value of the bonds, nor the issue of the letters of credit, nor the payment of funds by FKF could have provided any reasonable basis for the respondents to conclude that RGO would avoid going into insolvent liquidation. That date was a month after the letters of September 15, 1998, written by Mr Kuhns and Mr Zecchin respectively, over seven weeks after BIL's letter of August 25, 1998, and over five weeks since Mr Stables wrote to Mr Scrope on September 7, 1998, giving details of the bonds. The failure of all those matters to come about ought, in the mind of any reasonable director in the

> position of the respondents, to have out-weighed whatever benefit of the doubt they had previously given Mr Stables by virtue of the funds he had provided for RGO and the production of the film, his charming and persuasive manner, and the desire that Mr Stables could be expected to have to save RGO in view of his substantial investment in it."

(1) "No reasonable prospect that the company would avoid going into insolvent liquidation or entering insolvent administration"

469. The first significant issue between the parties was how the Court should interpret and apply the Knowledge Condition and the extent to which the Court should interpret S.214(2)(b) in the light of the decision of the Supreme Court in *BTI 2014 LLC v Sequana* [2024] AC 211. I will have to consider that decision in greater detail in the context of the Misfeasance Claims. But all of the members of the Supreme Court considered the creditor duty against the backdrop that Parliament had granted a specific statutory power to order a director to contribute to a company's deficiency on insolvency.

470. Lord Reed PSC expressly considered how the modified duty to promote the success of the company (below) interacted with S.214 at [92] to [99] and identified a number of differences between the two before concluding that they were not incompatible. In relation to the point in time at which the relevant duties arise, he stated this at [94]:

> "First, the points in time at which the relevant duties arise differ considerably. The fiduciary duty applies at all times, but if it is modified by the rule in *West Mercia* from the point when the company is bordering on insolvency or an insolvent liquidation or administration is probable, as I have suggested, it therefore applies in that modified way before the time when section 214 might become relevant, ie when a reasonably diligent and competent director would know that there was no reasonable prospect of avoiding insolvency proceedings."

471. Lord Briggs JSC (with whom Lord Kitchin agreed) used the word "inevitable" on a number of occasions to describe the point in time at which S.214 is engaged: see [148], [165], [172] and [176]. He also contrasted the modified duty arising under the rule in *West Mercia Safetywear Ltd v Dodds* [1988] BCLC 250 and S.214 at [174]:

> "If the fact of insolvency always and immediately rendered the interests of creditors paramount, then directors would be likely to decide, or to be advised for their own protection, to cause the company immediately to cease trading, because that course would usually minimise the risk of further loss to creditors, whereas continued trading with a view to a return to solvency might increase that risk. It would in my view be wrong for the

> common law to impose that fetter on the directors' business judgment. Section 214 is framed in terms which point to a very different parliamentary intention, because it permits directors to cause a company to continue to trade whilst insolvent, for as long as they reasonably discern light at the end of the tunnel."

472. Lord Hodge DPSC used the expressions "near the onset of insolvency" and "irretrievably insolvent" at [231]. Lady Arden also used the expression "irretrievably insolvent" in the following passage at [321] to [323]:

> "321. Section 214 is finely calibrated. Section 214 does not impose any obligation in relation to creditors until the company's liquidation is inevitable. By implication, it rejects the idea that a liability as Draconian as that found in section 214 can be fixed at any earlier date. Section 214 therefore gives the directors the necessary space to continue running the business if that is appropriate to enable them to pursue the possibilities of a rescue. Furthermore, there is a defence for directors who can show they took all reasonable steps to prevent any loss to creditors.
>
> 322. Section 214 of the 1986 Act is very important in practice because directors are not liable for wrongful trading if having acted with due care they do not know of the threat to the company's insolvency or, where they know or have reason to believe that the company is threatened with insolvency, they have reasonable grounds for believing that the company will overcome its difficulties.
>
> 323. Section 214 provides that when a company becomes irretrievably insolvent the court may make the directors liable for the losses to creditors unless the directors, from the time they should have known that to be the position, took "every step with a view to minimising the potential loss to company's creditors" that they ought to have taken. Under this duty the directors know precisely when they incur liability and what they must do to avoid it. The steps which they must take may involve a corporate rescue or restructuring or an injection of equity funding ranking behind creditors, or both. The liability can only be enforced in administration or liquidation, but directors will know prior to that event that they may be liable under section 214 if the company does go into liquidation or administration. (When l refer to liquidation in this judgment in the context of wrongful trading, it should be read as including administration unless otherwise stated.)"

473. Mr Curl submitted that S.214(2)(b) was clear and that I should apply it without adding a gloss to it or reformulating the test so that a director is not liable for wrongful trading unless he or she knew or ought to have known that the company was irretrievably insolvent or that insolvency was inevitable. I agree that the Court must apply the statutory test and not substitute its own form of words. But in the light of *Sequana* I am satisfied that the bar is a very high one and that the Joint Liquidators have to demonstrate

that Mr Henningson and Mr Chandler knew or ought to have known that insolvent liquidation or administration was inevitable. I also add the following comments:

(1) S.214(3) is framed in negative terms and, in my judgment, this is no accident. Where a company is cashflow or balance sheet insolvent, the usual question for the Court is whether the directors honestly and reasonably believed that there was a prospect that they could trade out of insolvency and, given time, avoid liquidation or administration altogether.

(2) The critical question, therefore, is whether there was "light at the end of the tunnel" to use Lord Briggs' expression. As the authorities emphasise, directors are not liable for wrongful trading because the company was insolvent but only if they either knew or ought to have known that insolvent liquidation or administration could not be avoided and was now inevitable.

(3) Nevertheless, the Court must be satisfied that the prospect of trading out of insolvency and avoiding liquidation or administration was more than fanciful and a reasonable one. Again, this explains why the authorities emphasise that the directors' belief that they could trade out of insolvency must have been a rational one and that blind optimism or micawberism is not sufficient to defeat liability.

(4) S.214 must be applied as a whole. The effect of the section is not to impose an immediate liability on the directors for wrongful trading but a duty to take every step with a view to minimising the potential loss to the company's creditors: see S.214(3). Lord Hodge articulated this most clearly at [231]:

> "Further, it appears to me that in order to make sense of the power of the court to impose personal liability for wrongful trading in section 214 it is implicit that there is a point in time at or near the onset of insolvency at which directors are required to consider and in certain circumstances give priority to the interests of the company's creditors when they are in conflict with the interests of the company's shareholders. It is consistent with section 214 that where directors know or ought to know that the company has become irretrievably insolvent, they come under a duty to the company to give priority to the interests of its creditors as a body."

(5) It is important to approach the formulations in *Sequana* in this context. The members of the Supreme Court were comparing and contrasting a director's

> modified duty to promote the success of the company with S.214 and considering in general terms when S.214 is engaged. It is engaged when the directors have no rational basis for continuing to trade and they are only liable for continuing to trade if at that point they fail to take steps to minimise the loss to creditors.

(2) "At some time before the commencement of the winding up of the company"

474. A second and closely related issue is whether the Court could properly find that Mr Henningson and Mr Chandler were guilty of wrongful trading if the Knowledge Date was months or even years before the onset of liquidation. Mr Lightman and Ms Hilliard submitted that the Court had to be satisfied that at each Knowledge Date Mr Chandler or Mr Henningson knew or ought to have known that the Companies could not avoid going into liquidation or administration either by a specified date or within a very short period of time. They also submitted that it was not enough to find that they must have known that the Companies would go into liquidation or administration at some vague point in the future.

475. I do not accept that submission as a matter of law. S.214 does not impose a time limit or limitation period and for obvious reasons. Each case will depend on its own facts. It is fair to say that Lord Hodge used the expression "near the onset of insolvency" in *Sequana*. But it would create a real difficulty if the Court laid down a time limit or bracket even as a rule of thumb. In *Sequana* in the Court of Appeal David Richards LJ (as he then was) described the difficulty with a temporal test in discussing the modified duty. He stated this ([2019] Bus LR 2178 at [218] and [219]):

> "The precise moment at which a company becomes insolvent is often difficult to pinpoint. Insolvency may occur suddenly but equally the descent into insolvency may be more gradual. The qualified way in which judges have expressed the trigger (and I am among them; see *Burnden Holdings (UK) Ltd v Fielding* [2016] EWCA Civ 557, [2017] 1 WLR 39 at [18]) reflects that the directors may often not know, nor be expected to know, that the company is actually insolvent until sometime after it has occurred. For this reason, among others, a test falling short of established insolvency is justified. I consider there to be a problem with formulations in the second category, such as being on the verge of insolvency, because they suggest a temporal test. If the test is that insolvency is "imminent", or if similar words are used, it suggests that actual insolvency will be established within a very short time. That may well describe many situations in which the duty is triggered, but it does not or may not cover the situation where, although the company may be able to pay its debts as

> they fall due for some time, perhaps a considerable time, to come, insolvency is nonetheless likely to occur and decisions taken now may prejudice creditors when the likely insolvency occurs.

476. In the present case, it is common ground that the BHS Group was trading at a loss between Day One and 25 April 2016 and that there was a very large IND at each one of the Knowledge Dates. Moreover, the principal reason why the BHS Group was able to trade over that period was that it had the Dowry and property assets which it was able to realise. If the Court were satisfied that Mr Chandler and Mr Henningson fully appreciated that the Companies would enter insolvent administration once they had sold Oxford Street and the rest of their property portfolio but that they might keep going for a year or so in the meantime, I see no reason why they should escape liability for wrongful trading on the basis that they were unable to predict precisely when they would have to put the Companies into administration or wind them up.

477. On the other hand, the lapse of time between the Knowledge Dates and the decision to put the Companies into administration is an important evidential factor which the Court must weigh in the balance. It was an important part of the rationale for the sale to RAL that the Dowry, the release of debt and the property assets would give BHSGL breathing space to achieve a separation from Arcadia and turnaround the business. The BHSGL board expected to trade at a loss and to sustain the Companies by selling property assets for the short to medium term. The Joint Liquidators have to demonstrate, therefore, that at a very early or relatively early stage in this process Mr Chandler and Mr Henningson knew or ought to have known there was no light at the end of a very long tunnel which lasted over a year.

(3) The Notional Director

478. Mr Curl and Mr Perkins submitted that S.214(4)(a) imposes a minimum objective standard and not a subjective one and that if the general knowledge, skill and experience of the individual directors are inadequate for the task which they undertook, that is not sufficient to protect them: see *Re DKG Contractors Ltd* [1990] BCC 904 at 912B-C (Mr John Weeks QC). Mr Lightman accepted that S.214(4) imposed a "twofold objective standard" but he submitted that: "the director's actual abilities at the relevant time are assessed and then grafted on to the reasonably diligent person carrying out the same functions".

479. I am not certain that there was any real difference between the parties. But at various stages in his oral submissions Mr Lightman suggested that this was a subjective test or had a significant subjective element which turned on the skill and experience of the individual director. In case there is any doubt, I accept Mr Curl's submission on this point. In my judgment, S.214(4)(a) imposes a minimum objective standard of the general knowledge, skill and experience reasonably expected of a person carrying out Mr Chandler and Mr Henningson's functions. If the general knowledge, skill and experience of a director is higher than that of a reasonably diligent person, then they should be held to the higher standard. But if the general knowledge, skill and experience of a director is lower than that of the reasonably diligent person discharging the same functions, then it is no defence that they did not have that knowledge, skill or experience. This issue is of particular relevance to the Wrongful Trading Claim against Mr Chandler.

(4) Delegation

480. It is trite law that the duties and responsibilities of a director are personal and that a director cannot delegate them to a fellow director or a non-board employee. However, the board of directors may delegate management functions to each other or to employees who are not also directors: see *Re City Equitable Fire Insurance Co Ltd* 1925] Ch 407 at 426-7. In *Re Westmid Packing Services Ltd (No 3)* [1998] BCC 836 Lord Woolf drew a distinction between "a proper degree of delegation and division of responsibility" (which is permitted) and "a total abrogation of responsibility" (which is not). Examples of total abrogation of responsibility often involve total inactivity: see *Re Park House Properties Ltd* [1997] 2 BCLC 530 (Neuberger J) and *Lexi Holdings PLC v Luqman* [2007] EWHC 2652 (Ch) (Briggs J).

481. Even if directors delegate a number of functions either to individual directors or employees, it remains their duty to monitor and supervise the discharge of those functions: see *Re Barings plc (No 5)* [1995] BCLC 433 at B7 (Jonathan Parker J), *Re Continental* (above) at [399] and *Brumder v Motornet Services & Repairs Ltd* [2013] 1 WLR 2783 at [55] (Beatson LJ). In *Madoff Securities International Ltd (in liquidation) v Raven* [2014] Lloyd's Rep FC 95 Popplewell J (as he then was) explained the balance between the personal duties of a director and the reliance on other directors or employees at [191] to [194]:

> "191. It is legitimate, and often necessary, for there to be division and delegation of responsibility for particular aspects of the management of a company. Nevertheless each individual director owes inescapable personal responsibilities. He owes duties to the company to inform himself of the company's affairs and join with his fellow directors in supervising them. It is therefore a breach of duty for a director to allow himself to be dominated, bamboozled or manipulated by a dominant fellow director where such involves a total abrogation of this responsibility:...Similarly it is the duty of each director to form an independent judgment as to whether acceding to a shareholder's request is in the best interests of the company:…The duty to exercise independent judgment is now reflected in section 173 Companies Act 2006.
>
> 192. Moreover, it has long been established that a trustee who knowingly permits a co-trustee to commit a breach of trust is also in breach of trust. A director who has knowledge of his fellow director's misapplication of company property and stands idly by, taking no steps to prevent it, will thus not only breach the duty of reasonable care and skill (which is not fiduciary in character:…), but will himself be treated as party to the breach of fiduciary duty by his fellow director in respect of that misapplication by having authorised or permitted it:..
>
> 193. In fulfilling this personal fiduciary responsibility, a director is entitled to rely upon the judgment, information and advice of a fellow director whose integrity skill and competence he has no reason to suspect:... Moreover, corporate management often requires the exercise of judgement on which opinions may legitimately differ, and requires some give and take. A board of directors may reach a decision as to the commercial wisdom of a particular transaction by a majority. A minority director is not thereby in breach of his duty, or obliged to resign and to refuse to be party to the implementation of the decision. Part of his duty as a director acting in the interests of the company is to listen to the views of his fellow directors and to take account of them. He may legitimately defer to those views where he is persuaded that his fellow directors' views are advanced in what they perceive to be the best interests of the company, even if he is not himself persuaded. A director is not in breach of his core duty to act in what he considers in good faith to be the interests of a company merely because if left to himself he would do things differently.
>
> 194. Where a director fails to address his mind to the question whether a transaction is in the interests of the company, he is not thereby, and without more, liable for the consequences of the transaction. In such circumstances the court will ask whether an honest and intelligent man in the position of a director of the company concerned could, in the whole of the existing circumstances, have reasonably believed that the transaction was for the benefit of the company:…."

482. Mr Henningson was an executive director of the other Companies. But Ms Hilliard submitted that his functions were limited to introducing financial contacts and dealing with the international side of the business. I have to decide whether to accept that

evidence. But even if it was agreed that Mr Henningson's responsibilities would be limited to these two areas of expertise, it was not open to him to leave to his fellow directors those decisions which were required to be made by the BHSGL board (or the boards of the other companies). In *Re Landhurst Leasing plc* [1999] 1 BCLC 286 Hart J dealt with this issue at 346e-h:

> "Closely allied to the difficulty of distinguishing the responsibilities and conduct of the individual directors from that of the board as a whole is the question of the extent to which an individual director may trust his or her colleagues. The judgment of Romer J in *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407 is usually taken as authority for the general proposition that a director may rely on his co-directors to the extent that (a) the matter in question lies with their sphere of responsibility given the way in which the particular business is organised and (b) that there exist no grounds for suspicion that that reliance may be misplaced. But even where there are no reasons to think the reliance is misplaced, a director may still be in breach of duty if he leaves to others matters for which the board as a whole must take responsibility. *Re City Equitable Fire Insurance* vividly illustrates that rider to the general proposition, since Romer J there held all (save one) of the respondent directors to have been negligent in approving accounts for three successive years without having caused detailed lists of the company's investments first to be drawn up for their examination. In that case reliance had been placed on the chairman, Mr Bevan, of whom it was said '... he was one of the greatest authorities on finance in the City of London. In reputation and in credit he stood second to none. His advice on questions of investment was eagerly sought and readily followed' (at 445). Later events proved him in fact to have been 'daring and unprincipled scoundrel' (at 474). The case is not in that respect without its resonance here."

(5) Professional Advice

483. Ms Hilliard and Ms Earle submitted that where directors relied on the advice of reputable professionals, then they will prima facie have fulfilled their duties and in support of that proposition they cited *Green v Walkling* [2008] BCC 256 at [34] to [38] (Bernard Livesey QC), *Burnden Holdings (UK) Ltd v Fielding* [2019] EWHC 1566 (Ch) at [158] (Zacaroli J) and *Pro4Sport Ltd (in liquidation) v Adams* [2016] 1 BCLC 257 at [45] and [46] (HHJ Behrens). They also relied on *Ralls Builders* (above) at [176]:

> "In deciding what conclusion a director ought to have come to as regards the prospects for his company, the courts have been prepared to place some weight upon the evidence as to whether the directors took professional advice, and if so, what that advice was. So, for example, in *In re Hawkes Hill Publishing Co Ltd* [2007] BCC 937, para 45, Lewison J placed some

> weight upon the fact that the company's auditor did not advise the directors that the position was hopeless, but in fact told them that the business had a promising future, albeit that he also told them that they needed to find a capital injection or sell the business."

484. Mr Lightman relied on *Sharp v Blank* [2019] EWHC 3096 (Ch) where Sir Alastair Norris stated that in general a director who takes and acts upon expert advice "has gone a long way towards performing his duties with reasonable care": see [629]. He also stated that in testing whether a director has been negligent the question is not simply what the Court thinks it would be reasonable for the director to have done but what the evidence before the Court establishes were the courses open to reasonably competent directors: see [631].

485. I accept these submissions as a general proposition. However, the weight which the Court will attach to the professional advice which directors take will depend on the scope of the engagement, the instructions which the adviser was given, the knowledge which they had or the assumptions which they were asked to make, the advice which they gave (or did not give) and the extent to which the directors relied on that advice (or not). Where a professional adviser did not advise the board of directors of a company that they should put the group into administration or liquidation, the weight to be attributed to the absence of that advice will depend on a detailed assessment of the facts.

486. For example, in *Rubin v Gunner* (above) Etherton J attributed little weight to the advice which the directors took from a chartered accountant, who had been a former director and remained the secretary of the company, because his advice was based on the assumption that they would obtain the necessary funding from the third party: see [115] to [117]. On the other hand, in *Ralls Builders* Snowden J considered that the advice given by an insolvency practitioner was fatal to the wrongful trading claim at one Knowledge Date but not at the other because he advised the directors that they should give their efforts "a limited period to succeed": see [210] to [213].

(6) The S.214(3) Defence

487. The burden of proof is on Mr Henningson and Mr Chandler to show that they took every step with a view to minimising the potential loss to the Companies' creditors as they ought to have taken: see *Re Idessa (UK) Ltd (in liquidation)* [2012] BCC 315, [113] (Ms Lesley Anderson QC sitting as a Deputy High Court Judge) and *Brooks v Armstrong*

[2016] BCC 661 at [5] to [7] (Mr Registrar Jones). *Brooks v Armstrong* was successfully appealed on quantum: see [2017] BCC 99 (Mr David Foxton QC (as he then was) sitting as a Deputy High Court judge). But Mr Henningson and Mr Chandler did not challenge that proposition and Mr Lightman relied on *Brooks v Armstrong* himself.

488. S.214(3) imposes a high hurdle to overcome. It is not enough for the directors to prove that they continued trading with the intention of reducing the net deficit of the company. They must also show that it was designed to minimise the risk of loss to individual creditors. *Ralls Builders* provides authority for these propositions at [243] to [244]. It is also instructive to consider how Snowden applied S.214(3) on the facts of that case at [246]:

> "243. I do not, however, think that the defence under section 214(3) can be made out, as the directors suggest in this case, simply by showing that their actions after the relevant case were aimed at reducing the net deficit of the company.
>
> 244. The function and wording of the two subsections of section 214 are different. Section 214(1) provides for a financial remedy in effect to restore the financial position of the company to what it would have been had the wrongful trading not occurred. Section 214(1) is thus a provision that focuses on the consequences of wrongful trading for unsecured creditors as a whole. In contrast, section 214(3) focuses on the regime which the director puts in place to protect creditors after the relevant time, rather than the result. If a director can show that he took "very step... as he ought to have taken" after the relevant time "with a view" to minimising the potential loss to creditors, he avoids liability under section 214(1), even if he does not actually succeed in his objective.
>
> 245. Given the express wording of section 214(3) ("every step"), I think that it is plain that section 214(3) is intended to be a high hurdle for directors to surmount. I therefore think that it is right to construe section 214(3) strictly and to require a director who wishes to take advantage of the defence covered by that subsection to demonstrate not only that continued trading was intended to reduce the net deficiency of the company, but also that it was designed appropriately so as to minimise the risk of loss to individual creditors. Otherwise a director could make out the defence under section 214(3) by claiming that he traded on with a view to reducing the overall deficiency for creditors as a general body, irrespective of how he achieved that result as between creditors.
>
> 246 The facts of the instant case provide a very good example. Whether or not the directors succeeded in reducing the net deficiency of the company as regards its general body of unsecured creditors, they ought not, in my judgment, be entitled to an outright defence under section 214(3) on the facts of this case. That is because the manner in which they chose to continue trading meant that the bank and some of the existing unsecured

> creditors were paid at the expense of new creditors who ended up not being paid. Irrespective of whether or not that amounted to a breach of duty to the company, a preference under section 239, or fraudulent trading under section 213, that is not, in my judgment, a regime which the directors ought to have allowed to operate after the time at which they ought to have concluded that there was no reasonable prospect of avoiding insolvent liquidation. Their failure to take steps that they £ought to have taken" to protect the interests of new creditors prevents them from being able to rely upon section 214(3)."

489. Mr Curl and Mr Perkins submitted in their opening submissions that the only proper steps which Mr Chandler and Mr Henningson could reasonably have taken were to seek insolvency advice from lawyers and financial advisers shortly after each of the Knowledge Dates and to put the Companies into insolvency proceedings shortly after each of the Knowledge Dates. Mr Lightman challenged that submission as a matter of law. He placed particular reliance on *Armstrong v Brooks* (above) where Mr Registrar Jones set out a number of steps which the directors should have taken at [259]:

> "What "every step" which a reasonably diligent person with the knowledge of or attributed to the director will be must depend upon the facts. As a matter of guidance the following factors fall to be considered by directors and kept under review both generally and when considering specific financial decisions assuming the business remains sustainable: Ensuring accounting records are kept up to date with a budget and cash-flow forecast; preparing a business review and a plan dealing with future trading including steps that can be taken (for example cost cutting) to minimise loss; keeping creditors informed and reaching agreements to deal with debt and supply where possible; regularly monitoring the trading and financial position together with the business plan both informally and at board meetings; asking if loss is being minimised; ensuring adequate capitalisation; obtaining professional advice (legal and financial); and considering alternative insolvency remedies."

490. I agree that what "every step" will be must depend on the facts. I also accept that a director may be able to rely on S.214(3) even if he or she does not take insolvency advice or consider whether to put the company into insolvency proceedings when the three conditions in S.214(2) are satisfied. However, if the director does not take insolvency advice or consider whether insolvency proceedings should be taken immediately, it will be more difficult for the directors to demonstrate that they properly considered whether continuing to trade would reduce the deficiency and what the risks were to individual creditors (and, in the present case, the risk to unsecured creditors).

(7) Causation

491. In this section it is convenient for me to address the question of causation and how it applies both to wrongful trading under S.214 and to the general law of equitable compensation for breach of directors' duties. It is convenient for two reasons: first, because the Misfeasance Claims require the Court to apply the general law and, secondly, because I have to resolve the question whether the same test applies to both categories of claim and how to apply it to the facts of this case.

(i) Wrongful Trading

492. It was common ground between the parties that it was necessary for the Joint Liquidators to prove causation in the sense that there must be a causal connection between the relevant wrongful conduct and the losses suffered by the company. In *Continental Assurance* (above) Park J stated the general proposition at [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 appropriate 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."

493. In *Ralls Builders* Snowden J cited this passage and agreed that it is not sufficient for the Joint Liquidators to satisfy the "but for" test in the sense that but for continuing to trade, the company would not have suffered the relevant loss. He accepted the proposition that there must be a causal nexus and that the Court must begin by asking whether there was an increase or reduction in the net deficiency:

> "241 From these cases I therefore conclude that the correct approach to determining whether the directors should be required to make a contribution under section 214(1) is, as the directors contended, to ascertain whether the company suffered loss which was caused by the continuation of trading by the company after 31 August 2010 until the

> company went into administration on 13 October 2010, and that as a starting point this should be approached by asking whether there was an increase or reduction in the net deficiency of the company as regards unsecured creditors between the two dates.
>
> 242 I think that the authorities to which I have referred also make good the submission on behalf of the directors that there has to be some causal connection between the amount of any contribution and the continuation of trading. Losses that would have been incurred in any event as a consequence of a company going into a formal insolvency process should not be laid at the door of directors under section 214. That factor is of particular importance in this case as a result of the evidence (including the contemporaneous comments of Mr Tickell) of the particular difficulties in dealing with customers in the insolvency of any construction company."

494. Finally, Edwin Johnson J accepted in *Chandler v Wright* (above) that it was necessary for the Joint Liquidators to plead and prove causation. He stated this at [22](4):

> "If a claim under section 214 is to succeed the court must find that there has been a loss, and that there is a causal connection between the continuation of trading and the loss; see Snowden J (as he then was) in *In re Ralls Builders Ltd* [2016] Bus LR 555, paras 241–242. Put more simply, causation of loss must be demonstrated in a claim under section 214."

495. In both *Continental Assurance* and *Ralls Builders* the argument which the Court had to resolve was analogous to the issue which often arises in auditors' negligence claims which is whether the negligent conduct of the auditors in allowing the company to trade was the effective cause of the continued trading losses or whether the company would have suffered the losses in any event. This can be seen from the detailed analysis which Snowden J carried out in *Ralls Builders* before deciding on a balance of probabilities that the continuation of trading did not cause any material increase in the net deficiency: see [268]. Moreover, I am not satisfied that Edwin Johnson J had anything more detailed in mind in *Chandler v Wright* other than the general proposition accepted by Snowden J in *Ralls Builders*.

496. This issue does not arise in the present case because the experts have agreed that the Companies suffered substantial losses by continuing to trade after all of the Knowledge Dates. They have also agreed the IND from each Knowledge Date until the Companies went into administration. In the present case, I am faced with the prior question which is whether the conduct of Mr Chandler and Mr Henningson had any causative effect at all on the Companies continuing to trade. They did not provide a majority of the board

of directors and neither was a shareholder of RAL. They argue, therefore, that whatever they would or should have done, their conduct was not the cause of the losses which the Companies suffered as a consequence of continuing to trade.

497. In *Re Ralls Builders Ltd (No 2)* [2016] 1 WLR 5190 the principal issue was whether the liquidators were entitled to recover the increased costs which the company had unnecessarily incurred as a consequence of continuing to trade even though they were unable to prove an IND. After citing *Continental Assurance* (above) Snowden J expressed the following view at [31] and [32]:

> "31. I agree with Park J that section 214 requires something more than just a "but for" test of causation. A director's conduct is not wrongful for the purposes of section 214 simply because there is a relevant date at which he actually concluded or ought to have concluded that insolvent liquidation was inevitable. Nor is it wrongful per se for a director not to put the company into administration or liquidation once that relevant date has been reached. This much seems clear from the fact that the terms of section 214 do not simply require directors to cease trading and put the company into administration or liquidation as soon as the relevant date is reached; and it also appears from section 214(3), which provides that the court cannot make any order under section 214(1) even if the company does not go into administration or liquidation at the relevant date, provided that the directors take every step thereafter that they ought to take with a view to minimising the potential loss to creditors.
>
> 32. Accordingly, I cannot see that merely establishing that there was a relevant date beyond which the directors did not immediately place the company into administration in this case provides any basis for characterising their behaviour as "wrongful" for the purposes of section 214, or that of itself it provides a basis for ordering them to pay for the fees and costs subsequently incurred by the joint liquidators in investigating or pursuing litigation to establish when the relevant date occurred in this case. That is especially so since I did not accept the primary argument advanced by the joint liquidators as to when the relevant date occurred (i e 31 July 2010 as opposed to 31 August 2010)."

498. In *Biscoe v Milner* [2022] 1 BCLC 368 Meade J applied *Ralls Builders* and accepted that it was necessary to prove a causal connection between the director's conduct and the losses suffered but that it was not necessary to prove that this conduct was their sole cause. He stated the principles at [262] to [264]:

> "[262] There was one point of dispute in relation to wrongful trading. The Respondents argued that, for a claim in wrongful trading to succeed, it must be shown that the loss complained of would not have been suffered had the respondent complied with his or her duties. For this proposition

> they rely on *Lexi Holdings plc v Luqman (No 2)* [2008] EWHC 1639 (Ch), [2008] 2 BCLC 725. In that case, a company in administration made claims against two non-executive directors for breach of duty. It was alleged that their total inactivity had caused the company to suffer loss as a result of misappropriations by the managing director and transactions infringing ss 330 and 320 Companies Act 1985. The Court considered (at [28] et seq) whether the breaches of duty had caused loss, so that the causation requirement was established. [263] The Applicants say that *Lexi Holdings* was not a claim under s 214 of IA86. Accordingly, they argue that it is not relevant and does not establish that there is a causation requirement of the kind alleged in relation to a wrongful trading claim. [264] I agree with the Applicants on this point. Their position is consistent with the language of s 214(1) and with the decision in *Re Ralls Builders*, which requires a causative link between the continuation of trading and an increase in the deficiency to creditors. [265] In any event, on the facts as I find them below David Clarkson's behaviour was a key causative factor in causing the losses ELC suffered and the increase in loss to the creditors. His behaviour was not the sole cause because others, including in particular Lillie Milner, also played a major part. I mention this because it means that this point would go nowhere for David Clarkson unless it were to be submitted on his behalf that s 214 only bites where the failures of the director in question were the sole cause of loss. No authority was provided in support of such a proposition and in my view it would be obviously wrong."

(ii) Misfeasance

499. In general terms, the law distinguishes between two types of claim for breach of fiduciary or statutory duty against a director, a claim to recover trust assets (or their substitute) and a claim for compensation. This is a complex area of the law and it is unnecessary for me to analyse it in detail. For present purposes, it is sufficient to cite *Davies v Ford* [2023] EWCA Civ 167 in which Sir Launcelot Henderson provided a very helpful distillation of the principles before summarising the position at [131]:

> "Bribes and the taking of secret commissions are persistent scourges of commercial life which fully justify the most stringent remedies against agents who take them, but it by no means follows that the same principles should be translated, in their entirety, to the generality of cases where compensation is sought from an erring fiduciary. In such cases, as it seems to me, the right approach is that the principal may seek a substitutive remedy in respect of existing trust property which is misapplied by the agent, or an account of profits made by the agent, but that if the principal elects not to seek an account of profits, he should be confined to a reparative remedy compensating him for any actual loss caused by the breach of duty."

500. In that case David Holland QC (sitting as Deputy High Court Judge) dismissed the claim for compensation: see [2021] EWHC 2550 (Ch). The Court of Appeal upheld his decision and Sir Launcelot Henderson described his reasoning as "impeccable": see [132]. The issue of law which the judge had to decide was whether it was open to the director to advance a counter-factual case that if he had complied with his duties, the company would still have suffered no loss. The judge decided that the director was entitled to advance such a case and he stated this at [107] and [108]:

> "However, in cases of breach of trust or fiduciary duty which do not involve the misappropriation of existing trust property, such as (per David Richards LJ in the PATEL[4] case) breaches of duties of loyalty, and those which involve the trustee in making profits at the expense of the trust or the use of information or opportunities available to the trustee in that capacity or breaches of duties of skill and care, resulting in loss to the trust, equitable compensation will be assessed on the reparative basis. This requires the court to determine what would have happened but for the breach of fiduciary duty. The breaching trustee or fiduciary is entitled to argue the counterfactual. The court can be asked to consider how the principal or company would have acted if the trustee or fiduciary had not acted in breach of duty. The GWEMBE VALLEY[5] case is an example of this type of breach. This seems to me to be a principled approach as, with the latter type of breach, the court is not seeking to replace property or assets which already belonged to the trust or company and were wrongfully diverted away, but rather to assess sums or profit which the trust or company did not make because the opportunity to make the profit was wrongfully diverted away."

501. In *Lexi Holdings v Luqman* [2007] EWHC 2652 (above) Briggs J (as he then was) declined to grant summary judgment on the issue of causation against directors who had failed to take any action to prevent a fellow director from committing breaches of duty. He concluded that the critical question was one of causation (at [225]):

> "The real issue in relation to Monuza is the question of causation. It is not suggested that the Claimant can establish beyond the possibility of a real defence that she was aware of improper practices by her brother to an extent sufficient to affix her with liability as someone who authorised or permitted his misconduct. This is so, notwithstanding that she is alleged to have been the recipient of one of Shaid's misappropriations, to which I shall refer in more detail in due course. The case which Mr Marshall submits meets the summary judgment test is that her inactivity caused the losses suffered by the Claimant at the hands of Shaid because, had she performed her duty, she would have prevented them. That this is a

[4] See *McKenzie (Pharma Division) Ltd v Patel* [2020] BCC 316 (David Richards J).
[5] See *Gwembe Valley Development Ltd v Koshy (No 3)* [2004] 1 BCLC 131 (CA).

> necessary part of any case in which a company seeks to establish liability against one of its directors for culpable inactivity is sufficiently established in *Bishopsgate Investment Management Ltd v Maxwell (No.2)* (supra): see for example per Hoffmann LJ at page 1285 c-e. Causation is no less a part of a claim based upon breach of fiduciary duty by inactivity, as it is a part of a claim based upon breach of a common law duty of care, although aspects of the causation tests, such as the rules as to remoteness, may differ in detail: see per Chadwick J in the same case at [1993] BCLC 814, at 830d to 831g."

502. The claim also failed on causation when it came to trial: see *Lexi Holdings plc v Luqman (No 2)* [2008] 2 BCLC 725. This was the decision which Meade J cited in *Briscoe v Milner* (above) and the passage from Briggs J's judgment to which he was referring is at [28]:

> "The question whether a breach of duty constituted by total inactivity causes a particular loss raises issues of law, fact and hypothesis. The law serves to define the relevant duty, and the steps which that duty required these defendants to take is ascertained by the application of those legal principles to the relevant factual background including, importantly, the particular knowledge, experience and skill which each of Monuza and Zaurian actually had. Thereafter, the court must construct a necessarily hypothetical edifice so as to ascertain what would probably have happened if the relevant duties had been performed, so as to ascertain whether in that event the losses actually suffered by Lexi would, probably, not have been suffered. Subject to any relevant questions of remoteness and (in relation to a duty of care) contributory negligence, the difference between Lexi's actual financial position and its hypothetical financial position derived from an assumption that the relevant duties had been performed represents the measure of the loss caused by the defendants' breach of duty."

503. The company appealed and the Court of Appeal allowed the appeal: see [2009] 2 BCLC 1. For the appeal counsel accepted that the test applied by the judge was accurate subject to one qualification which Sir Andrew Morritt C addressed at [38]:

> "The qualification in relation to proof of causation counsel seeks to emphasise relates to the need to distinguish in relation to any particular link in the chain what, consistently with his duty as a director or auditor, a person should have done and what, in all probability, he would have done. He submits that if consistently with his duty to the company, whether as director or auditor, a person should have performed a particular action then he is liable for the consequences of not doing it. It is no answer to prove that he would have done something else for that would be to enable one breach of duty to be used to excuse another. If, hypothetically, a director should have done something then it is no answer to prove that in all probability he would have done something different. I would accept that

> submission in the abstract; it remains to be seen if it is susceptible of being applied in relation to any part of the judgment of Briggs J."

504. Sir Andrew Morritt then conducted a detailed analysis of the facts found by the judge and came to the conclusion that if the defendant directors had complied with their duties the company would have avoided the relevant losses. In particular, he concluded that if they had complied with their duties, they would have identified a fictitious loan account and notified the auditors who would have been unable to provide a "clean" audit certificate and the company would have been unable to obtain increased loan facilities: see [48] to [50]. He continued as follows:

> "[51] Had Zaurian performed her duty as a director of Lexi when and in the manner that she should have done it is probable that Lexi would have gone out of business before Monuza and Mr Davis were appointed as directors on 14 October 2003. But not having done so then and Lexi continuing in business, it was the duty of Zaurian to inform the incoming directors of what she knew or ought to have known, namely the convictions and the fact that the directors' loan account was fictitious. If Monuza had not known before that the directors' loan account was fictitious she ought to have known shortly after her appointment both from Zaurian and from performing her own duties as a director of Lexi. [52] At that stage there were four directors: Shaid, Zaurian, Monuza and Mr Davis. The three last-named directors had the ability to remove Shaid from his positions of managing director and ordinary director under art 13.2 of Lexi's Articles. Given both that power and the knowledge they are deemed to have had, proper performance of their duty must have involved the imposition of external controls on Shaid or his removal altogether so that, in either event, the subsequent misapplications would not have occurred."

505. *Lexi Holdings (No 2)* at first instance is authority for the proposition that in deciding whether a breach of duty by directors caused loss, the Court must consider what would have happened if the directors had complied with the relevant duties and ask the counter-factual question whether the company would have suffered the loss. *Lexi Holdings (No 2)* in the Court of Appeal is authority for the proposition that in answer to that question the Court must assume that the directors would have complied with all of their duties in the relevant counter-factual situation.

506. The decision is also instructive because it is a case in which the directors failed to act and stood by whilst another director misappropriated assets. Nevertheless, there are cases in which the company will be unable to prove any loss even if the director had complied with its duty. *Davies v Ford* (above) is one example. *Dickinson v NAL*

Realisations (Staffordshire) Ltd [2018] BCC 506 is another. In that case His Honour Judge David Cooke held as follows at [160] to [162]:

> "160. Having said that, it does not automatically follow that this breach of duty was causative of any loss to the company. Insofar as the company has suffered loss the immediate cause of it is that Mr Dickinson caused it to enter into transactions for which he required, but did not obtain, the authority of the board and/or shareholders and which as a consequence were not binding on it. The fact that other directors were disengaged did not cause him to do this, nor did it in any real sense enable him to do what he did. The directors did not stand by knowing of a misapplication of company funds, since they knew little or nothing of these transactions until after they had happened. They cannot thus be made liable as parties to any such misapplication. Further, to the extent they might previously have declined to be as disengaged as they were and sought to impose some system of control on Mr Dickinson, I have little doubt he would simply have engineered their removal so that he could continue to act in the unfettered way he considered was his right. Mr Barker did not put any positive case as to what they might have done that would have led to a different outcome. 161. I find therefore that Mr Williamson and Mrs Dickinson are not liable, notwithstanding the breach of duty by them. 162. In case the matter goes further, had I reached the opposite conclusion I would not have granted relief to either director under Companies Act 2006 s.1157. The circumstances in which a director is found to have been in breach of duty to act in the interests of the company but nevertheless to have acted honestly and reasonably must be rare. No dishonesty is alleged here, but it simply cannot be said that a director with an inescapable duty to join in the management of a company acted reasonably in abandoning any effective role at all in doing so."

507. Finally, in *Cohen v Selby* [2001] 1 BCLC 176 (a decision upon which Mr Lightman and his team placed particular reliance) Chadwick LJ expressed the view that there was a difference between the tests for causation for a misfeasance claim and a wrongful trading claim. He stated as follows at [20] and [21]:

> "20. The submission that the judge failed to appreciate the distinction between ss 212 and 214 of the Insolvency Act 1986 was not developed before us in any depth. It is enough, I think, that I should emphasise that the distinction exists and is of importance. Section 212 is the successor to s 333 of the Companies Act 1948. It, and its statutory predecessors, have been in the Companies Acts since 1862. It provides a summary procedure in a liquidation for obtaining a remedy against delinquent directors without the need for an action in the name of the company. It does not, of itself, create new rights and obligations: see *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407 at 507. The scope of the section was enlarged by the 1986 Act (or, more accurately, by the Insolvency Act 1985, in which s 212 was enacted as s 19) to include 'breach of other duty'; thereby removing

> the limitation imposed by the concept of misfeasance which had been identified by Evershed MR in *Re B Johnson & Co (Builders) Ltd* [1955] 2 All ER 775 at 781, [1955] Ch 634 at 648. There can be no doubt, now, that a liquidator can proceed under s 212 of the Insolvency Act 1986 where all that is alleged is common law negligence. But, if he does so, he must establish a cause of action at common law; that is to say he must show that the breach of duty of which he complains has caused loss or damage. In my view, when exercising the power, conferred by s 212(3)(b), to compel a delinquent director 'to contribute such sum to the company's assets by way of compensation in respect of the … breach of … other duty' in a case where the breach of duty complained of is a breach of the common law duty to take care, the court has to be satisfied that the negligence has caused a loss in respect of which compensation can be awarded. The position, in this respect, is the same as it would be if the company had brought an action in its own name. In so far as the judge suggested, in the passage of his judgment to which I have already referred, that the position was otherwise, I have no doubt that he was wrong. But the point is not, I think, material in the present case because, as the judge thought, causation had been established.
>
> 21. Section 214 of the Insolvency Act 1986 ('Wrongful trading') is new. It was first enacted as s 15 of the Insolvency Act 1985. It supplements the provisions in earlier legislation (s 332 of the Companies Act 1948 and its predecessors) as to fraudulent trading. Those provisions now appear in s 213 of the 1986 Act. But s 214 applies only where, at some time before the insolvent liquidation, a person knew or ought to have concluded that there was no reasonable prospect that that fate could be avoided. It has no application to the present case. Its only relevance, in the present context, is that sub-s (4) provides a useful exposition of the standard of care required of a director in relation to the facts which he ought to have known, the conclusions which he ought to have reached and the steps which he ought to have taken. I am content to assume (without so deciding) that, on an application under s 214 of the Insolvency Act 1986, it may not be necessary to establish a causal link between the wrongful trading and any particular loss. But this is not an application under s 214 of the Act; and, on the facts alleged, it could not have been brought under that section."

(iii) Conclusions

508. For the purpose of both the Misfeasance Trading Claim and the Individual Misfeasance Claims I apply *Lexi Holdings (No 2)* and ask myself the question whether the Company would have continued trading and suffered the individual losses if Mr Henningson and Mr Chandler had not committed any breaches of duty which I may have found against them. This is a particularly important question in the context of the Misfeasance Trading Claim where the Liquidators allege that if they had complied with their duties, the Companies would have gone into administration or insolvent liquidation.

509. For the purpose of the Wrongful Trading Claim I agree with Meade J in *Briscoe v Milner* that it is not necessary for the Joint Liquidators to prove that the conduct of Mr Henningson and Mr Chandler was the sole or effective cause of any individual losses which the Companies suffered and I consider that the assumption made by Chadwick LJ in *Cohen v Selby* is correct. However, in my judgment it remains necessary for the Joint Liquidators to establish that the conduct of Mr Henningson and Mr Chandler caused the Companies to continue trading and that they would have ceased trading and gone into administration if Mr Henningson and Mr Chandler had complied with their duties.

(8) Discretion

510. S.214(1) confers a discretion upon the Court to declare that a director is liable to make such contribution (if any) to the company's assets as it considers proper. In *Commissioners for HM Revenue & Customs v Holland* [2010] 1 WLR 2793 at [124] Lord Walker stated that the discretion is not a wide one but enables the Court to adjust the remedy to the circumstances of the particular case: see [124]. He also referred to *West Mercia* (above) where Dillon LJ illustrated the scope of the discretion under section 333 of the Companies Act 1948 at 253c-e:

> "The question then remains: what financial relief ought to be granted against him? Prima facie the relief to be granted where money of the company has been misapplied by a director for his own ends is an order that he repay that money with interest, as in *Re Washington Diamond Mining Co*. The section in question, however, sec. 333 of the Companies Act 1948, provides that the court may order the delinquent director to repay or restore the money, with interest at such rate as the court thinks fit, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication as the court thinks fit. The court has a discretion over the matter of relief, and it is permissible for the delinquent director to submit that the wind should be tempered because, for instance, full repayment would produce a windfall to third parties, or, alternatively, because it would involve money going round in a circle or passing through the hands of someone else whose position is equally tainted."

(i) Quantum

511. It was common ground that the maximum amount which the Court could declare directors liable to contribute under S.214(1) was the IND at the relevant Knowledge

Date or Dates. In *Continental Assurance* Park J explained the reasoning for the quantification of the maximum in this way at [296] and [297]:

> "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 l0C 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."

512. In *Ralls Builders* (above) Snowden J took this as his starting point: see [241]. In *Brooks v Armstrong* (above) David Foxton QC also considered this to be the starting point unless the IND cannot be calculated as a result of the directors' failure to keep proper books and records: see [63] to [74]. In the present case, there is no dispute that the Companies' continued trading led to an IND at each Knowledge Date and Ms Hilliard and Mr Lightman did not attempt to persuade me that this was not the correct starting point. They argued instead that reductions should be made to reflect a number of discretionary factors.

(ii) Several or joint and several

513. The Court has a discretion whether to impose joint and several liability or several liability. In *Re Continental Assurance* Park J stated that if he had been imposing liability at all, he would have imposed it on a several basis for the following reasons at [388] and [389]:

> "[388] On the facts of this case, if I was imposing any liability at all, I would not be willing to exercise my discretion to impose it on a joint and several basis. I think that that would be inappropriate given the composition of the Continental board, the differing backgrounds of its members, and the ways (in all cases commendable, but varying) in which they sought to react to the financial crisis which suddenly confronted them in the middle of 1991. I think that it would be all the more inappropriate where the liquidators' real complaints are ones of accounting inadequacies, and the liquidators have not brought any claims in respect of them against the auditors and have settled the claim which they did bring against the finance director, Mr Davis. If I had agreed with the liquidators' case I would have considered that by far the greater part of the increase in net deficiency flowed from accounting inadequacies (as the liquidators would have it) on the part of MacIntyre Hudson and Mr Davis, and I would have required the continuing respondents to contribute, on the basis of several liability, only small proportions of such amount of increase in net deficiency as the liquidators had succeeded in establishing and in showing to have sufficient connection with the wrongful decision of the directors that Continental should carry on trading.
>
> [389] That would have been my view in relation to Mr Burrows as well as in relation to the non-executive directors. Mr Burrows was the managing director and an executive director, but he was a businessman with particular knowledge and experience of insurance. He had no more specialist knowledge of accountancy and of the particular complexities of accounting for an insurance company than was possessed by the non-executive directors. Perhaps if the question had arisen I would have felt it appropriate to attribute to him a slightly larger proportion of the increase in net deficiency than I would have attributed to the non-executive directors, taking that view because of the greater responsibility which he ought to bear simply by virtue of having been the managing director. But the increase in liability for him would not in my view have been of any major size, perhaps no more than an extra five percentage points."

(iii) Exercise

514. This passage also suggests that where the directors have varying levels of responsibility and culpability for the IND, the Court should impose several liability and assess the culpability of each director and the causative potency of their conduct separately in order. These remarks were necessarily *obiter* and I was not taken to a decision in which the Court had applied these principles. Mr Lightman cited *Nicholson v Fielding*

(unreported, Deputy Registrar Prentis, 15 September 2017) where the judge applied *Continental Assurance* (above) but also dismissed the application.

515. In applying S.214 I gain some assistance by comparing and contrasting the approach which the Court takes in relation to claims for contribution under section 1(1) of the Civil Liability (Contribution) Act 1978. Section 2(1) provides that the amount of a person's contribution shall be "such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question". The editors of Jackson & Powell on Professional Liability 30th ed (2021) summarise the principles which the Court will apply at 4—018 (footnotes removed):

> "Where the client suffers loss or injury as a result of the negligence of two or more of his professional advisers, the apportionment of liability between them is governed by the same general principles as apply to any other wrongdoers. The court should have regard both to the culpability of the various parties and to the extent to which each party's conduct "caused" the damage in question. This includes consideration of each party's "moral responsibility in the sense of culpability and organisational responsibility in the sense of where in the hierarchy of decision-making and in the organisational structure leading to the damage the contributing party was located". The "just and equitable" criterion is wide enough to enable the apportionment take account of blameworthiness as well as causative potency, and even, to an extent, of non-causative matters, but the financial means of the party from whom contribution is sought have held not to be relevant. However, the main factor to consider is each party's responsibility for the damage."

516. There is, however, a limit to this analogy. In *Brian Warwick Partnership PLC v HOK International Ltd* [2006] PNLR 5 Arden LJ explained that Parliament had given clear guidance in relation to the Contribution Act 1978. She stated this at [45]:

> "Parliament has particularly directed the courts when exercising their powers under s.2(1) of the 1978 Act to have regard to the extent of the defendant's responsibility for the damage in question. Section 2(1) is not an unstructured discretion. It is a semi-structured discretion which directs the court to attach most weight to the defendant's responsibility for the damage in question. If the defendant's action did not cause the damage in question, it cannot, as such, form part of the responsibility for the damage. It may, quite separately, be relevant to the court's evaluation of the blameworthiness component of responsibility. Putting that possibility aside, and while the point has not been fully argued, I would provisionally express the view that, if non-causative material is brought into account, there is only a limited role it can play. It must be given less weight than the material showing the defendant's responsibility for the act in question.

> Moreover, if any non-causative material is brought into account, the resulting order for contribution must, nonetheless, be just and equitable within s.2(1) . Therefore, there will have to be some sufficient relationship between it and the damage in question."

517. Counsel were not able to draw my attention to any authority which shows how the Court should weigh up the relevant factors or whether the Court is entitled to take into account means or insurance cover. In my judgment, I am entitled to take into account all factors and to give them such weight as I consider proper. S.214 does not involve the same "semi-structured" discretion as the 1978 Act. Nor does it direct the Court to attach most weight to a particular factor or factors. In particular, it does not direct the Court to attach most weight to causative factors or non-causative factors such as means.

518. In deciding whether to impose liability on a joint and several basis or on a several basis and to declare the amount of the contribution, the Court is entitled to take into account the culpability of the director, the extent to which the director's conduct caused the IND, the organisational responsibility of the director, their place in the hierarchy of decision-making and non-causative matters such as means and the scope of their insurance cover. The weight which I give to each factor is also a matter of discretion. However, I return to the starting point. The discretion is not intended to be a wide one but one which enables the Court to mould the remedy to the facts of the particular case.

O. Misfeasance

519. Section 212 of the IA 1986 ("**S.212**") provides a procedure for the recovery of property or compensation by a liquidator against an officer of a company. It is headed "Summary remedy against delinquent directors, liquidators etc" and it provides as follows:

> "(1) This section applies if in the course of the winding up of a company it appears that a person who— (a) is or has been an officer of the company, (b) has acted as liquidator or administrative receiver of the company, or (c) not being a person falling within paragraph (a) or (b), is or has been concerned, or has taken part, in the promotion, formation or management of the company, has misapplied or retained, or become accountable for, any money or other property of the company, or been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company.
>
> (2) The reference in subsection (1) to any misfeasance or breach of any fiduciary or other duty in relation to the company includes, in the case of a person who has acted as liquidator of the company, any misfeasance or

> breach of any fiduciary or other duty in connection with the carrying out of his functions as liquidator of the company.
>
> (3) The court may, on the application of the official receiver or the liquidator, or of any creditor or contributory, examine into the conduct of the person falling within subsection (1) and compel him— (a) to repay, restore or account for the money or property or any part of it, with interest at such rate as the court thinks just, or (b) to contribute such sum to the company's assets by way of compensation in respect of the misfeasance or breach of fiduciary or other duty as the court thinks just."

520. It was common ground that S.212 does not create a new cause of action (unlike S.214) or create new substantive rights but it permits a liquidator to enforce an existing cause of action which the company claims to have against a director. It was also common ground that a liquidator is entitled to bring claims against directors for breach of their duties under the CA 2006 on behalf of a company and without bringing a separate claim: see, e.g., *Parkinson Engineering Services plc (in liquidation) v Swan* [2010] 1 BCLC 163 at [12] and [13] (Lloyd LJ). It is necessary, therefore, for me to consider the scope of those duties.

(1) Duty to act within powers

521. Section 171 of the CA 2006 ("**S.171**") is headed "Duty to act within powers" and it provides as follows:

> "A director of a company must– (a) act in accordance with the company's constitution, and (b) only exercise powers for the purposes for which they are conferred."

522. The Joint Liquidators relied on both limbs of S.171. Mr Curl and Mr Perkins submitted that it was a breach of S.171(a) to act without the authority of the board or a majority of shareholders: see *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* [1986] Ch 246 at 286H to 287A (Slade LJ) and *Stimpson v Southern Private Landlords Association* [2010] BCC 387 at [33] (HHJ Pelling QC). I am not convinced that the dicta in either of those cases go so far as to lay down a rigid rule but I am prepared to accept that a director who enters into a transaction knowing that it has not been authorised by the board acts in breach of S.171(a) (always assuming that the transaction is not ratified). But in my judgment, the failure to call a meeting or to minute a decision properly is not by itself a breach of S.171(a).

523. The Joint Liquidators also relied on S.171(b) and the "proper purposes" rule. Mr Curl and Mr Perkins submitted that Mr Chandler and Mr Henningson acted either for their own private purposes or for the purposes of RAL and in so doing they acted in breach of S.171(b). In *Eclairs Group Ltd v JKX Oil & Gas plc* [2016] BCLC 1 Lord Sumption JSC described the origin of the rule and stressed that it is not concerned with excess of power but with abuse of power, i.e., performing acts which fall within the scope of the power but for an improper reason: see [14] and [15]. The test is, therefore, a subjective one. He continued at [16]:

> "A company director differs from an express trustee in having no title to the company's assets. But he is unquestionably a fiduciary and has always been treated as a trustee for the company of his powers. Their exercise is limited to the purpose for which they were conferred. One of the commonest applications of the principle in company law is to prevent the use of the directors' powers for the purpose of influencing the outcome of a general meeting. This is not only an abuse of a power for a collateral purpose. It also offends the constitutional distribution of powers between the different organs of the company, because it involves the use of the board's powers to control or influence a decision which the company's constitution assigns to the general body of shareholders. Thus in *Fraser v Whalley* (1864) 2 H & M 10 the directors of a statutory railway company were restrained from exercising a power to issue shares for the purpose of defeating a shareholders' resolution for their removal. In *Cannon v Trask* (1875) LR 20 Eq 669, which concerned the directors' powers to fix a time for the general meeting, Sir James Bacon V-C held that it was improper to fix a general meeting at a time when hostile shareholders were known to be unable to attend. In *Anglo-Universal Bank v Baragnon* (1881) 45 LT 362 Sir George Jessel MR held that if it had been proved that the power to make calls was being exercised for the purpose of disqualifying hostile shareholders at a general meeting, that would be an improper exercise of the directors' powers. In *Hogg v Cramphorn Ltd* [1966] 3 All ER 420, [1967] 1 Ch 254 Buckley J held that the directors' powers to issue shares could not properly be exercised for the purpose of defeating an unwelcome takeover bid, even if the board was genuinely convinced, as the current management of a company commonly is, that the continuance of its own stewardship was in the company's interest. The company's interest was an additional and not an alternative test for the propriety of a board resolution."

524. Where a director has a number of different purposes, the conventional approach is to ask what the primary or dominant purpose of the act or omission was: see, e.g., *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 421. However in *Eclairs* Lord Sumption identified the practical difficultly involved in "a forensic enquiry into the relative intensity of the directors' feelings about the various considerations that influenced

them": see [20]. He expressed the view (with which Lord Hodge concurred) that directors commit a breach of the proper purposes rule if they permit themselves to be influenced by any improper purpose and that the question whether the decision would have been made is better addressed at the causation stage. He stated this at [21]:

> "The fundamental point, however, is one of principle. The statutory duty of the directors is to exercise their powers "only" for the purposes for which they are conferred. That duty is broken if they allow themselves to be influence by any improper purpose. If equity nevertheless allows the decision to stand in some cases, it is not because it condones a minor improper purpose where it would condemn a major one. It is because the law distinguishes between some consequences of a breach of duty and others. The only rational basis for such a distinction is that some improprieties may not have resulted in an injustice to the interests which equity seeks to protect. Here, we are necessarily in the realm of causation. The question is which considerations led the directors to act as they did. In Hindle v John Cotton Ltd (1919) 56 Sc LR 625 , 631, Lord Shaw referred to the "moving cause" of the decision, a phrase taken up by Latham CJ in Mills v Mills , supra , at p 165. But this cryptic formula does not help much in a case where the board was concurrently moved by multiple causes, some proper and some improper. One has to focus on the improper purpose and ask whether the decision would have been made if the directors had not been moved by it. If the answer is that without the improper purpose(s) the decision impugned would never have been made, then it would be irrational to allow it to stand simply because the directors had other, proper considerations in mind as well, to which perhaps they attached greater importance."

525. Mr Curl and Perkins cited a number examples to show that the ambit of the proper purposes rule extended beyond the classic situations described by Lord Sumption: see *Bishopsgate Management Ltd v Maxwell Ltd v Maxwell (No 2)* [1993] BCC 120 at 139H to 140C (giving away company assets to another company for no consideration), *MacPherson v European Strategic Bureau Ltd* [2000] 2 BCLC 683 at [48] and [49] (payments for consultancy services by insolvent company without proper provision for creditors), *Re HLC Environmental Projects Ltd* [2014] BCC 337 at [116] and [124] (payments to a director and associated company) and *Re McCarthy Surfacing Ltd* [2009] 1 BCLC 622 at [73] to [77] (bonus arrangements).

526. Ms Hilliard submitted that the test was objective and relied on *Extrasure Travel Insurance Ltd v Scattergood* [2003] 1 BCLC 598 in which Mr Jonathan Crow (sitting as a Deputy Judge of the High Court) stated as follows at [92] and [93]:

> "[92] The law relating to proper purposes is clear, and was not in issue. It is unnecessary for a claimant to prove that a director was dishonest, or that he knew he was pursuing a collateral purpose. In that sense, the test is an objective one. It was suggested by the parties that the court must apply a three-part test, but it may be more convenient to add a fourth stage. The court must: 92.1. Identify the power whose exercise is in question; 92.2. Identify the proper purpose for which that power was delegated to the directors; 92.3. Identify the substantial purpose for which the power was in fact exercised; and 92.4. Decide whether that purpose was proper. [93] Finally, it is worth noting that the third stage involves a question of fact. It turns on the actual motives of the directors at the time: *Re a company, ex p Glossop* [1988] BCLC 570 at 577."

527. In my judgment, there was no real difference between the parties. The test is objective in the sense that it is unnecessary to demonstrate that the director knew or believed that they were acting for a collateral or improper purpose. But it is subjective in the sense that the Court is required to examine the purpose or motive for which the power was exercised and decide whether it was a proper purpose. Moreover, in *Re Cardiff City Football Club (Holdings) Ltd* [2023] 1 BCLC 133 Adam Johnson J applied Lord Sumption's test in *Eclairs* (above) at [21] even though the view which he expressed was strictly an *obiter dictum*.

528. The subjective and objective elements of the test are well illustrated by the facts of *Extrasure* itself. In that case the directors of E Ltd transferred £200,000 to C Ltd because it needed to pay a debt urgently. Both companies were subsidiaries of IH Ltd and the payment was routed through the parent. Jonathan Crow summarised the facts at [2]:

> "In August 1999, both the first and second defendants (Mr Scattergood and Mr Beauclair respectively) were directors of Extrasure. It is common ground that on 17 August 1999 they both signed a fax from Extrasure to its bank, Royal Bank of Scotland plc (RBS), instructing the bank to transfer £200,000 from the company's 'IBA a/c No 20833257' to an account in the name of Inbro Holdings Ltd (Inbro Holdings). The fax also instructed RBS to convert this sum into US dollars, and to transfer the resulting sum to an account in the name of Inbro Citygate Insurance Brokers Ltd (Citygate). Finally, the fax instructed RBS to pay 'the transfer' from Citygate's account to an American company called United Capitol Insurance Corporation. No separate 'transfer' has been put in evidence, but it would appear to have referred to the US dollar equivalent of about £114,000."

529. The judge found that the directors did not believe that they were paying a debt due to IH but made the transfer because C Ltd needed the money: see [107]. He also rejected their evidence that they believed that the transfer was in E Ltd's interests on the basis

that it was calculated to preserve the group and to protect E Ltd itself: see [137]. In deciding whether the payment was made for a proper purpose, he applied the four stage test which I have set out (above) at [140] to [143]:

> "[140] Applying the four-part test which I have set out above, I can answer this question equally briefly: 140.1. The power in question was the directors' ability to deal with the assets of Extrasure in the course of trading. 140.2. The purpose for which that power was conferred on the directors was broadly to protect Extrasure's survival and to promote its commercial interests in accordance with the objects set out in its memorandum. 140.3. The defendants' substantial purpose in making the transfer was, as I have found, to enable Citygate to meet its liabilities, not to preserve the survival of Extrasure. 140.4. As such, the purpose for which the transfer was made was plainly an improper one.
>
> [141] The parties made written submissions after trial by reference to the objects clause in Extrasure's memorandum of association (which was not available at trial). The defendants drew attention to clause 3(F) of the memorandum, which enabled Extrasure to provide guarantees of the obligations of its parent or fellow-subsidiary companies, whether or not it received any consideration or advantage therefor. However, providing a guarantee is not the same as simply paying money to a fellow subsidiary. Furthermore, clause 3(Q) appears more nearly to fit the circumstances of this case: and under that provision a loan could only be made if it was calculated to benefit the company.
>
> [142] In any event, as the claimants correctly observed, the fact that a transaction might fall within the terms of a company's memorandum of association only means that it is intra vires the company. It does not mean that it necessarily represents a proper exercise of the directors' powers.
>
> [143] Finally, given that the third stage in the four-part test set out above is a question of fact, and given also my factual findings in relation to issues (1) and (2) above, I do not consider that the defendants can credibly suggest that they considered the transfer was made for the proper purposes of Extrasure's business."

530. By contrast, the issue between Mr Curl and Mr Lightman was whether it was open to the Joint Liquidators to advance a case that Mr Chandler acted in breach of S.171(b) when he was not a director or shareholder of RAL although he was an employee of RAL from March 2016. The Joint Liquidators alleged that Mr Chandler "acted throughout for the purposes of RAL" and Mr Chandler served a request for further information in relation to that allegation. The response was as follows:

> "RAL's ownership of the BHS Group served only to promote the interest of RAL and those associated with it or who benefited from its patronage (or that of Mr Chappell as the majority owner and controlling mind of

> RAL). RAL benefited significantly from its ownership of the BHS Group and none of the Companies benefited in any way.
>
> In the premises, and as a minimum, it is to be inferred from the circumstances and the inherent commercial probabilities that Mr Chandler had an interest in benefiting RAL, for otherwise he would not have acted in the way he did as particularised in the Points of Claim. Mr Chandler's conduct is only explicable on the basis that he held such an interest. Put another way, any director without such an interest would not have acted in the way Mr Chandler did; most obviously, such a director would have reached the conclusion on 17 April 2015, or alternatively by a different Cessation Date (as defined in Paragraph 308 of the Points of Claim and some subsequent date prior to 25 April 2016 (as set out at Response 119)), that the Companies had no reasonable prospect of avoiding insolvent liquidation.
>
> Further, Mr Chandler owed his position as a director of the Companies to RAL and/or Mr Chappell and, as such, had a personal interest in furthering the interests of RAL and/or Mr Chappell."

531. The Joint Liquidators also relied on the fact that Mr Chandler was the sole director of Tamed Productions and the payments made to that company. Mr Lightman submitted in opening that Mr Chandler did not at any time have an interest in acting for the purposes of RAL and that he did not do so. He also argued that the Joint Liquidators' case involved a "warped view of the reality" and that it was circular. Mr Lightman did not go so far as to submit that it was not possible as a matter of law for Mr Chandler to commit a breach of S.171(b) if he had no interest in RAL. But he argued that there was no factual foundation for the allegation.

532. In case there is any doubt, I see no reason why a director should not be held to have committed a breach of S.171(b) if he or she acts for the purpose of benefitting a third party at the expense of a company even though the director receives no personal benefit and acts out of friendship or to please the third party or out of a mistaken sense of loyalty. In *Re Glossop* [1988] 1 WLR 1068 (which Jonathan Crow cited in *Extrasure*) Harman J made the point that a director may be liable for breach of S.171(b) even if he had no personal interest in the outcome. He stated this at 1076G-1077C:

> "It is, in my judgment, vital to remember that actions of boards of directors cannot simply be justified by invoking the incantation "a decision taken bona fide in the interests of the company." The decision of the Privy Council in *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 clearly establishes that a decision can be attacked in the courts and upset notwithstanding (a) that directors were not influenced by any "corrupt" motive, by which I mean any motive of personal gain as by obtaining

> increased remuneration or retaining office, and (b) that directors honestly believed that their decision was in the best interests of the company as they saw its interests. Lord Wilberforce's observations delivering the advice of the board at p. 831E acquits the directors of corrupt motive; at p. 832 he asserts the primacy of the board's judgment; but he goes on, at p. 835, to assert that there remains a test, applicable to all exercises of power given for fiduciary purposes, that the power was not to be exercised for any "bye-motives.
>
> If it were to be proved that directors resolved to exercise their powers to recommend dividends to a general meeting, and thereby prevent the company in general meeting declaring any dividend greater than recommended, with intent to keep moneys in the company so as to build a larger company in the future and without regard to the right of members to have profits distributed so far as was commercially possible, I am of opinion that the directors' decision would be open to challenge. This is an application, in a sense, of the principle affirmed in so many local government cases and usually called "the *Wednesbury* principle:" *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223. If it were proved that the board of directors had habitually so exercised its powers that could justify the making of an order for winding up on the just and equitable ground."

(2) Duty to promote the success of the company

533. Section 172 ("**S.172**") is headed "Duty to promote the success of the company" and it provides as follows:

> "(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to– (a) the likely consequences of any decision in the long term, (b) the interests of the company's employees, (c) the need to foster the company's business relationships with suppliers, customers and others, (d) the impact of the company's operations on the community and the environment, (e) the desirability of the company maintaining a reputation for high standards of business conduct, and (f) the need to act fairly as between members of the company.
>
> (2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.
>
> (3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company."

534. Mr Lightman and Ms Hilliard both submitted (and I accept) that the test is a subjective one and that it required the Joint Liquidators to prove that Mr Henningson and Mr Chandler did not act in good faith. In *Regentcrest plc v Cohen* [2001] 2 BCLC 80 Jonathan Parker J formulated the test in this way (at [80]):

> "The duty imposed on directors to act bona fide in the interests of the company is a subjective one (see Palmer's Company Law para 8.508). The question is not whether, viewed objectively by the court, the particular act or omission which is challenged was in fact in the interests of the company; still less is the question whether the court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind. No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the court that he honestly believed it to be in the company's interest; but that does not detract from the subjective nature of the test."

535. In *Re Coroin Ltd* [2012] EWHC 2343 (Ch) David Richards J cited this passage in *Regentcrest* and agreed that it was equally applicable to the duty under S.172. There are, however, exceptions to the rule. The Court may apply an objective test where the director did not consider whether their act or omission was in the interests of the company. Moreover, this is particularly relevant where the individual is a director of a number of companies. In *Charterbridge Corporation Ltd v Lloyds Bank Ltd* [1970] Ch 62 Pennycuick J made this point at 74E-F (although it was an *obiter dictum*):

> "Each company in the group is a separate legal entity and the directors of a particular company are not entitled to sacrifice the interest of that company. This becomes apparent when one considers the case where the particular company has separate creditors. The proper test, I think, in the absence of actual separate consideration, must be whether an intelligent and honest man in the position of a director of the company concerned, could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company. If that is the proper test, I am satisfied that the answer here is in the affirmative."

536. Jonathan Crow recognised this exception in *Extrasure* (above) at [138] and Mr John Randall QC (sitting as a Deputy Judge of the High Court) followed both decisions in *Re HLC Environmental Projects Ltd* (above) at [92](b). He also recognised a second exception to the rule or, perhaps better, an extension to the exception identified in *Charterbridge* and *Extrasure*. He stated this at [92](c):

> "Building on (b), I consider that it also follows that where a very material interest, such as that of a large creditor (in a company of doubtful solvency, where creditors' interests must be taken into account), is unreasonably (i.e. without objective justification) overlooked and not taken into account, the objective test must equally be applied. Failing to take into account a material factor is something which goes to the validity of the directors' decision-making process. This is not the court substituting its own judgment on the relevant facts (with the inevitable element of hindsight) for that of the directors made at the time; rather it is the court making an (objective) judgment taking into account all the relevant facts known or which ought to have been known at the time, the directors not having made such a judgment in the first place. I reject the respondent's contrary submission of law."

537. Ms Hilliard and her team recognised this second exception or extension in her written opening submissions and Mr Lightman and his team did not disagree with her either in writing or orally. In my judgment, Ms Hilliard and her team were right to do so. However, as both she and Mr Lightman submitted (and I accept), a director is not in breach of duty under S.172 if he or she forms an honest but unreasonable belief that a particular act or omission is in the interests of the company: see *Extrasure* (above) at [88] to [90] and [96] to [97] and *ClientEarth v Shell PLC* [2023] EWHC 1897 (Ch) at [29] and [30] (Trower J).

538. Section 172(3) preserves the common law requirement for directors to consider the interests of creditors. In *Sequana* (above) the Supreme Court held that in discharging their duty under S.172 to promote the success of the company, the directors must in certain circumstances have regard to the interests of its creditors. The Court also held that this modified or extended duty did not arise whenever there was a real risk that insolvency might arise in the future. It was not necessary for the Court to express a view about the threshold at which the duty arose but all of the members of the Court expressed a view on that issue.

539. I begin my analysis with the content of the duty. All of the members of the Court rejected the argument that the directors or officers of a company assumed a separate and free-standing duty to creditors or "creditor duty" but held that S.172(3) preserved the common law rule in *West Mercia*. Lord Briggs (with whom Lord Kitchin agreed) formulated the scope of that duty at [176]:

> "In my view, prior to the time when liquidation becomes inevitable and section 214 becomes engaged, the creditor duty is a duty to consider

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

540. Lord Reed adopted a very similar formulation at [81] (set out below) and Lord Hodge adopted very similar reasoning (and I return to a particular example in his judgment below). Lord Briggs held that the modified duty arose where insolvency was imminent. He set out his formulation of the test at [203]:

> "I would prefer a formulation in which either imminent insolvency (ie an insolvency which directors know or ought to know is just round the corner and going to happen) or the probability of an insolvent liquidation (or administration) about which the directors know or ought to know, are sufficient triggers for the engagement of the creditor duty. It will not be in every or even most cases when directors know or ought to know of a probability of an insolvent liquidation, earlier than when the company is already insolvent. But that additional probability-based trigger may be needed in cases where the probabilities about what lies at the end of the tunnel are there for directors to see even before the tunnel of insolvency is entered."

541. Lord Hodge agreed with Lord Briggs: see [227]. Lord Reed considered that the modified duty would arise where the company was "insolvent or bordering on insolvency" but contrasted that with "an inevitable insolvent liquidation or administration" at [81]:

> "Where the company is insolvent or bordering on insolvency but is not faced with an inevitable insolvent liquidation or administration, the directors' fiduciary duty to act in the company's interests has to reflect the fact that both the shareholders and the creditors have an interest in the company's affairs. In those circumstances, the directors should have regard to the interests of the company's general body of creditors, as well as to the interests of the general body of shareholders, and act accordingly. Where their interests are in conflict, a balancing exercise will be necessary. Consistently with what was said in Kinsela at p 733 (para 33 above), and

> with the reasoning in paras 48-59 above, it can I think be said as a general rule that the more parlous the state of the company, the more the interests of the creditors will predominate, and the greater the weight which should therefore be given to their interests as against those of the shareholders. That is most clearly the position where an insolvent liquidation or administration is inevitable, and the shareholders consequently cease to retain any valuable interest in the company."

542. Lady Arden agreed with Lord Reed that the rule in *West Mercia* applied where the company was insolvent or bordering on insolvency or an insolvent liquidation or administration was probable. She stated this at [279]:

> "In my judgment, the Rule in *West Mercia* comprises two parts, and there is a distinction between them which applies not just to the question of knowledge but generally. The first part is the requirement for directors to consider creditors' interests. This arises whenever a company is financially distressed. By that I mean, as Lord Reed puts it in para 12 of his judgment, the company is insolvent or bordering on insolvency, or an insolvent liquidation or administration is probable, or the directors plan to enter into a transaction in question would place the company in one of those situations. That requirement creates a responsibility not to harm creditors in the meantime. The Rule also includes a second requirement. This requires directors to act predominantly in creditors' interests."

543. The members of the Supreme Court also considered the state of knowledge which was required for the modified duty to arise. They did not cast doubt on the general principle that S.172(1) imposed a subjective test (subject to the exceptions which I have identified). However, Lord Briggs and Lord Hodge expressed the view that the modified duty would only arise where the directors knew or ought to have known that the insolvency was imminent or that insolvent liquidation was probable: see [203] (above) and [238] (below). Lord Reed and Lady Arden preferred not to express a view on this issue: see [90] and [281].

544. Lord Hodge and Lady Arden also debated a particular example which has, in my judgment, direct application to the present case. Lord Hodge used the example as a reason for not overruling *West Mercia* and recognising the modified duty at the highest level. He explained the context at [237] and set out the example at [238]:

> "237. In section 172(3) Parliament has in effect authorised the courts to develop the common law duty of directors in relation to the interests of the company's creditors as a company nears insolvency. But that development must take place against the backdrop of the pre-existing section 214 of the

1986 Act and the courts must have regard to the boundaries which Parliament placed on the power which it conferred on the courts under that section. Section 214 is not concerned with the fiduciary duties of a director to the company. It creates a remedy where a director has failed to act in the interests of the company's creditors in circumstances in which he or she objectively should have so acted. Nonetheless, questions will arise as to how far section 214 , in which Parliament has identified the circumstances in which liability is to be imposed on directors in the context of insolvency, constrains judicial development of the common law to impose liability and give the company or its liquidator the remedies of an accounting or to order the making of equitable compensation for a breach of a fiduciary duty to the company in relation to the interests of its creditors in circumstances outside those identified in section 214 of the 1986 Act .

238. It may be only in rare circumstances that such questions will arise. In many cases when a company is bordering on insolvency, an obligation to consider the interests of a company's creditors and balance them against the interests of the shareholders will involve directors in making a commercial judgment about the benefits and risks of a transaction or course of action which may not readily be impugned. A reasonable decision by directors to attempt to rescue a company's business in the interests of both its members and its creditors would not in my view involve a breach of the common law duty. But there may be more egregious circumstances in which the absence of a remedy beyond section 214 would appear to be a lacuna in our law. By way of example, suppose (i) a company has been unsuccessful and the capital of the shareholders has been lost through balance sheet insolvency; (ii) the company's directors know or ought to be aware in the exercise of their duty of skill and care that a formal insolvency process is more likely than not; (iii) there is a prospect of avoiding the formal insolvency if the company were to undertake a particularly risky transaction; but (iv) the company's assets that remain and which would be put at risk by the transaction would be lost to its creditors if the gamble were to fail. The shareholders, whether present or future, would probably have nothing to lose from the adoption of the very risky transaction as a last roll of the die because the likely alternative would be a formal insolvency from which they would receive nothing. A requirement that the directors consider and, if the facts of the particular case require it, give priority to the interests of the company's creditors in their decision- making in such circumstances appears to be a necessary constraint on the directors. I am not persuaded that the directors' duty to exercise care and skill set out in section 174 fills the gap in the law as, absent the West Mercia duty, the directors would be required to exercise their skill and care to achieve the purpose set out in section 172(1) . To my mind the law would be open to justifiable criticism if it were to provide no remedy in respect of the interests of such creditors where such a course of action was proposed or had been adopted in the exclusive interest of the shareholders and to the probable detriment of the company's creditors without a proper consideration of the interests of the latter.

545. Lady Arden addressed this example in considering whether the rule in *West Mercia* is necessary given the range of statutory remedies available. She discussed the example at [289] and then expressed the view that there would be remedy in misfeasance without resort to the modified duty at [329] and [330]:

> "289. This formulation also addresses the specific problem of what I would call "'insolvency-deepening activity". This problem was raised by Mr Thompson KC in his submissions and is discussed by Lord Hodge in his judgment (para 238 above). The example (the "insolvency-deepening example") which Lord Hodge gives is of a financially distressed company which the directors know or ought to know will probably have to enter some formal insolvency but there is a prospect of a return to solvency if the company undertakes a particularly risky transaction. That transaction if it fails will deepen, not improve, the insolvency. A critical feature of this example is the slimness of the chance of avoiding irreversible insolvency. Creditors then have not even a sporting chance of gain. Lord Hodge concludes that in this situation directors should give creditors' interests priority over shareholders' interests."
>
> "329. I can further illustrate this point by further reference to the example taken by Lord Hodge at para 238 of his judgment and first mentioned at para 289 above. This is a case where the company is balance sheet insolvent and liquidation is probable but there is a prospect that, if the directors apply the entirety of the company's free assets for this purpose, the company could be saved. However, in this example, "egregious" circumstances occur. Shareholders have little if anything to lose when the directors opportunistically wager the company's assets as the last throw of the dice on a single venture which is very risky to creditors and is thus not in their interests. Lord Hodge holds that "the law would be open to justifiable criticism if it were to provide no remedy in respect to the interests of such creditors where such a course of action was proposed or had been adopted in the exclusive interest of the shareholders and to the probable detriment of the company's creditors without a proper consideration of the interests of the latter." (para 238) So he is contemplating that the directors carry out, or threaten to carry out, an action in the interest of shareholders exclusively and fail properly to consider the interests of creditors.
>
> 330. I respectfully disagree that there would be no remedy under the general law. There would be a remedy in misfeasance. The directors have clearly abused their position. If they go ahead with their scheme, and the company goes into liquidation as they foresaw with a larger deficiency than before, the liquidator will say, in my judgment with some force, that the scheme was a breach of duty for at least two reasons. First, reasonably diligent and skilful directors would not have implemented such a risky and potentially disadvantageous scheme. This is not a duty to balance shareholders' and creditors' interests: cf para 244 of Lord Hodge's judgment. The second ground would be that the scheme was driven by a desire to benefit current shareholders rather than for the benefit of the

> company as a whole. This point was made by the Supreme Court of Canada in *Trustee of People's Department Stores Inc v Wise*, above, at paras 42 and 47: see also *Colin Gwyer & Associates Ltd v London Wharf (Limehouse) Ltd* [2003] 2 BCLC 153, paras 411-412 below. Professor LS Sealy made a similar point about the insolvency-deepening activity of Mr Dodd in *West Mercia* (see paras 406-407)."

546. Lord Hodge was not persuaded by this explanation: see [243] to [245]. Lord Briggs also preferred his view on this issue: see [204]. It follows that they and Lord Kitchin (who agreed with Lord Briggs) formed the majority on this point. But for present purposes, the critical point is that both Lord Hodge and Lady Arden were agreed that "insolvency-deepening activity" can amount to a breach of duty by directors even though insolvent liquidation is not inevitable and there is no liability under S.214. *Roberts v Frohlich* [2011] 2 BCLC 625 provides a good example of "insolvency-deepening" conduct. In that case Norris J considered that it was a breach of a director's duty to exercise reasonable care, skill and diligence not to consider the interests of creditors at [98]:

> "I turn to consider whether there is a breach of the duty to ODL to exercise reasonable skill and care (a question which is to be answered by reference to the law as it was before the coming into effect of the Companies Act 2006). In doing so I accept the submission of Mr Russen QC that it is important to recognise this as a duty to ODL to employ reasonable skill and care in the performance of the functions of a director of ODL (and to resist the temptation simply to treat it as if it were a duty to the creditors of ODL to see that they did not suffer loss). But if the solvency of ODL was doubtful then the functions of the director fall to be performed in that context. His skill and care would be called for in relation to acts which might threaten the continued existence of the company. The acts which a competent director might justifiably undertake in relation to a solvent company may be wholly inappropriate in relation to a company of doubtful solvency where a long-term view is unrealistic."

(3) Duty to exercise independent judgment

547. Section 173 ("**S.173**") is headed "Duty to exercise independent judgment" and it provides as follows:

> "(1) A director of a company must exercise independent judgment. (2) This duty is not infringed by his acting– (a) in accordance with an agreement duly entered into by the company that restricts the future exercise of discretion by its directors, or (b) in a way authorised by the company's constitution."

548. Mr Curl and Perkins submitted (and I accept) that a director may not defer to the wishes of a shareholder, another director or another personality without bringing their own independent judgment to bear on the issue. They relied on *Bishopsgate (No 2)* (above) as an example of a situation in which a director was liable for blindly following his brother. They also relied on the passage from *Charterbridge* (above) as illustrating the approach which the Court should adopt where there are a number of different group companies with different interests and different creditors. In *Lonrho Ltd v Shell Petroleum Co Ltd* [1980] 1 WLR 627 Lord Diplock also emphasised that it is the duty of directors of a subsidiary company to consider independently whether it is in the company's interests to comply with a request by a shareholder and that the directors may take into account the interests of creditors: see 643E-G.

(4) Duty to exercise reasonable care, skill and diligence

549. Section 174 ("**S.174**") is headed "Duty to exercise reasonable care, skill and diligence" and, perhaps unsurprisingly, it imposes the same standard of care as the Notional Director standard in S.214(4). It provides as follows:

> "(1) A director of a company must exercise reasonable care, skill and diligence. (2) This means the care, skill and diligence that would be exercised by a reasonably diligent person with– (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and (b) the general knowledge, skill and experience that the director has."

550. Directors are under a duty to inform themselves about the company's affairs on appointment: see *Sequana* at [90] (Lord Reed). I have set out the law as it applies to delegation and reliance on professional advice in addressing S.214 (above). Mr Curl and Mr Perkins also cited *Re Barings plc* [1998] BCC 583 where Sir Richard Scott V-C (as he then was) explored the standard of care to be expected of a director in a large corporate organisation where they have delegated functions to individual directors or employees. He stated this at 586D-G:

> "That may be so up to a point in theory, but the higher the office within an organisation that is held by an individual, the greater the responsibilities that fall upon him. It is right that that should be so, because status in an organisation carries with it commensurate rewards. These rewards are matched by the weight of the responsibilities that the office carries with it, and those responsibilities require diligent attention from time to time to the

> question whether the system that has been put in place and over which the individual is presiding is operating efficiently, and whether individuals to whom duties, in accordance with the system, have been delegated are discharging those duties efficiently. It plainly becomes individuals holding high office to be responsive to warning signs that indicate some failure in the system, or in the discharge by individuals within the system of their respective responsibilities. It would, I think, be quite rare to find a case where there have been serious continuing failures on the part of individuals of which the senior executive officers could disclaim responsibility on the ground that they did not know, and were not told of the failures. There may be some cases of that sort, and if it is right that the senior executives did not know, were not told and could not have been expected to know about the failures, they may be absolved of criticism. But the responsibilities that go with the high office held by Mr Maclean, notwithstanding that there were others who held higher office, carry with them the obligation of diligent supervision. That seems to me to be the context against which I must examine the particular complaints made against Mr Maclean in the Secretary of State's case."

551. This is consistent both with the general statements in both *Re City Equitable Fire Insurance Co Ltd* and *Re Produce Marketing Consortium Ltd* (above). But whatever systems the directors have put in place, the Court must still be satisfied that the individual decision which is the subject matter of the claim went beyond an error of commercial judgment and was one which no director would have reached applying the Notional Director standard: see *Optaglio Ltd v Tethal* [2015] EWCA Civ 1002 at [23] (Floyd LJ). In *Sharp v Blank* (above) Sir Alastair Norris expressed this principle at [627]:

> "Third, Romer J observed that a director is not liable for mere errors of judgment (an expression oft-repeated). By this I understand him to mean that where the opinions of reasonably informed and competent directors might differ over, for example, some entrepreneurial decision, the mere fact that a director makes what proves to be clearly the wrong choice does not make him liable for the consequences. When embarking upon a transaction a director does not guarantee or warrant the success of the venture. Risk is an inherent part of any venture (whether it is called "entrepreneurial" or not). A director is called upon (in the light of the material and the time available) to assess and make a judgment upon that risk in determining the future course of the company. Where a director honestly holds the belief that a particular course is in the best interests of the company then a complainant must show that the director's belief is one which no reasonable director in the same circumstances could have entertained."

(5) Duty to avoid conflicts of interest

552. The duty to exercise reasonable care, skill and diligence is a duty owed by a fiduciary but not a fiduciary duty. Sections 175 to 177 codify the no conflict rule for fiduciaries as it applies to directors. Section 175 is headed "Duty to avoid conflicts of interest" and it provides as follows:

> "(1) A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.
>
> (2) This applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity).
>
> (3) This duty does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company.
>
> (4) This duty is not infringed– (a) if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest; or (b) if the matter has been authorised by the directors.
>
> (5) Authorisation may be given by the directors– (a) where the company is a private company and nothing in the company's constitution invalidates such authorisation, by the matter being proposed to and authorised by the directors; or (b) where the company is a public company and its constitution includes provision enabling the directors to authorise the matter, by the matter being proposed to and authorised by them in accordance with the constitution.
>
> (6) The authorisation is effective only if– (a) any requirement as to the quorum at the meeting at which the matter is considered is met without counting the director in question or any other interested director, and (b) the matter was agreed to without their voting or would have been agreed to if their votes had not been counted.
>
> (7) Any reference in this section to a conflict of interest includes a conflict of interest and duty and a conflict of duties."

553. In *Breitenfeld UK Ltd v Harrison* [2015] EWHC 399 (Ch) Norris J stated that whether a director's direct or indirect interest conflicts (or may conflict) with the interest of the company is to be ascertained by asking whether a reasonable man, looking at the relevant facts, would think that there was a real, sensible possibility of conflict: see [60](e) and (f). He also stated that conflicts of interest are identified not by shoe-horning the facts of a given case into various pre-determined categories of relationship but by the application of the general principle: see [67].

(6) Duty not to accept benefits from third parties

554. Finally, section 176 ("**S.176**") codifies the element of the conflict rule which prohibits a fiduciary from exploiting his or her engagement for personal benefit (including the acceptance of secret commissions or bribes) without full disclosure of all material circumstances. It is headed "Duty not to accept benefits from third parties" and it provides as follows:

> "(1) A director of a company must not accept a benefit from a third party conferred by reason of – (a) his being a director, or (b) his doing (or not doing) anything as director.
>
> (2) A "third party" means a person other than the company, an associated body corporate or a person acting on behalf of the company or an associated body corporate.
>
> (3) Benefits received by a director from a person by whom his services (as a director or otherwise) are provided to the company are not regarded as conferred by a third party.
>
> (4) This duty is not infringed if the acceptance of the benefit cannot reasonably be regarded as likely to give rise to a conflict of interest.
>
> (5) Any reference in this section to a conflict of interest includes a conflict of interest and duty and a conflict of duties."

555. The law is particularly stringent in relation to claims against an agent who has received a bribe or secret commission. In *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] AC 250 Lord Neuberger explained the wider policy considerations behind S.176 at [42]:

> "Wider policy considerations also support the respondents' case that bribes and secret commissions received by an agent should be treated as the property of his principal, rather than merely giving rise to a claim for equitable compensation. As Lord Templeman said giving the decision of the Privy Council in *Attorney General for Hong Kong v Reid* [1994] 1 AC 324, 330H, "bribery is an evil practice which threatens the foundations of any civilised society". Secret commissions are also objectionable as they inevitably tend to undermine trust in the commercial world. That has always been true, but concern about bribery and corruption generally has never been greater than it is now: see for instance, internationally, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1999 and the United Nations Convention against Corruption 2003, and, nationally, the Bribery Acts 2010 and 2012. Accordingly, one would expect the law to be particularly stringent in relation to a claim against an agent who has received a bribe or secret commission."

556. This stringency is reflected by the fact that an agent who accepts a bribe will hold it on trust for his or her principal even when there is no specific transaction in view: see *Daraydan Holdings Ltd v Solland International Ltd* [2005] Ch 119 and *Fiona Trust & Holding Corp v Privalov* [2010] EWHC 3199 at [73] (Andrew Smith J). Lawrence Collins J (as he then was) stated as follows in the first of these decisions at [53]:

> "In proceedings against the payer of the bribe there is no need for the principal to prove (a) that the payer of the bribe acted with a corrupt motive; (b) that the agent's mind was actually affected by the bribe; (c) that the payer knew or suspected that the agent would conceal the payment from the principal; (d) that the principal suffered any loss or that the transaction was in some way unfair: the law is intended to operate as a deterrent against the giving of bribes, and it will be assumed that the true price of any goods bought by the principal was increased by at least the amount of the bribe, but any loss beyond the amount of the bribe itself must be proved; (e) that the bribe was given specifically in connection with a particular contract, since a bribe may also be given to an agent to influence his mind in favour of the payer generally (e g in connection with the granting of future contracts)."

557. It is also unnecessary for the principal to prove that the secret commission was paid or received dishonestly or that either party realised that it was unlawful or wrong to give or take a secret commission. In *Re a Debtor (No 229 of 1927)* [1927] 2 Ch 367 Scrutton LJ stated this at 376:

> "A man who is the agent of A in a transaction between A. and B., and who also acts secretly for B in the same transaction, is presumed to act corruptly. Common law authorities require the Court to hold that that is a corrupt practice, and, in my opinion, the Court ought to presume fraud in such circumstances. It seems to me a dangerous thing to allow a man to say: 'Although you did not know it, I was also agent for the other party.'"

558. Nor is it a defence for the agent or fiduciary to prove that the secret commission was received by a connected or associated company. Mr Curl and Mr Perkins drew my attention to three examples in which the agent or fiduciary was held liable where the secret commission was paid to an offshore company: see *Logicrose Ltd v Southend United Football Club Ltd* [1988] 1 WLR 1256 (Millett J), *Shell International Trading & Shipping Co Ltd v Tikhonov* [2010] EWHC 1399 (QB) (Jack J) and *Shetty v Al Rushaid Petroleum Investment Co* [2013] EWHC 1152 (Ch) (Floyd LJ). They also submitted that the use of an offshore company should be seen as an aggravating factor, in that it shows that the fiduciary knew that what they were doing was wrong and took

steps to disguise their wrongdoing. I agree that it may be appropriate to draw the inference that the agent knew that the conduct was unlawful or wrong from the use of an offshore company and the attempts by the agent to distance themselves from the bribe or secret commission and to this extent I accept that submission.

559. Ms Hilliard and Ms Earle placed particular reliance on the recent decision in *Republic of Mozambique v Privinvest Shipbuilding SAL (Holding)* [2023] Lloyd's Rep 564 where the Supreme Court had to decide whether claims for bribery, conspiracy and fraud fell within the scope of an arbitration agreement. In the course of his judgment Lord Hodge described a claim for bribery at [86] and [87] (their emphasis):

> "86. The Republic's first claim for damages and indemnity relates to its allegations of bribery. Leggatt J in *Anangel Atlas Cia Naviera SA v Ishikawajima-Harima Heavy Industries Co (No.1)* [1990] 1 Lloyd's Rep 167, 171 succinctly described a bribe as: "a commission or other inducement, which is given by a third party to an agent as such, and which is secret from his principal." The components of a claim for bribery are (i) that a secret payment or other inducement has been made to an agent which gives rise to a realistic prospect of a conflict between the agent's personal interest and that of his principal, and (ii) the recipient of the bribe (or the person at whose order the bribe is made) must be someone with a role in the decision-making process in relation to the transaction in question. But the payment need not be linked to a particular transaction, it is sufficient that the agent is tainted with bribery at the time of the transaction between the payer of the bribe and the principal. The agent and the payer of the secret commission are jointly and severally liable not only to account to the principal for the amount of the bribe but also for damages for fraud for any loss suffered by the principal. See *Novoship (UK) Ltd v Mikhaylyuk* [2012] EWHC 3586 (Comm), paras 104-111 per Christopher Clarke J (his judgment was later overturned on a different point).
>
> 87. It is clear from this description of a claim for bribery that the Republic's claim based on bribery does not require an examination of the validity of any of the supply contracts. Nor is it necessary to prove dishonesty or that any fraudulent representation was made to the principal. Further, a defence that the supply contracts were valid and were on commercial terms would not be relevant to the question of a defendant's liability to account for the bribe. The law assumes that the price of the goods and services purchased by or on behalf of the principal was increased by at least the amount of the bribe : *Daraydan Holdings Ltd v Solland International Ltd* [2004] EWHC 622 (Ch); [2005] Ch 119, para 53 per Lawrence Collins J. In this case, although this matter need not be proved, it is not disputed that the cost of the payments said to be bribes was financed by Credit Suisse's lending which the Republic purportedly guaranteed. A defence of the commerciality of a supply contract, ie that the Republic received value for the monetary obligation which it undertook in entering into a guarantee,

> would be relevant only in relation to the quantification of the Republic's claim for damages and indemnity beyond the amount of the bribes."

560. Ms Hilliard relied on the words which I have emphasised above and submitted that the Joint Liquidators had to prove that Mr Henningson was in a position of conflict at the time of the transaction. For my part, I do not consider Lord Hodge intended to depart from any of the authorities which I have set out above or lay down a prescriptive rule about claims for bribery or a secret commission. Indeed, he stated that it was unnecessary to prove that the payment was linked to a particular transaction. In any event, he was not considering a case in which a company made a claim against a director or the construction of S.176.

561. Ms Hilliard and Ms Earle also submitted that an allegation of bribery or of a secret commission is tantamount to a claim for fraud and that allegations of this nature have to be properly pleaded and proved: see *Three Rivers District Council v. Bank of England* [2003] 2 AC 1 at [186] (Lord Millett). They also submitted that cogent evidence was required to prove such an allegation: see *JSC BM Bank v. Kekhman* [2018] EWHC 791 (Comm) at [51] to [56] (Bryan J). Finally, they submitted that this should be derived from primary facts, i.e. those observed by witnesses and proved by oral testimony or original documents: see *British Launderers Association v Hendon Rating Authority* [1949] 1 KB 462 at 471-2 (Denning LJ). This kind of "solid foundation" is to be contrasted with "speculation and inference": see *The Federal Deposit Insurance Corp v Barclays Bank plc* [2020] EWHC 2001 (Ch) at [36] to [39] (Snowden J).

562. I accept that an allegation of bribery is a serious one and must be properly pleaded. However, it is unnecessary for the company to plead that the director was dishonest or to give particulars of a transaction with which it is linked or even to plead that the director had a conflict. S.176 required the Joint Liquidators to plead and prove that Mr Henningson accepted a benefit from a third party conferred by reason of either (a) his being a director or (b) his doing (or not doing) anything as director. I also accept that an allegation of this nature must be proved by cogent evidence.

563. However, I do not accept that the Court cannot draw an inference in appropriate circumstances. Indeed, this debate brought to mind the observations of Rix LJ about circumstantial evidence in relation to an allegation of contempt in *JSC BTA Bank v Ablyazov (No 8)* [2013] 1 WLR 1331 at [52]:

> "It is, however, the essence of a successful case of circumstantial evidence that the whole is stronger than individual parts. It becomes a net from which there is no escape. That is why a jury is often directed to avoid piecemeal consideration of a circumstantial case: *R v Hillier* (2007) 233 ALR 634, cited in Archbold's Criminal Pleading, Evidence and Practice, 2012 ed, para 10-3. Or, as Lord Simon of Glaisdale put it in *R v Kilbourne* [1973] AC 729, 758, 'Circumstantial evidence … works by cumulatively, in geometrical progression, eliminating other possibilities'. The matter is well put by Dawson J in *Shepherd v The Queen* (1990) 170 CLR 573, 579–580 (but also passim): 'the prosecution bears the burden of proving all the elements of the crime beyond reasonable doubt. That means that the essential ingredients of each element must be so proved. It does not mean that every fact—every piece of evidence—relied upon to prove an element by inference must itself be proved beyond reasonable doubt. Intent, for example, is, save for statutory exceptions, an element of every crime. It is something which, apart from admissions, must be proved by inference. But the jury may quite properly draw the necessary inference having regard to the whole of the evidence, whether or not each individual piece of evidence relied upon is proved beyond reasonable doubt, provided they reach their conclusion upon the criminal standard of proof. Indeed, the probative force of a mass of evidence may be cumulative, making it pointless to consider the degree of probability of each item of evidence separately."

564. In the present case, Mr Henningson has admitted that he discussed the payment of a fee with a third party. The third party asserts that it paid the fee but Mr Henningson denies this. He also denies that the fee was paid either by reason of his being a director or his doing (or not doing) anything as director. In the absence of cross-examination, I have to decide whether I can properly draw the inference that the Carlwood Payment was made to him or for his benefit and, if so, whether it related to his duties as a director. This is an inference which I am entitled to draw after considering all of the evidence.

(7) Ratification

565. S.175 expressly permits authorisation of a conflict subject to certain procedural constraints. Ms Hilliard and Ms Earle also submitted that a director did not have to account for a benefit received from a third party where the director had disclosed it and the circumstances in which they had acquired it and the retention of the benefit had been sanctioned by a resolution of the members or their acquiescence if they were protected by an appropriately worded provision in the Articles of Association: see *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378.

566. Neither Mr Henningson nor Mr Chandler raised the defence that RAL had ratified or authorised any breaches of duty which I found them to have committed. It may, therefore, be academic but in case there is any doubt *Sequana* also contains clear statements by a number of the members of the Supreme Court that shareholders cannot authorise or ratify a breach of duty once the modified duty to act in good faith in the interests of creditors arises. Lord Reed stated this most clearly at [91]:

> "As has been explained at paras 40-45, the law governing shareholder authorisation and ratification has developed in recent times in parallel with the law governing the directors' fiduciary duty, sometimes in the same cases. As the law was stated in *Ciban Management Corpn v Citco (BVI) Ltd* [2021] AC 122, para 40, the shareholders cannot authorise or ratify a transaction which would jeopardise the company's solvency or cause loss to its creditors. That principle should ensure that, where the directors are under a duty to act in good faith in the interests of the creditors, the shareholders cannot authorise or ratify a transaction which is in breach of that duty."

567. It is an open question whether the directors could ratify a breach of any other duties (and, in particular, to sanction a bribe or secret commission) once the modified duty has arisen and it may be that it would in fact amount to a breach of S.174 for directors to ratify a benefit to one of their number under S.176 even if full disclosure is given. There is also authority that a shareholder cannot ratify an act which is ultra vires or incapable of ratification under section 239 of the CA 2006: see *Franbar Holdings Ltd v Patel* [2009] 1 BCLC 1 at [44] to [45] (William Trower QC, as he then was, sitting as a Deputy High Court Judge). I can see no reason why section 239(7) should not preserve the general principle as it applies to other breaches of duty. But this is a question for further consideration if and when it arises.

(8) Quantum

568. I have dealt with the question of causation in the context of the Wrongful Trading Claim (above). The parties did not address me on the way in which to assess the quantum of equitable compensation in the context of the Misfeasance Trading Claim. This is unsurprising given that on most findings which I was likely to make, the question was likely to be academic. Mr Curl and Mr Perkins assumed that if they succeeded on the Misfeasance Trading Claim, the measure of compensation would be the IND at the relevant Knowledge Date. Ms Hilliard and Mr Lightman focussed on defending the

claim and the contribution which their respective clients would be liable to make if the Wrongful Trading Claim succeeded. In the event, this issue is not academic and I set out how I propose to deal with it at the end of this judgment.

(9) Section 1157

569. Section 1157(1) of the CA 2006 ("**S.1157**") provides that the Court may relieve a director from liability for negligence, breach of trust or breach of duty. S.1157 provides as follows:

> "(1) If in proceedings for negligence, default, breach of duty or breach of trust against – (a) an officer of a company, or (b) a person employed by a company as auditor (whether he is or is not an officer of the company), it appears to the court hearing the case that the officer or person is or may be liable but that he acted honestly and reasonably, and that having regard to all the circumstances of the case (including those connected with his appointment) he ought fairly to be excused, the court may relieve him, either wholly or in part, from his liability on such terms as it thinks fit."

570. Mr Lightman and his team submitted in their opening submissions (and I accept) that a director who relies on the section must establish that: (i) they acted honestly, (ii) they acted reasonably (iii) they ought fairly to be excused having regard to all the circumstances. He also accepted that the burden is on the director to prove both honesty and reasonableness: see *Coleman Taymar Ltd v Oakes* [2001] 2 BCLC 749. In that case Robert Walker LJ gave the following guidance at [83] and [85] in relation to section 727 of the Companies Act 1985 (S.1157's predecessor section):

> "Section 727 requires an "essentially subjective approach": per Knox J in *Re Produce Marketing Consortium Ltd* [1989] 3 All ER 1 at 6. In my view this subjective approach must be limited to the "honesty" element of "honestly and reasonably". I do not see how the reasonableness requirement can be a subjective requirement. Any reasonableness test must by its very nature be objective. It does not follow that merely because a director has acted (subjectively) honestly and (objectively) reasonably the court is bound to excuse him. Proof that a director has acted honestly and reasonably are pre−conditions of the court's jurisdiction. Once the conditions are fulfilled, the court must consider whether in all the circumstances the director ought fairly to be excused, and if so may (not must) relieve him either absolutely or partly on the terms the court thinks fit: see *National Trustees Co of Australasia Ltd v General Finance Co of Australasia Ltd* [1905] AC 373 at 381 (PC)."

571. Ms Hilliard and Ms Earle submitted that the test for reasonable conduct which the Court should apply is whether the director acted "in the way in which a man of affairs with reasonable care and circumspection could reasonably be expected to act in such a case": see *Re Duomatic Ltd* [1969] 2 Ch 365 at 377 (Buckley J). Indeed, in *PNC Telecom plc v Thomas (No 2)* [2008] 2 BCLC 95 Mr Thomas Ivory QC (sitting as a Deputy High Court Judge) applied that test to S.1157: see [94]. Mr Curl and Mr Perkins did not submit that I should adopt a different test and I am content to adopt it. Finally, Mr Lightman and his team pointed out (and I accept) that the Court may grant relief under S.1157 even though the director has been found liable for negligence: see *Re D'Jan of London Ltd* [1993] BCC 646 at 649A (Hoffmann LJ).

572. The parties did not address the Court on the question whether it had jurisdiction under S.1157 to relieve a director from liability or wrongful trading under S.214. But in *Re Produce Marketing* (above) Knox J rejected such an argument in relation to S.727 (above) and Mr Henningson and Mr Chandler did not challenge the correctness of that decision. In the event, this issue does not arise for consideration in the present case.

V. Knowledge

P. Completion

"101. Each of the Respondents had access to the Olswang Report, the Olswang Letter and the GT Report prior to their being appointed as directors of the Companies and should in any event have familiarised themselves with the matters addressed in those documents before accepting appointment as a director of any of the Companies."

(1) Mr Chandler

573. On 18 March 2015 Mr Chandler was appointed a director of BHSGL and on 20 March 2015 he was appointed a director of BHSL. He accepted that he would have read the Olswang Report, the Olswang Letter and the GT Report and made sure that he understood them. He could not recall precisely when he saw each of these documents for the first time but he accepted that he received the Olswang Letter on 10 March 2015 and the Olswang Report on 14 March 2015. He could not recall precisely when he received the GT Report but he accepted that he had read all three within a couple of weeks. I find that Mr Chandler had received and read all three documents by the 17 April Board Meeting.

(2) Mr Henningson

574. On 11 March 2015 Mr Henningson was appointed a director of all four Companies. His evidence was that he did not recall receiving the Olswang Report or the GT Report and being directed to those documents or reading them. He did not address the Olswang Letter at all. I accept that it is possible that Mr Henningson does not recall receiving or reading any of these documents. But I find that he did receive and read all three documents for the following reasons:

(1) On 7 March 2015 Mr Roberts copied the Olswang Report and the Olswang Letter to Mr Henningson at River Rock. About an hour later Mr Henningson forwarded them to his gmail account. Shortly afterwards he also forwarded the pensions matrix to his gmail account. The inference which I draw is that he forwarded them to himself so that he could download and read them.

(2) On 7 March 2015 Mr Martin of GT also sent Mr Henningson a draft of the GT Report. In the covering email he stated that this was for a meeting at 9 am on the following morning. Again, the inference which I draw is that Mr Henningson read that draft in preparation for the meeting.

(3) The minutes of a RAL meeting on 11 March 2015 at which Mr Henningson was present record that the Olswang Report, the Olswang Letter were tabled and that Mr Roberts led a detailed conversation focussing on the key findings in the report and the key risks in the letter. Those minutes also record that GT had undertaken extensive due diligence.

(4) By email dated 11 March 2015 Mr Martin wrote to Mr Henningson in his capacity as a director of RAL stating that later that day he would receive the final version of the GT Report. The inference which I draw is that he received and read the final report.

"By inter alia their own knowledge of RAL's asset and liability position and/or access to publicly available filed accounts and/or the Olswang Report and/or the Olswang Letter and/or the GT Report, the Respondents knew (or ought to have known immediately on their appointment as directors of the relevant Companies) the following matters prior to completion taking place on 11 March 2015 and in any event prior to their being appointed as directors of the Companies: a. the BHS Group was dependent on the financial support of the Taveta Group

without which it would have entered insolvent liquidation or administration before 11 March 2015;"

(1) Mr Chandler

575. Mr Curl put the terms of the SPA to Mr Chandler which was sent to him on 13 March 2015. Mr Chandler accepted that Sir Philip Green was effectively paying RAL to take the Companies off his hands and that before the sale they had been entirely dependent upon Taveta's support. Mr Curl also put an email dated 18 February 2015 from Mr Roberts to Mr Brian Hendry of Paragon Brokers. In that email Mr Roberts stated that without the support of its parent the business was "technically insolvent". Mr Chandler did not accept that he was aware that the BHS Group was insolvent:

> "Q. You knew also that because this transaction was being done with a dowry and in consideration of £1 that the BHS companies had a negative value, didn't they? A. I -- I didn't think about that at the time, but it -- and if that's what you say then I knew that it was for £1 and I knew there was a cash dowry. Q. So if you'd thought about it, which you say you didn't, you would have known, as a matter of commonsense, that this meant that the BHS companies had a negative value; yes? A. Yes, possibly. Q. So you should have known that then, shouldn't you? A. Yes. Q. What this means is that Sir Philip Green is effectively paying RAL to take the BHS companies off his hands, isn't he? A. Yes. Q. And they have been entirely dependent on Taveta's support up until now? A. Yes. Q. And you know that RAL has no way of replicating the Taveta support because it has no money, don't you? A. Well, it has no way of replicating it from its own resources, yes. Q. And nor does the BHS Group? A. Well, we -- I mean, we don't agree about that, Mr Curl. So that's why we're here; right? Q. Could I have, please, bundle {C/187/2}. This is an e-mail from David Roberts to Brian Hendry of Paragon Brokers on 18 February 2015. I don't suggest you saw this at the time, but this is what David Roberts thought. He says -- to someone who is a potential lender -- in the third paragraph: "The business is technically insolvent without parent support and has a £500 million pension deficit so its difficult to ascribe an [enterprise value] of for [it should be "more" I think] than £1." Do you see that? A. Yes. Q. So the fact that the companies are insolvent without Taveta's support was well known to anyone who cared to look prior to completion; do you agree? A. No. Q. Do you think David Roberts is wrong? A. Well, I don't -- I don't know what David Roberts was intending to achieve in -- in that e-mail. Q. Oh, you think David Roberts might have been misrepresenting the position to a counterparty, like Eddie Parladorio had got you to do? A. Well, I don't know. Q. Well, have a think. What do you mean? A. Well, I don't know what "technically insolvent" is meant to imply in that respect. Q. Do you think you should have known what that meant before taking appointment as Group General Counsel of the BHS Group? A. I would

> have expected David Roberts to have said to us: this company is technically insolvent."

576. Mr Curl also put to Mr Chandler the email which he sent to Mr Parladorio on 18 March 2015 which showed that on or shortly after Day One he had particular concerns about the risk of insolvency:

> "Q. You continue: "If there is an insolvency event, then there will be an investigation into the company's affairs. This could lead to directors disqualification proceedings. This has to be reported to the bar Council. This could lead to disbarment. Which would be bad. I think there are steps that could be taken that would inoculate me from risk sufficiently to assuage my concerns: importantly I think around company secretarial support, but other things too....I urgently need to discuss all this with you. I know we are all busy but this is critical to me/us. I will be at Marylebone house early reading the BHS articles ready for the board meeting. Speak in morning". Then if we could have the top of that page, please. Mr Parladorio replies that he will aim for 8/8.30 at Mario's which I'm guessing is a cafe or something like that? A. It is. Q. Now, worrying about being disqualified would ordinarily be a bizarre thing to be concerned about when contemplating taking an appointment as a director, wouldn't it? A. I couldn't disagree more with that. Q. Well, normally, one doesn't think that taking appointment as a director carries risk of disqualification, because one doesn't think that one is going into a business of the kind that this was, with people like this. So, Mr Chandler, you were right to be worried about that, given what you had learnt over the previous week. That was why you were worried, weren't you? A. You -- we've just been looking at document after document which explains that BHS was in a distressed situation; and one of the outcomes -- remember, as a lawyer, I'm interested in risk -- one of the outcomes was an insolvency event. And so I had been reading up about what happens in an insolvency event. And actually this -- this demonstrates that I was concerned from the start that my own position would not be damaged by taking unnecessary risks or -- or continuing to trade a company that I thought had no reasonable prospect of liquidation -- of avoiding insolvent liquidation."

577. I accept Mr Chandler's evidence that on 18 March 2015 he did not know that the BHS Group was insolvent without the support of Arcadia or the Taveta Group. However, I also accept his evidence that he was consciously aware from Day One that there was a real risk of an "insolvent event". By "insolvent event" I understood him to mean from the last sentence of his answer that the BHS Group or those members of the group of which he was a director would go into insolvent liquidation.

(2) Mr Henningson

578. I find that Mr Henningson was fully aware of the terms of the SPA. On the morning of 11 March 2015 Mr Roberts sent him the most recent draft and he forwarded it to his gmail account and at the meeting of the board of directors of RAL later that day he approved its terms. The inference which I draw is that Mr Henningson read the draft of in the morning and was fully familiar with its terms when the board of RAL met to make the decision to enter into the SPA later that day. I also find that Mr Henningson knew that the BHS Group remained solvent due to the financial support provided by the Arcadia Group because Mr Roberts stated this in terms in the Olswang Letter. This was also made clear to him by Mr Roberts who identified and discussed a number of key issues at that meeting and before the decision to enter into the SPA was taken.

"b…the BHS Group's performance as a business had deteriorated while under the control and management of the Taveta Group, despite the extensive financial resources at the disposal of the Taveta Group;"

(1) Mr Chandler

579. The Liquidators' case was that BHSL was consistently loss-making on an annual basis even while it had access to the extensive financial support and retail management expertise of the Taveta Group. They relied on the filed accounts of BHSL as the main trading entity of the BHS Group, which showed that turnover was declining between 2010 and 2014 and that BHSL had made losses before tax. Mr Chandler admitted the relevant figures. He also admitted that he knew on or shortly before 18 March 2015 that the BHS Group's business was loss-making and had been for some time.

580. Mr Chandler did not refer to the audited accounts of BHSL in Chandler 1 or suggest that he had read them (or read them in detail). Mr Curl did not put BHSL's accounts to him or suggest to him that he should have been familiar with them or subjected them to the detailed analysis which, for example, Mr Shaw had carried out. On the other hand, Mr Chandler accepted that RAL had no way of replicating Taveta's support from its own resources. Moreover, the Olswang Letter stated in terms that Arcadia had provided ongoing financial assistance which had produced an inter-company debt of £240 million. I find, therefore, that on or shortly after 18 March 2015 Mr Chandler knew that the BHS Group had been loss-making for some time and that Arcadia had provided financial support of £240 million prior to the sale. To this extent, therefore, I find that the Liquidators have proved their case.

(2) Mr Henningson

581. For the reasons which I set out at [578] I find that on or shortly after 11 March 2015 Mr Henningson knew that the BHS Group had been loss-making for some time and that Arcadia had provided financial support of £240 million prior to the sale.

"c. RAL had no means of replicating the financial support that had hitherto been provided by the Taveta Group and in fact RAL had no financial resources at all;"

d. RAL had no means of paying any of its transaction costs associated with the acquisition and intended to use certain BHS Group assets for that purpose, including the sale proceeds of Lowland's North West House property (as more particularly set out at Paragraphs 113 to 139 below), which would deplete the cash available to the BHS Group from Day One"

(1) Mr Chandler

582. Mr Chandler accepted in Chandler 1 that after he became a director, he discovered that RAL had funded the acquisition by ACE 1 and the proceeds of North West House and that Olswang's fees had been paid from these sources. He also stated that he understood from speaking to Mr Chappell and Mr Parladorio that it was not unusual for an acquiring company to use the target's assets to fund the acquisition. Finally, he also stated that although he could not be sure when he had discovered ACE 1, he made a note of it at a meeting with Mr Roberts on 24 March 2015. This note records under the heading "ACE": borrowed £5, has to repay £6, has paid £1m, in breach of obligation to pay £1m, BHS is obliged to pay the company".

583. Further, in the passage which I have set out in [575] above, Mr Chandler accepted that RAL had no resources of its own to replicate the financial assistance which Arcadia or Taveta had provided. Mr Curl also cross-examined Mr Chandler about the proceeds of sale of North West House:

> "Q. Now, you were aware, before you took the appointment, that RAL had paid away to itself or caused to be paid away to itself a significant proportion of the incoming 32 million that was paid for North West House, weren't you? A. I think I was aware of that before the first – my appointment on the 18th, yes."

584. Mr Chandler also accepted that RAL had defaulted on ACE 1 within 5 days of completion on 11 March 2015 and that it was only able to stave of enforcement by charging assets belonging to the BHS Group:

> "Q. And could I have the second page of this, please. {C/643/4}. Could I have bundle {C/948.1/1}, please. This is an e-mail, a little later on, from Michael Hitchcock, who joined in July 2015, to Mr Topp. And he says: "Intercompany between RAL and BHS is now 15.7 million, ie RAL owe BHS 15.8 million. I cannot see how this will ever get repaid and technically RAL could therefore be seen as 'bust' -- interesting!". Now, in fact, RAL has been bust ever since it took the 7 million from the North West House proceeds, hasn't it? A. No. Q. Well, it's got a debt that it can't repay, so it's bust, isn't it? A. Well, I think the test is when the debt becomes due; and it wasn't due. And I also think that by the time the companies went into administration the amount of that intercompany debt was standing at around 6 million. So it had repaid monies along the way. Q. Talking of debts becoming due, RAL immediately defaulted on ACE I, didn't it? Because it was supposed to pay 2 million within five days of day 1 and it didn't. That's right, isn't it? A. It is right. Q. Yes. So RAL was unable to pay its debts as they fell due as early as 16 March 2015. That's right, isn't it? A. Yes. Q. So it's bust then, isn't it? A. Well, a solution was found to that issue. Q. And that was putting another charge on to an asset belonging to BHS Properties, wasn't it? A. No, I don't think it was. No, it was. It was increasing the amount that was due on -- on the RAL loan charged against Atherstone, yes. Q. Yes. You cancelled ACE loan note 1, re-issued it for a lower amount, and then the difference you put on to the debt that was secured on Atherstone? A. Yes. Q. That's what happened, isn't it? A. Yes. Q. Yes. So RAL was only able to stave off enforcement by charging up an asset belonging to the companies -- sorry, an asset belonging to BHS Group? A. Yes. Q. This in circumstances where the whole premise of the RAL acquisition was that RAL would be putting money into the companies, rather than taking assets out. That's right, isn't it? A. Yes."

585. In the light of this evidence I find that Mr Chandler was aware RAL had no means of replicating the financial support that had hitherto been provided by the Taveta Group, that RAL had no financial resources at all, that RAL had no means of paying any of the transaction costs associated with the acquisition and that it intended to use the assets of the BHS Group for that purpose and, in particular, the proceeds of sale of North West House. I am also satisfied that Mr Chandler knew these facts by the latest on 24 March 2015 when he spoke to Mr Roberts.

(2) Mr Henningson

586. I also find that Mr Henningson knew that RAL had no financial resources at completion. He knew that RAL had to raise £5 million to pay the hurt money: see Mr Parladorio's email dated 9 March 2015. He also knew that RAL had no means of paying any of its transaction costs associated with the acquisition of the BHS Group: see his email dated

5 March 2015 to Mr Robb. This email shows that Mr Henningson had approached Mr Robb for a loan of £1 million to pay the costs of RAL's professional advisers. It also shows that the only guarantee or security which Mr Henningson was able to offer was a personal guarantee from Mr Chappell. Accordingly, I find that Mr Henningson knew that RAL had no means of paying any of its transaction costs associated with the acquisition. I make findings in relation to Mr Henningson's knowledge about the application of the proceeds of sale of North West House in section VII.

"e. the BHS Group's performance as a retailer had deteriorated while it was under the control and management of the Taveta Group, despite the extensive experience and success as a retailer of the Taveta Group;"

(1) Mr Chandler

587. Mr Chandler gave evidence in Chandler 1 that he was aware of Sir Philip Green's expertise as a successful businessman. Mr Shaw produced a table derived from the BHS Group's financial statements showing that despite that expertise between 2010 and 2014 the group incurred total operating losses of £386 million and £72 million in the seven months before Day One. Mr Chandler accepted that the BHS Group had a negative value and that Sir Philip Green was effectively paying RAL to take the Companies off his hands. Even if Mr Chandler was not familiar with the group's financial statements, I am satisfied that he knew that its performance had deteriorated whilst under the control of Taveta and despite Sir Philip's experience and success.

(2) Mr Henningson

588. Mr Henningson also gave evidence about Sir Philip Green in Henningson 1 and it is clear that he was aware of Sir Philip's expertise. In his amended written replies to the Insolvency Service dated 30 May 2017 Mr Henningson also stated that it was clear to all of the Directors that the BHS Group required financing and that he began working on the acquisition in late 2014 and early 2015. He also stated that he was "extremely focused and aware of the financial position of BHS". Given these answers and Mr Henningson's own expertise, I find on the balance of probabilities that he must have read and analysed the group's financial statements and knew and appreciated the information contained in Mr Shaw's table. I am satisfied that Mr Henningson also knew

that the BHS Group's performance had deteriorated whilst under the control of Taveta and despite Sir Philip's experience and success.

"f. the BHS Group's major trade credit insurer had already notified it on or around 24 February 2015 that it would not be offering trade credit insurance due to uncertainty regarding the BHS Group's future;"

(1) Mr Chandler

589. On 24 February 2015 Euler Hermes withdrew cover. Mr Chandler accepted that when he was appointed he was aware that credit insurance had been withdrawn and I find, therefore, that he knew this by 13 March 2015. I do not find, however, that he knew that this was because of uncertainty about the BHS Group's future and I return to the significance of trade credit insurance in greater detail below.

(2) Mr Henningson

590. Mr Henningson accepted in Henningson 1 that he was aware that there was an issue with trade credit insurance. In his written responses to the Insolvency Service, however, he was more emphatic. He described the difficulties with trade credit insurance as "the single most important matter as it drove cash flow". The minutes of the board meeting of BHSGL on 18 March 2015 at which both Mr Henningson and Mr Chandler were present also record that Mr Chappell told the meeting that a meeting with Euler Hermes had been difficult and that it was not prepared to offer cover again without a substantial amount of information. I am satisfied that Mr Henningson knew that Euler Hermes had withdrawn cover either on or shortly after Day One and understood the significance of that decision.

"g. RAL had no retail experience of any kind;"

(1) Mr Chandler

591. When Mr Curl put it to him that RAL had no retail experience of any kind, Mr Chandler did not disagree. However, he thought that Mr Tasker might have had some relevant experience. I do not accept that he had any relevant experience on the basis of this evidence or that Mr Chandler believed that he did. Mr Tasker was a solicitor and he described the "bedrock" of his practice as an "M&A lawyer" in his evidence to the Insolvency Service and he did not suggest that he had any retail managerial experience.

Moreover, this was not put to Mr Bourne, who was a friend of his. Indeed, Mr Bourne's evidence was that Mr Tasker resigned as a director on completion. I find that Mr Chandler knew from his appointment that RAL had no retail experience of any kind.

(2) Mr Henningson

592. Mr Henningson described RAL as a holding company and not a trading company in Henningson 1. He did not suggest that either he or any of the other directors of RAL had any retail experience or that he thought that they did. I find that Mr Henningson knew from his appointment that RAL had no retail experience of any kind.

"h. BHSL required a working capital facility of at least £120 million"

(1) Mr Chandler

593. Mr Chandler's evidence in his witness statement was that he was not aware that BHSL required a working capital facility of at least £120 million and he repeated this in cross-examination. Mr Curl put paragraphs 7 to 12 of the Olswang Letter (above) to him and, in particular, paragraph 12 in which Olswang advised RAL's directors not to transact until they had maximum commercial comfort that they were able to satisfy the terms of the Farallon £120 million working capital facility. Mr Chandler accepted that he was aware that there was a funding gap, that it was critical and that it had not been filled at the date of the Olswang Letter. But he did not accept either that he knew a working capital facility of £120 million was required.

594. I accept Mr Chandler's evidence. Although it was one of the Points of Principle and Mr Chappell had told the Pensions Regulator that RAL would raise £120 million of new debt, the terms of the SPA did not require RAL to obtain such a working capital facility and in his email dated 17 March 2015 Mr Roberts informed Mr Chandler that the BHS Group did not require the Farallon facility of £120 million at the date of his appointment.

(2) Mr Henningson

595. In his amended written responses to the Insolvency Service dated 30 May 2017 Mr Henningson accepted that he knew that the BHS Group required financing and that he was working with River Rock and assisting RAL to negotiate a £120 million facility up to March 2015. I am also satisfied that he read and understood the warning in the

Olswang Letter not to enter into the SPA until the facility was in place. However, as with Mr Chandler I am not satisfied that Mr Henningson knew or believed that a facility of £120 million was required on completion. The SPA did not impose such a term and the GT Report stated that a working capital facility of £25 million was critical to achieving minimum headroom of £62.8 million in August 2015.

"i. negotiations with Farallon had been unsuccessful and no working capital facility had been arranged with Farallon or anyone else"

(1) Mr Chandler

(i) Farallon

596. Mr Curl suggested to Mr Chandler that there was no prospect of Farallon granting a working capital facility to BHSL because Arcadia held a first-ranking QFC over its assets (and I set out the relevant passage below). He also took Mr Chandler to Mr Bourne's evidence to the Select Committee that no one reading the Farallon term sheets dated 6 February 2015 or 6 March 2015 would have believed that BHSL could meet the conditions for the grant of the Farallon facility. Mr Chandler accepted in cross-examination that the views which Mr Bourne expressed were those of a reasonably informed person. Mr Lightman and his team did not suggest otherwise in closing submissions.

597. I consider elsewhere the negotiations between the BHS Group and Farallon in May and June 2015. But I am satisfied that at the time of Mr Chandler's appointment in March 2015 there was no real prospect of the BHS Group satisfying the conditions for the grant of the Farallon facility and that those negotiations had been unsuccessful. However, I also accept Mr Chandler's evidence that he was not aware of those negotiations and had no involvement in them. He gave this evidence in Chandler 1 and stood by it in cross-examination. Moreover, I am not satisfied that it would have been reasonable for him to inform himself about those negotiations or why they might have failed given that they had taken place before his appointment and that Mr Roberts had informed him that the BHS Group no longer required the facility.

(ii) Noah II

598. On 24 March 2015 Mr Chandler attended a meeting at which Mr Roberts took him and the directors of BHSGL through the terms of Noah II. Mr Chandler's handwritten notes record that Mr Roberts advised that any draw down of funds required the consent of Arcadia (such consent not to be unreasonably withheld). Mr Chandler accepted in cross-examination that Sir Philip Green was reluctant to grant permission to enable BHSGL to draw on Noah II. Mr Topp also accepted that it was not a "proper" facility and that on 28 April 2015 Sir Philip Green had refused to permit BHSGL to draw on it. Initially, Mr Pilgrem was not prepared to accept that it was a condition of drawdown that Arcadia gave its consent. But he did accept that on 28 April 2015 Arcadia refused to consent to BHSL drawing down the sum of £10 million (but ultimately consented only to an advance of £3 million).

599. Clause 2.1(c) of the Noah II Facility Agreement expressly provided that the Borrower (BHSGL) could not submit a Drawdown Request (as defined) in respect of the Tranche B Facility of £25 million without the prior written consent of the Corporate Guarantor (Arcadia) such consent not to be unreasonably withheld or delayed. I am satisfied, therefore, that BHSGL's ability to draw upon the Tranche B Facility (which was the only new money available) was conditional upon obtaining Arcadia's consent and although clause 2.1(c) imposed a qualified obligation upon Arcadia not to withhold or delay unreasonably, it was not a facility upon which the BHS Group was in practice free to draw. In deciding whether to give its consent, Arcadia was entitled to put its own interests first rather than the interests of the BHS Group and, as Mr Curl submitted, the BHS Group needed Sir Philip Green's goodwill and was in practice unable to challenge Arcadia's decision. I therefore agree with Mr Topp that Noah II was not a "proper" working capital facility.

600. However, I am not satisfied that Mr Chandler either knew or should have known that Noah II was not a proper working capital facility either on his appointment or at any time before the 17 April Board Meeting. His handwritten notes record that Mr Roberts was asked what reasonable grounds Arcadia might have for refusing consent and he advised that this might be the breach of any existing facility or insolvency. He also advised that there was "No upside on Arcadia letting BHS go under" and that it was "not a bad facility". In my judgment, Mr Chandler was entitled to accept that advice on

appointment. I am also satisfied that nothing occurred between 24 March 2015 and 17 April 2015 which should have caused Mr Chandler to reconsider the position.

(iii) Bank of China

601. The minutes of the 17 April Board Meeting record that Mr Chappell was negotiating with the Bank of China for a £120 million facility. The Joint Liquidators described this as a fantasy and they relied on the email dated 13 March 2015 from Mr Budge to Ms Hague as evidence that Mr Chappell lied to Sir Philip Green. In that email Mr Chappell is reported as telling him that he had £7 million on deposit at the Bank of China and that RAL was looking for finance from it. Mr Curl put this email to Mr Chandler in cross-examination:

> "Q. And could I have document {C/359.3/1}, please. And this is an e-mail, towards the bottom of that page, from Paul Budge to Gillian Hague. And it says: "He [and I think we can take it that "he" is Sir Philip Green] is quite jumpy at only 25 of the 32 coming in, apparently 7 in Bank of China according to Dominic as they may be looking for finance from them too. "Anyway ways two things. "I promised to text him the end of day balance again -- so please give me a breakdown and the report again (sorry) ... he's keen to see the 5 million safely arriving." Now, it looks like Mr Chappell has told a lie to Sir Philip Green. It looks like he has pretended that the 7 million has gone on deposit with Bank of China, doesn't it? A. It does. Well, yes, I don't think there ever was any money in that account. So I think that is a lie. Q. When did you find out that none of the companies in the BHS Group had 7 million on deposit in the Bank of China or RAL for that matter? A. I can't remember. Q. You became aware, didn't you, that Mr Chappell had told this lie to Sir Philip Green, didn't you? A. Yes. Q. Can you remember when that was? A. No. I want to say May or around then -- June. I don't know. Can't be sure. Q. What did you do when you found out that Dominic Chappell had told this lie to Sir Philip Green? A. Nothing. Mr Chappell and Mr Green had an interesting jousting relationship, I think. There were reports of conversations all the time; and I didn't know what was -- what was true and what wasn't. Q. But you knew there was never 7 million in Bank of China, didn't you? A. Eventually, yes. Q. But you never -- you never believed there was 7 million in Bank of China, did you? A. Well, I think the first time I heard it, I didn't disbelieve it. Q. Where did you think it had come from? A. Well, I don't know where it would have come from. Eventually, of course, I worked out that it was the same 7 million that had disappeared from Lowlands. But I didn't know that at the time or at the time that I heard it."

602. I accept Mr Chandler's evidence that he did not realise that Mr Chappell had told a lie to Sir Philip Green until either May or June 2015. He was entirely candid both in

accepting that Mr Chappell told a lie and in accepting that he eventually worked out that the £7 million which Mr Chappell claimed to have put on deposit at the Bank of China was the balance of the proceeds of sale of North West House. However, it does not follow that he must have known all of this by 17 April 2015. He was not copied into the email dated 13 March 2015 and there is no contemporaneous documentary evidence that he was told about any negotiations with the Bank of China until the meeting itself.

603. Indeed, I am satisfied that Mr Chandler only became aware that Mr Chappell had lied to Sir Philip Green shortly before an exchange of emails which he had with Mr Parladorio on 22 May 2015. Mr Curl put those emails to him and his evidence was as follows:

> "MR CURL: Could I have page {C/698.1/2} of this clip, please. This is that same e-mail chain -- A. Okay. Q. -- and it's been forwarded to you, Mr Chandler; so you did see this at the time -- A. Okay. Q. -- didn't you? A. Yes. Q. You just said you didn't? A. All right. I'm sorry. MR JUSTICE LEECH: And then you forwarded it to Mr Parladorio? A. Yes. So this is what I thought I was saying when I said: this is me doing something about it. I forwarded it to Mr Parladorio and we had a conversation about it. And within very short order this disappeared, which is why it became the internal joke that Mr Hitchcock referred to. MR CURL: Could I have the top of that page, please. And page {C/698.1/1}, please. So what you're doing there, Mr Chandler, is instead of actually doing something about it, you were simply forwarding it on to Mr Parladorio, aren't you? A. Yes. Q. Mr Parladorio is not a director of any BHS entity, is he? A. No. Q. So, yet again, you are deferring to Mr Parladorio, despite Mr Parladorio being a director only of RAL, aren't you? A. No, I was using Mr Parladorio for the very important purpose of dealing with things that were related to Mr Chappell. Q. Did you not think that dealing with things related to Mr Chappell was front and centre of your duties as a director of the companies? A. Well, again, I think this raises an important point of difference between your case and the reality. Dealing with Mr Chappell was a factor in all of the things that I was considering at the time. I don't think it was necessarily front and centre. And I'm not sure it needed to be front and centre at all relevant times. He -- he -- we didn't -- we weren't relying on him particularly in an executive function to do very much. There was -- the things that we'll talk about later today are things that happened along the way; but there was so much else going on and so many other people who were important and whose interests I had regard to. And I really don't think it's a valid criticism for you to suggest that me forwarding this on to Mr Parladorio and concomitantly having a conversation with him to say: Eddie, what's this all about? Is an abrogation of my duty at all. I think it's a perfectly sensible way for me to behave. Q. A more sensible way to behave would have been to have dealt with Mr Chappell directly, wouldn't it? A. I -- I disagree. Q. Given the considerable

> conflict of interest, by this stage, between the companies and RAL, Mr Parladorio was one of the last people in the world you should have been deferring to, wasn't he? A. No, because Mr Parladorio, as far as I was concerned, was also, like me, someone who -- who was keen to ensure that things were done properly. Q. Ah. Well, let's look at this e-mail. It says: "The Bank of China point (7 million charge over that cash) does not seem to go away". Pausing there. That suggests that Mr Parladorio has known about it for some time, doesn't it? A. Yes. Q. As had you? A. Well, no, I found out about it two days before this."

604. It is unnecessary for me to decide whether Mr Parladorio had known for some time that Mr Chappell had lied to Sir Philip Green and whether he was himself a party to that deception. But even if he had known for some time about the deception, I accept Mr Chandler's evidence that he only discovered it himself two days before and when it became clear that RAL (or BHSGL itself) could not provide security over a deposit of £7 million at the Bank of China. I am satisfied, therefore, that Mr Chandler did not know that the negotiations with the Bank of China were a fantasy when they were first brought to his attention.

(2) Mr Henningson

(i) Farallon

605. In his amended written responses Mr Henningson told the Insolvency Service that the Farallon facility was not obtained for undisclosed reasons but that he was aware that it did not obtain investment committee approval. Mr Henningson did not state when he first became aware of this and he did not address the Farallon facility at all in either of his witness statements. The inference which I draw is that the negotiations with Farallon had been terminated by 17 March 2015 when Mr Roberts told Mr Chandler that the facility was no longer needed and negotiations with HSBC for Noah II had begun. This is consistent with the evidence which Mr Chappell gave to the Select Committee which was that Sir Philip Green replaced the Farallon Facility with Noah II. Accordingly, I find that Mr Henningson knew by 17 March 2015 that negotiations with Farallon had been unsuccessful.

(ii) Noah II

606. On 19 March 2015 Ms Grant of Olswang sent Mr Henningson a summary of the terms of Noah II and a draft of the facility agreement. The minutes of a board meeting of

BHSGL on 24 March 2015 record that Mr Henningson was present and that Mr Chappell, Mr Chandler and he resolved to enter into Noah II and the other loan documentation associated with the loan. I find, therefore, that Mr Henningson knew and understood the terms of Noah II and that it only provided £25 million of new money. Mr Henningson did not sign the Arcadia Security Agreement and I was not taken to any minutes of a meeting at which he approved or authorised it. But I am satisfied that Mr Henningson knew that the consent of Arcadia was required to draw on the facility because he was told so by Mr Roberts in an email dated 20 March 2015.

607. Nevertheless, and as with Mr Chandler, I am not satisfied that Mr Henningson knew and understood that Noah II was not a proper facility because of the first QFC which BHSL had granted to Arcadia in the Arcadia Security Agreement. If the minutes of the relevant BHSL board meeting on 24 March 2015 are correct (and they were not challenged by any of the parties), then it is probable that Mr Henningson was also present when Mr Roberts gave the advice upon which Mr Chandler relied himself.

(iii) Bank of China

608. Mr Henningson did not mention any negotiations with the Bank of China in Henningson 1 or in his written responses to the Insolvency Service. Nor did he suggest that he was told by Mr Chappell that he was negotiating with the Bank of China for a £1 million overdraft or a £120 million draw down facility or that he believed Mr Chappell when he said this at the 17 April Board Meeting. But in case there is any doubt, I find that Mr Henningson did not believe Mr Chappell when he said this at the 17 April Board Meeting. I make findings in relation to Mr Henningson's knowledge about the application of the proceeds of sale of North West House in section VII. But in summary I find that Mr Henningson knew that Mr Chappell intended to use £5 million of the proceeds of sale to pay the transaction costs and £2 million to pay ACE and that he turned a blind eye to the payments which Mr Chappell then instructed Olswang to make.

609. But in any event, I also find that Mr Henningson knew by 19 May 2015 (at the latest) that Mr Chappell had lied to Sir Philip Green about having deposited £7 million at the Bank of China. On that date Mr Topp forwarded to him an email which Mr Budge had copied to him on the previous day. This email made it clear that Sir Philip Green had insisted on taking "a charge over the £7m in the Bank of China" and that Mr Chappell

had undertaken to sort out a Bank of China facility for £70 million by 11 June 2015. Mr Henningson knew that there were no funds in the Bank of China and (I also infer) no ongoing negotiations for a working capital facility.

610. In conclusion, therefore, I find that on or before 17 April 2015 both Mr Chandler and Mr Henningson knew that negotiations with Farallon had been unsuccessful and that no working capital facility had been arranged with Farallon or anyone else apart from the Tranche B facility of £25 million under Noah II. I also find that they knew that Sir Philip Green had arranged this facility on behalf of Arcadia and that Arcadia's consent was required to the drawdown of that facility. Finally, I find that neither of them appreciated that Noah II was not a proper working capital facility and that Arcadia was in a position to limit its use severely.

"j. a restructuring of the BHS Group, to include a restructuring of the Schemes as envisaged under Project Thor or something similar, was required"

(1) Mr Chandler

611. Mr Chandler accepted in cross-examination that on appointment he took GT's advice into account and that the pensions issues were the kind of issues which he considered in the coming days. He also accepted that a restructuring of the Schemes such as Project Thor or something similar was required. On the basis of the following evidence in cross-examination I find that the Joint Liquidators have proved their case on this point:

> "Q. And you were relying on the GT advice, weren't you? A. Well, I was taking the GT advice into -- into account; and these kind of issues would then be things that we would explore over the coming period. Q. Could I have page {C/359/9}, please. It says there, under "Pensions -- future risks", third bullet point: "Without Project Thor or a similar exercise it would appear that the scheme size and funding needs present a real threat to the viability of the business." So you knew that before you were appointed, didn't you? A. Yes. Q. And then the final bullet point on that page: "As things stand the Buyer should assume it is acquiring a business that is struggling to fund a pension scheme with a funding deficit of circa 300 million (subject to imminent review at upcoming triennial valuation) and a buyout deficit in excess of 500 million and which is under the close scrutiny of the Pensions Regulator". So GT are saying there it is really Project Thor style solution or nothing, aren't they? A. Yes."

(2) Mr Henningson

612. I have found that Mr Henningson read the GT Report and I am satisfied that he read and understood slide 9 and the future risks associated with the Schemes. I find that the Joint Liquidators have made out their case on this issue against Mr Henningson.

"k. to obtain clearance from the Regulator for a restructuring of the kind identified at Paragraph (j) above, it was necessary to show that, absent such a restructuring, insolvency was inevitable"

613. Mr Chandler accepted in cross-examination that an RAA was premised on the basis that insolvency was inevitable in the absence of such an agreement. Moreover, in the "Project Harvey – Pension Risk Matrix" which formed part of Appendix 9 to the Olswang Report, Olswang stated in terms that both the Trustees and the Pensions Regulator would need to be sure that insolvency was inevitable to agree to Project Thor. I have found that both Mr Chandler and Mr Henningson read the report and I find that the Joint Liquidators have proved their case on this point against them both.

"l. in the premises at Paragraphs (j) and (k) above, in recognising that a restructuring similar to Project Thor should be pursued, the Respondents necessarily recognised or ought to have recognised that, absent such a restructuring, insolvent liquidation or administration was inevitable"

(1) Mr Chandler

614. This allegation is the converse of the paragraph 102(l). It appears to be the Joint Liquidators' case that as a matter of logic Mr Chandler and Mr Henningson either knew or ought to have known that insolvency was inevitable if they knew that a restructuring was necessary but was not possible or could not take place. This is because the Pensions Regulator would only have consented to an RAA if insolvency was inevitable. Mr Chandler did not accept this logic when it was put to him:

> "This is titled, "HIGH LEVEL SUMMARY OF PROJECT THOR RISKS". Project Thor was the regulated apportionment agreement that had been put together under Taveta ownership in 2014, wasn't it? A. Yes. Q. And a regulated apportionment agreement is premised on the basis that insolvency is inevitable without such a regulated apportionment agreement. You knew that, didn't you? A. Yes. Q. Arrangement. And so you knew that such an RAA was essential, didn't you? A. Well, I knew that a solution to the pensions was required. Q. And it had to be an RAA for otherwise insolvency was inevitable, wasn't it? A. Well, no, there were other options, I suppose, which would have involved a much bigger cheque from Sir Philip Green. But I realised that the most likely outcome would be an RAA."

615. I accept Mr Chandler's evidence. The question whether Mr Chandler either knew or should have known that there was no real prospect of the BHS Group avoiding insolvent liquidation because of the pension deficit was not simply a matter of logic but depended on whether Sir Philip Green was prepared to provide the necessary contribution to reach agreement with the Trustees and clearance from the Pensions Regulator. It also follows that the question whether Mr Chandler had the requisite knowledge on his appointment depends on whether he believed that Sir Philip Green did intend to fund any settlement. Mr Curl also put this to Mr Chandler:

> "Q. And, as a matter of logic, if Sir Philip Green had been minded to fund a pensions solution, he would have done so rather than taking steps to distance himself from the BHS Group, wouldn't he? A. I don't agree with that. Q. Rather than paying RAL to take the BHS Group away. A. I think it's difficult to put oneself in Sir Philip Green's shoes and to work out exactly what his plan for BHS was and had been over the previous 15 years. I understood that he was under significant pressure from his American investors to divest himself of his other UK businesses. I also understood that he saw merit in his no longer being involved in BHS, for the reasons that we've spoken about in relation to the -- the rent concessions, for example. Q. Was that the view you took around 18 March 2015? A. Well, I can't -- I can't be certain when I -- I formed those views, but over the course of a period of time. Q. Could I have, please, bundle J -- A. I hadn't finished. Also that he didn't want, at that stage, to pay 80 million, but that he gave representations to all and sundry that the solution would be -- would involve him paying a large amount of money. Q. You said there representations to all and sundry. He didn't make any representations to you, did he? A. No. I hadn't met him. Q. No. You didn't meet him properly until you had the meeting to put the companies into administration; is that right? A. No, it was the day after that we decided to go to administration. The 18 April is the date you're referring to which is when he refused to subordinate his floating charge. That's when I first met him. I had met him for one conversation, you know, "Hello, how are you?" In the early week I think -- early weeks, but, yes. Q. To be clear, 18 April is a reference to 18 April 2016, isn't it? A. Yes. Q. Yes. So 13 months after day 1? A. Yes. Q. Just while we're on those representations. You -- given the weight you say you attach to the representations made to all and sundry, but not you, did it ever occur to you to try to speak to Sir Philip Green to fortify the representations? A. No, I didn't need to, because I -- I was able to get those from Darren."

616. Again, I accept Mr Chandler's evidence that on his appointment he relied on the assurances given by Sir Philip Green to Mr Chappell and Mr Topp that he would support BHSL in finding a pensions solution. I make that finding even though Mr Chandler did not meet Sir Philip Green until a year later or receive those assurances personally.

(2) Mr Henningson

617. Mr Henningson also placed reliance on the assurances which Mr Chappell told him he had received from Sir Philip Green. He also gave evidence in Henningson 1 that he met Sir Philip Green on two occasions before Day One and that Sir Philip made it very clear that he would support the BHS Group after completion and that he had a significant commercial interest to do so. Although I attribute very little weight to Mr Henningson's witness statements, I am prepared to accept this evidence because it is consistent with Mr Chandler's evidence (which I accept).

"m. the Regulator had powers of the kind summarised at Paragraphs 58 to 64 above"

618. I have set out the principal powers of the Pensions Regulator above. Those powers were set out in the Points of Claim and although Mr Chandler and Mr Henningson did not admit the accuracy of those paragraphs in the Points of Defence, I am satisfied that they contained an accurate summary. Moreover, I am also satisfied that Mr Chandler and Mr Henningson were aware of those powers and understood how the Pensions Regulator might exercise them in practice because they were set out extensively and explained in Appendices 2 and 3 to the Pensions Appendix of the Olswang Report.

"n. to complete Project Thor or a similar restructuring was likely to require a significant lump sum, which could be well in excess of the £80 million estimated by Olswang"

619. Olswang also stated in terms that the actual amount which would be required to restructure the Schemes "could be well in excess of the £80 million estimate". Mr Curl put this passage to Mr Chandler and he accepted that he was being warned that it would be extremely expensive even to put forward a proposal. I am satisfied that when they read the Olswang Report, both Mr Chandler and Mr Henningson understood that it might require well in excess of £80 million to restructure the Schemes.

"o. neither RAL nor the BHS Group had £80 million available for the purpose identified at Paragraph (n) above"

(1) Mr Chandler

620. Mr Chandler admitted in the Points of Defence that he knew that neither RAL nor the BHS Group had £80 million available and averred that his understanding was that the

compromise with the Trustees was likely to involve Sir Philip Green, the Taveta Group and Arcadia making a significant contribution. I accept this admission.

(2) Mr Henningson

621. Mr Henningson denied that he knew this (or, indeed, that he had any of the knowledge pleaded in paragraph 102). I have found that Mr Henningson knew that the BHS Group had no available working capital facility apart from Noah II. The minutes of the 17 April Board Meeting record that Ms Morgan spoke to GT's weekly cashflow forecast. The revised headroom forecast showed that the BHS Group did not have £80 million available for any purpose even after all the anticipated property sales and drawing down Noah II in full. I find that the Liquidators' case on this issue is made out against Mr Henningson.

"p. the funding deficits in the Schemes had increased since the 2012 Triennial Valuation, notwithstanding the Annual Contribution of £10 million being paid in the meantime"

(1) Mr Chandler

622. Mr Chandler admitted in his Points of Defence that he knew on or shortly before 18 March 2015 that it was likely that the pension deficit had increased since the 2012 Triennial Valuation but he denied that he was aware that Deficit Repair Contributions of £10 million had been paid in the meantime. However, he then accepted that on 13 March 2015 he made a handwritten note in his notebook confirming that the BHS Group had budgeted to pay an annual contribution of £10 million:

> "Q. Could I have, please, bundle {J/3/5}. This is from your notebook on 13 March 2015, five days before your formal appointment. A. Okay. Q. And this seems to be a meeting that you attended, Mr Chappell attended and Mr Smith attended. A. They're the only three people, are they, in the meeting? Q. Could we have page {J/3/3}, please. A. Okay. Thank you. Q. So the names at the top there. A. Hmm, hmm. Q. Can we have {J/3/5} again, please. Thank you. Could you blow up the lower half of the page, please. Thank you. So at point 8 it says: "Pension: SPG -- 5 million. RAL -- 5 million (budgeted in)". That's a reference to the deficit repair contributions, isn't it, or DRCs? A. I think so, yes. Q. And it says there: "If BHS goes bust takes Arcadia with us". Do you see that? A. Yes. Q. So from day 1 you are running this on a policy of mutually assured destruction? A. No, that's not what that means. Q. You're playing a game of chicken with Sir Philip Green? A. No. Q. You're playing a game of chicken with the Regulator? A. I think that's an entirely unfair way -- unfair

> way to characterise what we reasonably thought was likely to happen. Q. Could I have the next page, please. {J/3/6}. So the top line there, you've written: "Project Thor -- never going to happen". Do you see that? A. Right. Q. So that's what you reasonably thought was likely to happen at that time, wasn't it? A. Well, I'm talking about Project Thor was never going to happen. I don't think that means it's never going to happen in the future."

623. I am satisfied that by the date of his appointment Mr Chandler was fully aware that the BHS Group was making Deficit Repair Contributions of £10 million per year and that RAL was budgeted to fund £5 million of those contributions. I am also satisfied that he knew that the BHS Group had already been making the contributions for some time. Slide 35 of the GT Report also stated that a deficit repair plan had been agreed as at 31 March 2012 for the payment of £10 million pounds per year for 22 years and 8 months.

(2) Mr Henningson

624. I am satisfied that Mr Henningson read slides 31 to 36 of the GT Report. I find that he knew that BHSL had been making Deficit Repair Contributions since 2012 and that the estimated deficit for both Schemes was between £287 million and £527 million as at 31 December 2014 depending on the basis of funding. I am satisfied that he knew that the deficit was likely to have increased since 2012 because GT advised that a new valuation was expected to "deliver a larger deficit than at the 2012 valuation".

"q. the 2015 Triennial Valuation, on which work would have to commence within weeks, was inevitably going to lead to a demand for an increase in the Annual Contribution to a level that would be unaffordable"

"r. the BHS Group could not afford any increase in Annual Contribution"

(1) Mr Chandler

625. Mr Martin's note of the meeting on 19 February 2015 recorded that he told Mr Clare, Mr Chappell and Mr Parladorio that the Triennial Valuation would produce Deficit Reduction Contributions which would be unaffordable and he confirmed this in cross-examination. He also gave evidence that on 4 March 2015 Sir Philip Green told the Pensions Regulator and him that a new investor would raise £120 million of new debt, that once the Pensions Regulator had left, Mr Chappell joined the meeting and that both he and Mr Clare explained in no uncertain terms that the Deficit Reduction Contributions would have to increase to a figure of in the region of at least £20 million

per year. Finally, Mr Martin also gave evidence that on 18 March 2015 the Trustees told Mr Chappell, Mr Tasker and Mr Smith, Olswang and GT that the Deficit Repair Contributions were going to increase to £20 million to £25 million:

> "We, as Trustees, spent most of the meeting setting out the framework for the DRCs which we explained were going to increase to £20-25 million. It was no coincidence that we kept raising that number as we wanted to make sure that the new directors clearly understood the scale by which the DRCs were going to increase, and that they were going to have to run this continuously and seriously loss-making business with provision for significantly increased DRCs. We also explained to those present at the meeting that a wider pensions restructuring was required which needed to be adequately funded, but it was clear that Grant Thornton and those members of its client in the room all considered that the BHS Group did not have the cash to fund a restructuring (which the Trustees were also aware of from the analysis that KPMG and Deloitte had carried out for Thor previously), and neither did RAL."

626. Mr Martin confirmed this evidence in cross-examination. Mr Lightman put to him a note of a meeting on 9 November 2015 in which Mr Topp had noted that revised Deficit Repair Contributions were unaffordable and that unless there was a successful refinancing the BHS Group would run out of cash and become insolvent by March 2016. Mr Martin agreed that this is what Mr Topp had said although there was some debate whether Mr Martin understood him to be talking about the short, medium or long-term.

627. I accept Mr Martin's evidence in relation to these three meetings and I find that on each occasion Mr Martin or the Trustees told those present that the Triennial Valuation would produce Deficit Repair Contributions which would be unaffordable by the BHS Group. Mr Lightman did not challenge this evidence. Indeed, he relied on it in support of his case that the Trustees would not have insisted on an increase in contributions or taken action which would have put the BHS Group into liquidation.

628. Neither Mr Chandler nor Mr Henningson was present at any of the three meetings about which Mr Martin gave evidence. In his Points of Defence, however, Mr Chandler admitted that he knew that it was likely that there would be an increase in Deficit Repair Contributions but that they would not be likely to come into effect for around 15 months after the 31 March 2015. Mr Curl did not challenge Mr Chandler's admission in cross-examination and I accept it.

629. Moreover, Mr Chandler's evidence is also consistent with the expert evidence. Mr Scott and Mr Squires were agreed that a larger deficit by the date of the Triennial Valuation would have inevitably caused higher contributions over the lifetime of a recovery plan (all things being equal). They were also agreed that it was not inevitable that a larger deficit would have caused short term contributions to increase because the existing contributions would have continued pending either regulatory intervention or the turnaround or restructuring or insolvency of the employer. Finally, it is consistent with the minutes of the meeting of the Trustees on 15 May 2015 (above) which Mr Martin also confirmed in evidence.

(2) Mr Henningson

630. The minutes of the BHSGL board meeting on 25 March 2015 record that Mr Chappell reported that the meetings with both the Trustees and the Pensions Regulator had been difficult. The minutes do not record that Mr Chappell told the meeting what the Trustees had said to him. But I can see no reason why Mr Chappell would not have reported to Mr Henningson what was said at those meetings. I find, therefore, on a balance of probabilities that following the meeting on 4 March 2015 Mr Chappell told Mr Henningson that the Trustees had said that the Deficit Repair Contributions would have to increase to a level which would be unaffordable and that following the meeting on 18 March 2015 Mr Chappell had told him that the Trustees had said that DRCs would have to increase to £20 million or £25 million (unless a pensions solution was reached in the meantime).

"s. the Trustees regarded the acquisition by RAL as materially detrimental within the meaning of the regulatory regime and were seeking mitigation with the involvement of the Regulator"

631. Mr Martin gave evidence in his witness statement that the Trustees and their advisers were concerned that the separation of the BHS Group from Arcadia and Taveta would be materially detrimental to the Schemes and that they sought written assurances from RAL that it had sufficient working capital lined up to support the business. By email dated 6 March 2015 Deloitte provided a formal response stating as follows:

> "Offer to the Pension Scheme
>
> Management has confirmed the principles of the offer to the pension scheme are as follows;

> ● £15m provided over 3 years committed by a Guarantee from Arcadia Group Limited
>
> ● £15m provided over 3 years from the purchaser
>
> ● A floating charge over the stock in the business capped at £20m.
>
> ● £80m of the current Arcadia Group limited intercompany loan balance to be assigned to the pension scheme.
>
> The details in relation to the above are to be finalised over the coming days and are therefore subject to change/clarification."

632. Mr Martin set this email out in his written responses to the Select Committee and he stated that the Trustees understood it to be an offer of mitigation for the detriment to the sponsoring employer's covenant (although it was never made clear to the Trustees precisely what the mitigation was in respect of or what was being sought in return). He also stated that the Trustees chased in the lead up to the sale but only received formal confirmation from Linklaters that the support package was limited to £40 million and £15 million of contribution support. Again, this email was not in evidence but the gist of it was set out in an email dated 23 March 2015 from Mr Kahn of KPMG to Mr Martin.

633. It is clear from Mr Martin's evidence and from his written responses to the Select Committee that the mitigation support which RAL was prepared to offer fluctuated considerably in the run up to the acquisition. However, the Olswang Report stated in terms that the Trustees regarded the proposed acquisition by RAL as materially detrimental and were seeking mitigation with the involvement of the Pensions Regulator. Olswang also reported that they understood the package to be a £15 million cash contribution from both the seller and the buyer together with a floating charge for £25 million (together with the annual contributions of £10 million): see Appendix 9, §2.3.

634. I am satisfied that both Mr Chandler and Mr Henningson read and understood this paragraph which did not require any technical knowledge. Moreover, Mr Roberts repeated this statement in terms at the RAL board meeting on 11 March 2015 at which Mr Henningson was present. I am satisfied, therefore, that Mr Chandler and Mr Henningson knew that the Trustees regarded the proposed acquisition as materially detrimental and were either seeking or expecting RAL to provide a financial package to mitigate against the loss of support of Arcadia and Taveta and the kind of package which the Trustees had been led to expect that they might receive.

"t. the Trustees had reacted negatively to the proposed acquisition of the BHS Group by RAL"

635. Appendix 9, §2.5 stated that the acquisition appeared to have been viewed negatively by the Trustees. Again, I am satisfied that both Mr Chandler and Mr Henningson read and understood this paragraph. Moreover, Mr Roberts told Mr Henningson this in terms at the RAL board meeting on 11 March 2015. I am satisfied therefore that they either knew or ought to have known that the Trustees had reacted negatively to the acquisition.

"u. post-transaction secured debt would lead to a weakening of the employer pension covenant to the Schemes of relevance to the regulatory regime"

(1) Mr Chandler

636. Mr Curl put it to Mr Chandler a number of times that it was impossible for the BHS Group to borrow money on ordinary commercial terms whilst Taveta held a first QFC over the assets of the group and could appoint an administrator. In my judgment, this was a reason by itself why the post-transaction debt structure led to a weakening of BHSL's covenant to the Schemes and why the debt structure was of direct relevance to the regulatory regime. I am also satisfied that this must have been apparent either on completion or shortly afterwards when the negotiations between RAL and Farallon came to an end and Arcadia arranged Noah II.

637. On 4 March 2015 Sir Philip Green had told the Pensions Regulator that RAL proposed to raise new debt of £120 million. However, when Mr Curl put this point to Mr Chandler, he admitted that he did not understand its significance:

> "Q. So they're saying: make sure you can comply with the terms of the Farallon facility. You know that that Farallon facility required a first priority floating charge over the BHS Group, didn't you? A Do I know now or did I know then? Q. You knew upon your appointment? A. No. Q. You could have found that out, though, couldn't you? A. Yes, but I was relying on other people to do that, because I had other things to do. Q. Who were you relying on? A. Mr Chappell and Mr Morris, I think. Q. Did you know what -- A. Sorry. Sorry. And Olswang. Q. You were relying on Olswang? A. For information about -- for dealing with the Farallon thing that -- they were dealing with that. Q. So you didn't ask to see the draft facility letter at any time then? A. No. Q. Or the draft term sheet? A. No. Q. Did you know what a qualifying floating charge was on 18 March 2015? A. I don't think so. Q. So you didn't know that it's more or less impossible to borrow money on ordinary commercial terms as part of a group refinancing unless you can grant a first ranking qualifying floating charge? A. I don't think I knew that at the time. Q. Would you agree that your lack

> of knowledge of such a basic point rendered you unsuitable to be Group General Counsel of a business this size? A. No."

638. Mr Chandler's evidence was consistent with his Points of Defence in which he averred that he did not have a full understanding of the implications of the Taveta Group being granted security over the £40 million debt left on the BHS Group's books or that he could have gleaned a full understanding from the Olswang Report or the GT Report. He also denied that he was aware that this would lead to a weakening of the employer's covenant or that this was relevant to the regulatory regime.

639. I accept Mr Chandler's evidence that he did not appreciate the significance of Taveta having a first QFC over the assets of the BHS Group. However, I find that a reasonable director in the position of Mr Chandler would have done so. The Olswang Report stated in terms that the £40 million inter-company debt was to be secured by fixed and floating charges over securities in the BHS Group and the GT Report stated that GT expected a weakening of the employer's covenant as a result of the post-transaction secured debt.

(2) Mr Henningson

640. Given the statements in both due diligence reports, I would have expected an experienced corporate finance professional like Mr Henningson to appreciate the effect of the secured debt on BHSL's covenant as the employer under the Schemes. But whether or not he appreciated this fact, I am satisfied that he ought to have done if he had read those reports with care.

"v. Project Thor had not been agreed and the Respondents had no visibility on what stage had been reached"

(1) Mr Chandler

641. In his Points of Defence, Mr Chandler admitted this allegation. However, he also averred that on or shortly before 18 March 2015 his understanding was that Project Thor had been acceptable to the Trustees in principle save in respect of the amount of the mitigation payment. I accept both that this was Mr Chandler's understanding and that it was accurate. Mr Martin accepted that the Trustees had agreed in principle to Project Thor and signed heads of terms.

(2) Mr Henningson

642. The Olswang Report made it clear that Project Thor had not been agreed and that there was uncertainty about what stage of agreement the parties had reached: see Appendix 9, §2.4. Again, I am satisfied that Mr Henningson read and understood this paragraph and that he knew that Project Thor had not been agreed and that the Directors had no visibility on what stage had been reached.

"w. there was no objective supporting evidence that Project Thor was acceptable to the Regulator or the Trustees in its original form"

(1) Mr Chandler

643. In his Points of Defence, Mr Chandler did not admit this allegation but denied that he had the relevant knowledge. However, when the Olswang Report was put to him he accepted that he was being told that it was going to be extremely expensive even to put forward a proposal for Project Thor and that Olswang were completely in the dark about whether the Pensions Regulator or the PPF would consider it. When Mr Curl put his notebook entry for 13 March 2015 to him, Mr Chandler also accepted that he had recorded that Project Thor was never going to happen (although he did not accept that he meant that it might never happen in the future). I find that this allegation is made out and that his note reflected Mr Chandler's understanding or belief that Project Thor was never going to happen on his appointment as a director of each of the Companies.

(2) Mr Henningson

644. Mr Chandler did not record Mr Henningson as being present at the meeting on 13 March 2015 although he did record that the other directors at the time and both Olswang and GT were there. However, the minutes of a BHSGL board meeting record that Mr Henningson joined Mr Chappell to approve RAL's subscription for a further 20 million shares. It is highly improbable that Mr Chappell or Mr Chandler or one of the other directors would not have brought Mr Henningson up to date and I find on a balance of probabilities that they did so. Accordingly, I find that Mr Henningson was told that the consensus at the meeting was that Project Thor was never going to happen.

"x. none of the detailed advisory work that had been undertaken by Deloitte (who had acted for the Taveta Group in relation to Project Thor) was available to the Respondents, it would be expensive to replicate it, and there was no guarantee that Project Thor would be legally possible"

(1) Mr Chandler

645. In his Points of Defence, Mr Chandler admitted this allegation apart from the words "there was no guarantee that Project Thor would be legally possible". Mr Curl did not pursue this question with Mr Chandler in cross-examination and I accept the limited admission which he made. I find that on his appointment Mr Chandler knew that none of the detailed advisory work undertaken by Deloitte was available to the Respondents and that it would be expensive to replicate it but not that there was no guarantee that Project Thor would be legally possible.

(2) Mr Henningson

646. I am, however, satisfied that Mr Henningson had all the relevant knowledge. Mr Roberts told him at the RAL board meeting on 11 March 2015 that to implement Project Thor would be expensive and time consuming, that the advice which Taveta had received would not be made available and that there was no guarantee that any new advisers would find it legally possible. Moreover, he also told Mr Henningson that "SPG had said himself that this would be breaking new ground."

"y. there was no plan of any kind in place to deal with the Schemes or even a strategy to formulate a plan"

647. Mr Chandler gave evidence in Chandler 1 that the initial plan was to negotiate with the Trustees in an open and constructive manner to ensure that the annual contributions remained at a level which was affordable whilst a solution similar to the Project Thor proposals could be explored. He also stated that this strategy gave the BHS Group the time and opportunity to improve its negotiating position. He also placed significant reliance upon the assurances given by Sir Philip Green that he would make a substantial contribution or mitigation payment to achieve that solution:

> "57. From my discussions with Mr Parladorio around the time that RAL purchased BHSGL, I was told that Sir Philip Green had repeatedly made assurances that he would assist with the business going forward. At that stage, I was told by Mr Parladorio that Sir Philip Green had specifically said that he would help with the trade credit insurance and pension schemes issues. I was told that:
>
> (1) Sir Philip Green had stated that he (or Taveta/Arcadia) was committed to resolving, and would in fact resolve, the trade credit insurance issue. I

> thought this meant that, if necessary, Taveta/Arcadia would arrange the reinstatement of credit insurance for BHS.
>
> (2) Sir Philip Green acknowledged, and accepted, that any solution to the pension scheme deficit would involve him. I believed this, not only because it appeared to me to be axiomatic that the owner of the business during the period in which the deficit was created would be held liable to fund its rightsizing, but also because:
>
> (a) I knew that it was agreed that Taveta would contribute £5 million of the annual contributions for the pension schemes for three years.
>
> (b) I also knew, shortly after I joined as a director, that Sir Philip Green had entered into a side letter of agreement with Mr Chappell regarding a £40 million secured debt between BHSGL and Taveta. I understood, after reading that side letter and speaking to Mr Parladorio, that the benefit of this security was intended by all parties to be transferred to the pension schemes as part of a compromise with the pensions trustees.
>
> (c) I was aware that: Sir Philip Green (or Taveta/Arcadia) had offered to contribute around £50 million as part of the proposed Project Thor which had been rejected by the pensions trustees; it was thought that the offer would have needed to be closer to £80 million to be acceptable to the trustees; and Sir Philip Green was not at that time prepared to pay that amount.
>
> (d) I was often next to Mr Topp when he had telephone conversations with Sir Philip Green regarding the pension schemes and other matters and so I had first - hand experience of what was discussed (albeit that I was only privy to Mr Topp's side of the conversation).
>
> 58. I took a lot of comfort from this: it was reassuring that we were expecting to have the assistance of someone like Sir Philip Green. I felt that we could rely on Sir Philip Green's word. I recall a meeting with Mr Roberts where he said that Sir Philip Green had been good to his word generally. (I put a star next to this in my handwritten notes because it was important to me)."

648. Mr Chandler also gave evidence in Chandler 1 that he attended two meetings with the Trustees on 13 July 2015 and 15 September 2015. When Mr Curl took him to an attendance note of an internal, preparatory meeting on 7 July 2015 Mr Chandler did not accept that there had been a lack of engagement with the Schemes. However, he accepted that Mr Chappell did not treat the Pensions Regulator and the S.72 Notice with the degree of respect and seriousness which they deserved. He also accepted that a deliberate decision was taken not to progress Project Vera. Mr Curl then took him to his interview with the Pensions Regulator:

> "Q. Now, can I take you to bundle {G/1.1/11}, please. This is your interview with the Pensions Regulator from 20 July 2016, so the matters

> were very fresh in your mind at that time, I suggest. And you've said there, at line 5: "I've referred to the meeting in May or June -- April, May or June. I can't remember exactly when it was. Then we had, after that meeting, we were discussing whether or not we would instruct Grant Thornton to do the vast amount of actuarial work that would be required to try and model a new Thor. Thor became Vera eventually, and RAA that was called. Yeah? You might struggle to believe this, but we didn't want to spend any more money with Grant Thornton than we absolutely had to, so we got an idea as to the length of time it would take to get that information together and we held off. We didn't instruct them to do that immediately. Then later, September/October I want to say – Michael Hitchcock came on board in July. Michael's very black and white, so Michael just wanted to get it sorted out. He just ['said' I think] 'let's get the pension thing sorted out." So instead of progressing Project Vera, and instead of working hard on a solution, and instead of having a plan in any meaningful sense, you actually stand down Grant Thornton for several months, don't you? A. I can't remember if we stood them down. I do say there that we got an idea as to the length of time it would take to get that information together. So we had that in our minds. Whether we stood them down and didn't -- didn't progress in terms of, you know, meetings and correspondence with them, I don't remember. Didn't -- Q. So I suggest that this isn't a responsible or reasonable plan to progress an RAA. It is actually a plan to deliberately try to run down the clock on the triennial valuation for the deficit reduction plan. Do you agree with that? A. No. Q. And essentially you want to run the clock down on the triennial valuation deadline and simply hope that something turns up. That's fair, isn't it? A. No, I don't think the word "hope" is fair at all. I think have a reasonable and rational expectation that it would is a better way of phrasing it. Q. Could I have the bottom of that page, please. At line 34 you say: "Yeah, your question were we were talking about, yeah, we made a decision not to talk about it for a while" -- and that's the RAA, isn't it? A. I guess, yes. Q. -- "but we always knew that we would have to talk about it and we always knew that June this year" -- that's 2016, that's the absolute deadline for the triennial valuation that's due in March 2015 -- A. Hmm, hmm. Q. -- "was a timescale that we'd have to meet". A. Hmm, hmm. Q. So you were running the clock down, weren't you? A. Except your question presupposes the length of time that that actuarial work would have been -- would have taken. Q. Well, it would take a lot longer if Grant Thornton aren't instructed to do it, wouldn't it? A. Yes. Yes, I think we can both agree on that."

649. By contrast, Mr Martin gave evidence that there was no constructive dialogue between the BHSL board and the Trustees. His evidence was that he only met Mr Chappell on two occasions before the sale (19 February 2015 and 4 March 2015) and that he found the lack of information sought by Mr Chappell and his lack of engagement to be highly unusual. Mr Lightman challenged this evidence a number of times and I set out an extract from the relevant passage:

> "Q. The point I'm looking at is that you said -- you gave me -- you indicate at paragraph 24 of your witness statement that they -- that: "There was a complete lack of engagement, interest or desire to know any detail about the schemes. They saw pensions as a potentially inconvenient part of operational governance, and one that they did not want to devote any time or attention to". But you also say that -- that the pensions issue was the elephant in the room in all of their conversations? A. As they described it to me, I think being their desire to do some due diligence on the pension schemes. They were sitting with the Chairman of trustees and did not ask me any detailed questions about the pension scheme. Q. Well, you told the Select Committee that the meeting concluded with a recognition from Mr Chappell and Mr Parladorio that the pension scheme would need to be addressed; correct? A. That's correct, yes. Q. In the same way as Thor had recognised the pension scheme would need to be addressed and you and they would be carrying on discussing what proposals could be implemented for that; correct? A. Sorry. Could you repeat that last question? I ... Q. Yes. So it -- there was -- you told the Select Committee that the -- Mr Chappell and Mr Parladorio recognised that the pension scheme would need to be addressed in the same way as Thor had recognised the pension scheme would need to be addressed; and that you and they would carry on discussing what proposals could be implemented for that; correct? A. So, at the end of our meeting, they indicated the pension scheme would need to be addressed. I agreed that. I think I'd said it at the start of the meeting. And, as my note records, Mr Chappell suggested that we continue a dialogue about the pension scheme. Q. Can we go back to {G/55/15}, please. And I took you to this before. But, again, I just want to remind you what you told the Select Committee, which is that: "The meeting concluded with a recognition from the Swiss Rock team that the pension scheme would need to be addressed in the same way Thor had recognised the pension scheme would need to be addressed, and that we would carry on discussing what proposals could be implemented for that". A. That's correct."

650. Mr Martin also gave evidence that on 13 July 2015 he met Mr Chappell, Mr Topp and Mr Hitchcock when the Trustees presented the preliminary results of the Triennial Valuation and Project Vera was raised with them. He described this as a "Thor-style proposal to restructure the Schemes" but he also said that it was extremely high level and no formal proposal had been prepared. He said that the period following this meeting was relatively quiet and that he had very little engagement with any representative of BHSL although there were a number of conversations between the Trustees, Sir Philip Green and Linklaters.

651. Mr Martin did not mention Mr Chandler as being present at the meeting on 13 July 2015 in Martin 1. But he gave the following evidence about the Trustees' dialogue with BHSL more generally and with Mr Chandler in particular:

> "the Trustees were in any event limited in what formal action they could take against BHSL. The only way we could precipitate an insolvency was by agreeing a new DRC repayment schedule and then taking enforcement action if BHSL failed to meet the increased contributions. To impose a new DRC repayment schedule the Trustees needed the approval of the sponsoring employer; and BHSL was unlikely to agree to revised DRCs any time soon given its financial situation. We also simply did not have the necessary information from BHSL to know where the Schemes would stand in any insolvency. We were constantly met with obfuscation in our dealings with Mr Chandler and others at BHSL, but what was always clear was that BHSL could not meet any increased obligation to the Schemes absent a significant cash injection. In the meantime, we did not want to deprive the Schemes of the DRCs at the existing level of £10 million for the limited period we considered they would continue to be made;"

652. Finally, it was also Mr Martin's evidence that there was little movement towards a pensions solution in the eight months after the sale and that on 4 November 2015 Mr Hitchcock told him that there was a lack of engagement with the Trustees and a reluctance to share information but that he himself did not agree with this stance. Again Mr Lightman challenged that evidence. He suggested that Mr Martin was unable to point to any evidence of "obfuscation". He also suggested that words had been put in his mouth and that his evidence was not genuine:

> "Q. Could you go to paragraph 44.2 at page {B/1/11}. Sorry. 44.2 is -- sorry. So page {B/1/17}, sorry. Five lines from the bottom: "We were constantly met with obfuscation in our dealings with Mr Chandler and others at BHSL"? A. That's correct, yes. Q. Constantly. You only referred there -- you said there's one particular point of difficulty? A. I believe I said in -- Mr Chandler, as one of the directors of BHSL, and our attempts to obtain information from them as directors. Q. But you say: we were constantly met with obfuscation in our dealings with Mr Chandler? A. And others at BHSL. So -- Q. You have no documentary evidence of any obfuscation in your dealings with Mr Chandler, do you? A. So I -- you referred me earlier to the e-mail in which Mr Chandler was sending information, I believe to -- to Grant Thornton, to send to KPMG -- Q. I think that's 26 November -- February -- A. That would be one example where that information was incomplete or inadequate for purpose and there were -- Q. How careful were you when you wrote "we were constantly met with obfuscation in our dealings with Mr Chandler"? A. There was a genuine sense of frustration that the work that we wanted to do to understand the financial position of BHS at that time was being frustrated by the lack of clear information being provided. Q. Can I ask you to look back at this sentence? Yes. In retrospect do you regret having drafted that sentence in that way? A. So I could have said: we constantly met with obfuscation in our dealings with all of the directors of BHSL, including Mr Chandler. Q. It is the word "obfuscation" a word that you normally

> use? A. It's not a word I generally use in every day life, no. Q. So why is it in your witness statement? A. It -- it was suitable to capture the frustration we felt at the tlme. So we wanted to be in a position where we could pursue the best outcome for members, which was a solvent restructuring of the pension scheme. We couldn't get the basic information we needed and were being frustrated at every stage. Q. So someone suggested to you the word "obfuscation" A. So it is a word that I -- I would use to express the frustration. MR JUSTICE LEECH: I think you're being asked whether somebody drafted this for you -- did you -- is this your word or did someone suggest you -- put this word in your mouth? A. My solicitors helped draft the statement, yes."

653. I prefer the evidence of Mr Martin to the evidence of Mr Chandler in relation to this issue. I accept that Mr Chandler did not deliberately mislead the Court on this issue but, in my judgment, he tried to present the limited contact between BHSL and the Trustees in the most favourable light. I was not taken to any documents to show that the board of either BHSL or BHSGL discussed, formulated or approved a plan to engage with the Trustees or developed a long term strategy to resolve the pensions deficit. Nor was I taken to any correspondence which showed that the board of BHSL presented such a plan or strategy to the Trustees until December 2015 when Mr Martin met Mr Topp, Mr Parladorio and Grant Thornton to discuss Project Vera in greater detail.

654. Moreover, Mr Martin's evidence was supported by his email exchanges with Mr Hitchcock between 4 and 12 November 2015 and, in particular, Mr Hitchcock's statement that he had made a promise to Mr Martin to be open and transparent and to try and help move the pension solution forward with pace but that he had fallen at the first hurdle. The Respondents placed a great deal of reliance on the recruitment of Mr Hitchcock and his experience. In my judgment, this email contained a clear recognition by a respected member of the BHS Group's senior management at the time that Mr Chandler and his colleagues had not been open or transparent with Mr Martin and the Trustees between March 2015 and November 2015.

655. There was clearly an issue between the parties whether Mr Martin met Mr Chandler and, if so, on how many occasions. I accept that Mr Chandler was present at the meeting on 13 July 2015. However, I also accept Mr Martin's evidence that this was a high level discussion and no proposal was presented to the Trustees. But although I accept that Mr Chandler attended that meeting, I do not accept his evidence that he or any other board members met the Trustees on 15 September 2015. He had no recollection of this meeting

and relied on a note in his notebook. Mr Martin reviewed that evidence and the notebook entry and confirmed in Martin 2 that he had not attended that meeting. I have also reviewed the note myself and I am satisfied that Mr Martin is correct and that this was a meeting between the BHS management and the Pensions Regulator.

656. Finally, I find that Mr Chappell and Mr Parladorio did not have any plan or strategy for resolving the pension deficit beyond hoping that Sir Philip Green would agree a solution with the Trustees and the Pensions Regulator. In my judgment, it is more probable than not that they avoided engagement with the Trustees because they had no plan to progress an RAA and were running down the clock in the hope that something would turn up (as Mr Curl put to Mr Chandler). It also follows that neither Mr Chandler nor Mr Henningson could have known or believed that the BHSL board had a plan or strategy in place to deal with the Schemes and I find that they did not.

"z. advisers' fees for Project Thor or something similar might be in the order of £1 million"

(1) Mr Chandler

657. The Olswang Report stated that advisers' fees were expected to be in the order of £1 million and Mr Curl put the relevant passage in the report to Mr Chandler and he accepted that he was aware of it. In his Points of Defence, he also admitted that a proposal like Project Thor might involve significant advisers' fees. Moreover, he also admitted that his understanding was that such a proposal would not be pursued in the first instance. This admission is entirely consistent with the finding which I have made that the board of BHSL had no plan or strategy for dealing with the Schemes.

(2) Mr Henningson

658. I also find that Mr Henningson was aware of this statement. I have found that he read the Olswang Report and if Mr Chandler admitted that he picked this up, I am satisfied on a balance of probabilities that Mr Henningson must have done so too.

"aa. neither RAL nor the BHS Group had resources available to undertake the work identified at Paragraph (z) above"

(1) Mr Chandler

659. I have already found that by 24 March 2015 Mr Chandler knew that RAL had no financial resources at all, that it had no means of paying any of the transaction costs associated with the acquisition and that it intended to use the assets of the BHS Group for that purpose. Moreover when he was cross-examined about the proceeds of North West House, Mr Chandler pointed out on two occasions himself that both GT and Olswang were paid out of those proceeds of sale. I am satisfied, therefore, that by the same date Mr Chandler knew that RAL did not have the resources available to undertake Project Thor (or a revised Project Thor). But by the same token I am also satisfied that he did not know or believe that the BHS Group was unable to do so. Indeed, he knew that the group's funds had been used to pay professional fees of well in excess of £1 million.

(2) Mr Henningson

660. I have also found that Mr Henningson knew that RAL had no financial resources at all. I am also satisfied that he knew that RAL intended to apply £5 million of the proceeds of sale of North West House to pay for professional fees and turned a blind eye to the actual payments. I find that he well knew that no other source of funds was available. Again, I explore this issue further in dealing with the Individual Misfeasance Claims.

"bb. there was a lack of actuarial information and the funding deficits in the Schemes could be higher than those indirectly disclosed by the Project Thor documentation"

(1) Mr Chandler

661. In his Points of Defence, Mr Chandler admitted that this allegation was an accurate reflection of the contents of the Olswang Report. However, he averred that he did not have a full understanding of the implication of the lack of actuarial information and Mr Curl did not press this point in cross-examination. I accept this limited admission and I find that Mr Chandler knew that there was a risk that the funding deficits in the Schemes could be higher than those indirectly disclosed by the Project Thor documentation but he did not know how great a risk this was because he did not understand the significance of the lack of actuarial information. I also find that a reasonable director in Mr Chandler's position could not have been expected to pursue this issue or obtain actuarial advice immediately on his appointment.

(2) Mr Henningson

662. On the other hand, I find that Mr Henningson fully understood that there was uncertainty over the funding deficits and that they could be higher than the figures put forward by Deloitte. Olswang explained that they had only been provided with summary documents by Deloitte and were unable to give a detailed analysis of the legal framework. They also identified a series of risks associated with Project Thor: see the High Level Summary of Project Thor Risks at Appendix 1 (to Appendix 9). Moreover, in both the Olswang Letter and at the RAL board meeting on 11 March 2015 Mr Roberts emphasised these risks and the expense involved in trying to replicate Project Thor. Given his corporate finance background, I am satisfied that Mr Henningson fully understood those risks.

"cc. under the deal as embodied in the SPA, other than a two-year leasehold interest on the part of BHSL, no entity in the BHS Group would have any interest in Marylebone House or its sale proceeds"

(1) Mr Chandler

663. In his Points of Defence, Mr Chandler admitted that Marylebone House was not mentioned in the SPA. In cross-examination he accepted that the SPA provided for the proceeds of sale of North West House to be retained in the group and that this provision had been breached by the date of his appointment. He also accepted that he knew this or could have done so if he had read the SPA. Finally, he accepted that the SPA contained an entire agreement clause:

> "Q. Could I have the next page of that tab, please. {C/349/9}. Do you see there "North West House" is defined to mean "the property situated at 119 Marylebone Road"? Do you see that? A. Yes. Q. Now, if Marylebone House was any part of the SPA it would have appeared on this page between Management Accounts Date and "Needle Claim", wouldn't it? A. Yes. Q. So you knew, or could have known, on 13 March, that Marylebone House was not in the deal; yes? A. Was not in the SPA, yes. Q. Could I have page {C/349/14} of that tab, please. "Buyer Covenants", clause 6.2: "The Buyer shall procure that: "6.2.1 all monies in or available to the Group Companies at Completion, including the Group Cash Amount, the Capital Injection and the BHS Loan shall be used for the sole purpose of the day-to-day running of the business of the Group Companies; "6.2.2 all proceeds realised by the Group Companies from the sale of the Properties shall be retained by the Group Companies and used for the sole purpose of the day-to-day running of the business of the Group Companies until the

> compromise with the BHS Pension Scheme and the BHS Senior Management Scheme described in paragraph 1.1.1 of Schedule 8; and "6.2.3 no steps are taken by the Buyer or the Group Companies that would reasonably be expected to adversely affect the ability of the Group Companies and the BHS Business to continue to operate as a going concern and to pay their debts as they fall due." And do you see that? A. Yes. Q. That's very clear drafting, would you agree? A. Yes. Q. The assets of the companies are to be used for the day-to-day running of the companies until the pensions are sorted out; that's the gist of it, isn't it? A. Yes. Q. Now, you knew, by the time you were appointed, that this provision had already been breached, didn't you? A. Well, I don't -- I don't know if I knew that this provision existed. I accept that I could have done had I read it. And, yes, I knew that RAL had taken money and charged a property. Q. So before you take your appointment you either knew or should have known that the SPA had been breached in a serious way by RAL; do you agree with that? A. Yes. Q. And could I have, please, page {C/349/26}, in that tab. At clause 28 there there's a pretty comprehensive complete agreement clause. Do you see that? A. Yes. Q. 28.2, it says: "The Buyer agrees and acknowledges that, in entering into this Agreement and the documents referred to in it, it is not relying on any representation, warranty or undertaking not expressly incorporated into it." Do you see that? A. Yes. Q. Now, you've referred, a couple of times in the last 20 minutes or so, to there being things outside this deal. But do you agree that that entire agreement clause precludes any reliance being placed on them? A. Yes, save to take into account Mr Bourne's evidence of Philip Green's reaction when his word was questioned. Q. Yes. It was a strong reaction, wasn't it? A. Yes. Q. And he reacted in that way because he didn't want anything to be included in the SPA. Do you agree? A. I don't -- I don't know why he reacted in that way."

664. Mr Chandler placed significant reliance on the Completion Statement in Chandler 1 and on the assurances given by Sir Philip Green more generally. He accepted, however, that he never spoke to Sir Philip Green himself but relied on what Mr Parladorio and Mr Topp told him. He gave the following evidence about Marylebone House in his witness statement:

> "64. I understood that Mr Chappell, on behalf of BHSGL, and Sir Philip Green, on behalf of Taveta, orally entered into a side agreement in respect of Marylebone House on or around 11 March 2015. Under the terms of the side agreement, Sir Philip Green would procure that £8.5m be transferred to BHSGL upon the sale by Taveta of Marylebone House. I am not sure exactly when I found this out, but I think it was very shortly after I started as a director. I got this understanding from speaking to Mr Parladorio and seeing a completion statement that had been signed by Mr Chappell and Sir Philip Green which was sent on 19 March 2015. That included an entry for Marylebone House and a figure of £8.5 million next to it.

> 65. I recall there being discussions about when the sale of Marylebone House would take place and precisely how much BHSGL would receive. I think the uncertainty related to Sir Philip Green changing the terms of the acquisition late on because he had received a higher offer for Marylebone House than he had initially expected.
>
> 66. I remember that there were discussions between Mr Chappell, Mr Parladorio and Mr Roberts about what we could expect from the sale of Marylebone House. I was never involved in those talks. I recall that they mentioned that Marylebone House would be sold to a third party and any overage above £35 million (or some other figure similar to this) would be due to RAL to put into the business. I always believed, based on seeing the completion statement, that this would be a minimum of £8.5 million. Therefore, the quantum and timing of this transaction did not concern me. I was always confident that this money would come to the business (which it, in fact, did through the Framework Agreement, which I address below)."

665. Mr Curl suggested to Mr Chandler that he knew that the Completion Statement was inaccurate in a number of important respects. He also suggested to Mr Chandler that it was irrational for him to rely on it. I set out the relevant passages from his cross-examination in full:

> "Q. Could I have, please, bundle {C/1633/1}, please. Is this the document you're referring to? A. Yes. Q. And you say you attached considerable weight to this in relation to Marylebone House; yes? A. Well, yes, and -- and other things. Q. I suggest that, given your knowledge that Marylebone House had been removed as a completion deliverable, that was an irrational thing for a lawyer to think, that you could attach considerable weight to this. A. I'm not sure where you get the assumption that I knew that it had been removed as a completion deliverable. Q. Well, we've just looked at the SPA; yes? A. Yes. That -- the SPA shows that it wasn't included; that doesn't show that it had been removed. Q. I see. So I will re-phrase the question: I suggest that it was an irrational thing for you to do for you to attach weight to this document when it wasn't included in the SPA."
>
> "Q. You knew, on day 1, that a significant number of things on this completion statement were already inaccurate, didn't you? A. On day 1? Or do you mean on my appointment? Q. When you saw it. A. Well, I suppose I knew that North West House, the number there was no longer accurate; and I think that's all, is it? I don't know. Q. Well, Carlisle hadn't produced any money, had it? It didn't produce any money until 2016. So that's wrong? A. Yes. Q. And Marylebone House -- A. Hold on. I knew that it hadn't received money. I don't know what I knew about what the circumstances were, but, yes. Q. Well, you knew there wasn't 4.92 million realisations from it, didn't you? Well, you couldn't have done because it didn't sell until 2016? A. No, but I'm not sure when I became aware that that money hadn't come in or when it was going to come in. I can't

> remember. Q. Now, there's a line for equity of 5 million there as well. A. Hmm, hmm. Q. Now, you knew that RAL hadn't put in any equity in any meaningful form, at that time, didn't you? A. Yes, but that doesn't mean the number's wrong. Q. I suggest that it does. How can the number be correct if RAL has not put in any equity in any meaningful form? A. Well, it -- it did put equity in. Q. Is that what you think? A. Well, no. As I began to understand the mechanics, they didn't put equity in, but by the time that the loan that was ascribed in relation to it would have been paid off, they would have put that equity in. But it doesn't mean that the number on this page is wrong. Q. It says there "Goldman's facility 40". Now, Goldman did not provide a facility of 40 million or any amount, did they? A. Not as far as I'm aware. Q. No. So you know that's wrong as well, don't you? A. But I think HSBC put a facility in. Q. Yes. And that shows "net 25 million", doesn't it, on the second to last entry? A. Yes. Q. So even assuming that HSBC is replicating the Goldman's facility, there was never a facility for working capital from HSBC for 25 million, was there? A. I -- well, there was, wasn't there? Q. As you know, Noah II could not be drawn without the approval of Arcadia/SPG, and he was reluctant to provide approval, wasn't he? A. Not as far as I was aware. Q. Is that your evidence? A. Well, he -- he wanted to control the way in which it was used, but he allowed drawings of it up to 12 point something along the way. Q. Despite you requiring considerably more than 12 point something. Sir Philip Green was acutely reluctant to grant permission for you to draw on Noah II, wasn't he? A. There -- there were difficulties sometimes in persuading him to do it. The extent to which we pushed, I'm not sure. Q. Right. So I suggest, Mr Chandler, that your evidence here doesn't make sense. A few minutes -- a few moments ago I suggested he was reluctant to provide approval and you said "not as far as I'm aware". And then, when the question was put in a slightly different form, you said, "There were difficulties sometimes in persuading him to do it". So you accept that Sir Philip Green was reluctant to grant permission for you to draw on Noah II, aren't you? A. Yes. Q. Now, I suggest that it was irrational of you to put any weight on this informal document here, when you knew so many features of it were wrong. And that view is supported by the evidence of the companies' solicitor, Mr Roberts. Now, could I have bundle {B/8/1}, please. This is Mr Roberts' witness statement. Could I have page {B/8/3}, please. Paragraph 2.6 towards the bottom. He is asked: "Were there any changes to the structure of the Sale which caused you to reassess the risks identified in this letter prior to completion four days later?" And he answers: "There were in my view two key changes that increased the risk to RAL, being (i) the removal of a formal completion statement mechanic and (ii) the removal of the sale of Marylebone House as a completion matter." Now, you were speaking quite regularly to Mr Roberts in the early days of your directorship, weren't you? A. Yes. Q. And I suggest to you that he would have made no secret of his view on these points. A. I -- I don't know if he made any secret of it or not."

666. In their closing submissions, Mr Curl and Mr Perkins stated that the Completion Statement may be "one of the strangest ever documents in a major M&A transaction".

They also submitted that Mr Roberts had explained that the risks associated with the acquisition of the BHS Group had increased because of the absence of a formal completion statement and the removal of Marylebone House from the terms of the deal. They argued that Mr Chandler accepted that he knew that the Completion Statement was inaccurate in numerous respects. Finally, they submitted that Mr Chandler knew or ought to have known that the Companies had no entitlement to any of the proceeds of sale of Marylebone House and no ability to compel a sale.

667. I find that on or shortly after his appointment Mr Chandler knew that under the terms of the SPA no entity in the BHS Group would have any interest in Marylebone House or its proceeds of sale. Mr Chandler admitted as much in cross-examination. Indeed, he went further and accepted that the entire agreement clause prevented RAL from relying on any oral assurance given by Sir Philip Green. Nevertheless, I accept his evidence that he believed that Sir Philip Green had orally agreed with Mr Chappell on or around 11 March 2015 that he would procure that £8.5m be transferred to BHSGL upon the sale by Taveta of Marylebone House. I also accept his evidence that he was told that Marylebone House had been excluded from the sale because Sir Philip Green had received a higher offer for it and that he remained confident that the money would come into the business until (at least) 17 April 2015.

668. However, I also find that Mr Roberts advised the BHSGL board that there were two key changes to the transaction which increased the risk to RAL, namely, the removal of a formal completion statement mechanic and the removal of the sale of Marylebone House as a completion matter. I find that Mr Chandler also knew and understood Mr Roberts' advice and appreciated that there was a very significant risk that RAL would be unable to compel Taveta either to sell (or procure the sale of) Marylebone House or to transfer £8.5 million of the proceeds of sale.

(2) Mr Henningson

669. I must approach Mr Henningson's evidence differently. On 10 March 2015 Mr Roberts sent him a revised draft of the SPA and early on Thursday morning he emailed it to his gmail account. The inference which I draw is that he read the SPA and understood that it imposed no obligation on Taveta (as the Vendor) to procure that RAL or the BHS Group received any interest in Marylebone House or its proceeds of sale. I find,

therefore, that on 11 March 2015 Mr Henningson knew that other than a short two year lease no entity in the BHS Group would have any interest in Marylebone House or its sale proceeds under the terms of the SPA.

670. I could leave this issue there because Mr Henningson chose to give no evidence about Marylebone House or the Completion Statement in either of his witness statements. However, I am prepared to accept that Mr Henningson also relied on Mr Chappell's assurances that Sir Philip Green had promised to pay £8.5 million out of the proceeds of sale of Marylebone House to the BHS Group and that he took comfort from the Completion Statement. He referred to his own meetings with Sir Philip Green, the Side Letter and the other assurances which Mr Chappell told him he had received from Sir Philip Green. But I also find that Mr Henningson understood the risks associated with relying on an oral assurance from Sir Philip Green which was not reflected in the SPA and evidenced only by a handwritten completion statement. Mr Henningson was a very experienced corporate finance professional and must have understood that this was highly unusual.

"103. In addition to the matters identified at Paragraph 102 above, the Respondents ought to have known immediately on their appointment as directors of the relevant Companies (and would have known had they had acted in accordance with their duties identified at inter alia Paragraph 31 above) that: a. the Schemes' investment committee had recorded that the Annual Contribution of £10 million per year only covered interest on the deficits plus expenses and did not cover the Pension Protection Fund levies, which were £27.5 million per year"

(1) Mr Chandler

671. The Joint Liquidators also pleaded that the Respondents either knew or ought to have known two additional matters on appointment. The first was that the Deficit Repair Contributions did not cover the PPF Levy. In his Points of Defence, Mr Chandler did not admit the amount of the PPF Levy or the records produced by the Schemes' investment committee (and Mr Henningson simply denied that he had the relevant knowledge). I must, therefore, decide this issue.

672. I find that the Deficit Repair Contributions which BHSL was paying into the Schemes at the date of the appointment of both Mr Henningson and Mr Chandler did not include the PPF Levy and that the amount of the levy for both schemes was £2.5 million. The Recovery Plans expressly stated that BHSL had to meet the PPF Levy separately and

the July 2015 Turnaround Plan assumed an annual levy of £2.5 million: see slides 11 and 62. Mr Shaw relied on this figure and Mr Pilgrem accepted it (although he expressed the opinion that it was reasonable not to include these additional sums in the July 2015 Turnaround Plan). Finally, I assume that the figure £27.5 million was a typo in the Points of Claim and that the figure £2.5 million should have been pleaded. Neither Ms Hilliard nor Mr Lightman suggested that there had been any prejudice suffered as a consequence of the failure to plead the correct figure.

673. It follows that the annual PPF Levy which BHSL was required to pay in relation to each of the Schemes was very substantial indeed. Moreover, Mr Perkins took Mr Pilgrem to the minutes of the meeting of the board of directors of BHSGL which took place on 16 September 2015 which recorded that the PPF Levy had been increased to £2.9 million per year and he suggested that the reason for the increase was the increased insolvency risk:

> "Q. Okay. Let's go to the Board minutes at {E/55/2}, please. Now, can you see under the heading, "the Board discussed", the fourth bullet point reads -- sorry, the fifth bullet point reads: "The pension levy had been significantly increased as a result of the Company's risk profile, to 2.9 million for this year [that's 2015] and double that the following year although there was potential to reduce the levy". Just before we go to another page I just want to emphasise the words "as a result of the company's risk profile". Can we go to the previous page? A. Can you remind what's the date of this document? Q. I'm going to show you on the previous page {E/55/1}. A. Okay. Q. 16 September? A. 16 September. Q. I suggest it was always obvious that the PPF levy was going to increase; and that is for the very same reason that you say that the DRCs were going to remain constant at the outset. In other words, it's because the business was in a bad way. And let me explain why I say that: do you recall that you appended to your report the PPF levy guide? A. Yes. Q. Can we see that at {H/344/5}. Now, you'll see that there's a detailed description of how this all works. And under the heading, "Underfunding" it says: "Schemes only pay the risk-based levy if they are underfunded." And then can we go over the page, please. {H/344/6}. Can you see the heading, "Insolvency risk". "The second element of the risk-based heavy is the insolvency risk of the scheme's sponsoring employer". As I understand the case of the respondents and also the case that you put in your report, the reason that the DRCs weren't going to increase is that increasing them even by £1 million or £2 million would have been unaffordable, in the sense that it would have caused the collapse of the group. Can you recall that part of your case? A. Yes. Q. That obviously means that the insolvency risk has increased, such that the PPF levy is going to go up, doesn't it? A. The only reason I'm hesitating is I'm not sure logically it follows that the credit risk has increased because the credit risk could already have been

> present when the 10 million was set, but I accept your general proposition that if you -- if you expect the PPF's credit risk to have increased then you would expect these -- this levy to increase, subject to, of course, it's capped. Q. Yes. Can we go to your second report, {B/24/48}. If we just zoom in on paragraph 5.12. You say: "The July 2015 detailed business plan provided for". And you refer to the DRCs of 10 million and then the PPF levy of 2.5 million. And then can we turn over the page, please.{B/24/49}. You explain that Mr Shaw raised a question about whether the DRCs could remain at £10 million. But you say, at paragraph 5.14: "While I acknowledge that additional contributions to the Schemes would have given rise to additional funding requirements, I consider that there was a reasonable basis for excluding them." But then you only deal with the DRCs. Why didn't you deal with the obvious point arising out of the PPF levy which doubled weeks after the turnaround plan was issued? A. To be honest, from recollection, I can't remember. I imagine it wasn't -- it wasn't so material that was front of mind because, clearly, I deal with the PPF levy when I consider the question of insolvency under section 1232. So I'm -- you know, I was well aware that these levies were payable and they're a source of negativity in the analysis. I guess that when it came to the question of: was insolvent administration inevitable? I didn't -- it didn't occur to me that it was a material factor."

674. In his Points of Defence, Mr Chandler denied that he was aware that the PPF Levy was payable in addition to the Deficit Repair Contributions of £10 million on his appointment because he was not provided with the relevant materials. However, he admitted that in May 2015 he became aware of this. Mr Curl did not challenge this admission in cross-examination and I accept it. I am also satisfied that at the same time he became aware that the amount of the annual PPF Levy was £2.5 million. But in any event, I am satisfied that he was aware of this figure when he received a copy of the July 2015 Turnaround Plan. I am also satisfied that on 16 September 2015 he knew that it had been increased to £2.9 million.

(2) Mr Henningson

675. Mr Henningson did not mention the July 2015 Turnaround Plan in either of his witness statements. However, I find that he received, read and approved it. Mr Topp sent it to him under cover of an email dated 14 July 2015 and he attended the meeting on 14 October 2015 at which the BHSGL board approved the plan subject to the "Pillar Goals hierarchy". He also attended the BHSGL board meeting on 16 September 2015 at which the board discussed the increase in the PPF Levy to £2.9 million. I find, therefore, that on or about 14 July 2015 Mr Henningson knew that the Deficit Repair Contributions of £10 million did not include the PPF Levy of £2.5 million per annum and that on 16

September 2015 he knew that it had been increased to £2.9 million. I am unable to find that he knew these facts any earlier.

"b. by early 2015, additional annual contributions of a further £20 million to £30 million would be required and, accordingly, BHS Group could not support the Schemes in their current state"

(1) Mr Chandler

676. In support of this allegation, the Joint Liquidators relied on the Determination Notice dated 6 December 2017. The document was not put to Mr Chandler and, indeed, I was unable to find it in the trial bundle. But in any event, I have accepted Mr Chandler's admission that he knew that it was likely that there would be an increase in Deficit Repair Contributions but that they would not be likely to come into effect for around 15 months after the 31 March 2015. I am not satisfied, therefore, that on his appointment Mr Chandler knew that annual DRCs of a further £20 million to £30 million would be required or that the BHS Group could not support the Schemes in their current state.

(2) Mr Henningson

677. I have found on a balance of probabilities that Mr Chappell reported to Mr Henningson what the Trustees had told him at his meetings with them and the Pensions Regulator. I am satisfied that on his appointment he knew that the Trustees considered that annual contributions of £20 million to £25 million would be required and that these would be unaffordable by the BHS Group in their current state.

"105. In the premises set out at Paragraphs 101 to 103 above, the Respondents knew or ought to have known immediately on their appointment as directors of the relevant Companies (as it would have been known to any reasonably competent company director acting bona fide) that on the acquisition of the BHS Group by RAL on 11 March 2015 ("**Day One**") or urgently thereafter it was essential that an adequate and realistic plan was put in place."

678. The Joint Liquidators' case is that the Respondents either knew or ought to have known that an adequate and realistic plan was required to address the liability under the Schemes, the lack of a high profile or experienced CEO or Chairman, trade credit insurance, the need for a working capital facility of £120 million, ongoing cashflow requirements and the loss-making business. They defined such a plan as an "**Adequate Plan**" and I will adopt that term for convenience. It was also their case that no such plan was put in place.

(1) Mr Chandler

679. In his Points of Defence, Mr Chandler accepted that it was his view that an adequate and realistic plan was needed for the BHS Group but averred that such a plan was in place. He placed particular reliance on the Legacy Turnaround Plan and the appointment of Mr Topp first as interim CEO and then as the permanent CEO of the BHS Group. It was also his case that the Legacy Turnaround Plan was not intended to encapsulate the entirety of the Directors' strategy. He gave the following evidence about it in his witness statement:

> "79. I was shown a document dated March 2015 which I understand has been referred to by the Joint Liquidators as 'the Legacy Turnaround Plan'. I recall seeing this but do not know precisely when I first came across it. I would have studied this document and was aware that it was essentially a conceptual document that was subsequently supplanted by the more detailed plan in July 2015. I knew it was prepared on the basis that BHS was no longer part of the Arcadia group. 80. In addition to what is captured in that document, I understood from my discussions with Mr Topp that there were significant potential benefits to the Companies no longer being part of Arcadia (in terms of the potential trading initiatives and beyond). Mr Topp explained to me that there was the opportunity to run the business in a different, and better, way. This was exciting."

680. Mr Chandler was not cross-examined about the Legacy Turnaround Plan and this evidence was not challenged. In view of this, I accept Mr Chandler's case that he believed that an Adequate Plan was necessary for the BHS Group but that the Legacy Turnaround Plan was an Adequate Plan until the July 2015 Turnaround Plan could be put in place.

(2) Mr Henningson

681. In his Points of Claim, Mr Henningson denied that he knew that an Adequate Plan was essential and averred that this allegation was meaningless and that it ignored the actual steps which the Directors and their professional advisers had taken. He did not address this point directly in either of his witness statements but he gave the following evidence in Henningson 1:

> "60. Throughout my time as a director of the BHS Group, drilling down into the financial health or solvency of the business was not within my agreed role. I knew that the business had to be turned around but the question of whether that was possible or not was not something that I

> would have felt capable of answering. It appeared to me, however, that there was a long term plan in place supported by a great number of professionals to succeed in a tum around."

682. Mr Henningson did not refer to a particular document such as the Legacy Turnaround Plan or the July 2015 Turnaround Plan. Despite the little weight which I attach to his witness statements, I am prepared to accept that on his appointment Mr Henningson understood that there was a turnaround plan in place but that he did not drill down into that plan or examine whether that plan was adequate or realistic. I find, therefore, that Mr Henningson believed that the BHS Group had a plan in place (as indeed it did) but that he did not turn his mind to the question whether it was an Adequate Plan.

"111. The Legacy Turnaround Plan was not and could not have been an Adequate Plan following the takeover of the BHS Group by RAL…112. As the Respondents knew or ought to have known immediately on their appointment as directors of the relevant Companies, the Legacy Turnaround Plan was unsuitable for the needs of the BHS Group under the ownership of RAL…"

(1) Mr Chandler

683. Neither Mr Chandler nor Mr Henningson advanced a positive case that the Legacy Turnaround Plan was an Adequate Plan in their Points of Claim. Mr Chandler admitted that the main focus of the plan was on trading issues, that it had been prepared on the instructions of Sir Philip Green and that it did not address any corporate restructuring issues and, in particular, cashflow, a working capital facility and trade credit insurance. Mr Curl asked Mr Topp about the Legacy Turnaround Plan in cross-examination and his evidence was as follows:

> "Q. Now, it's fair to say that the legacy turnaround plan, that was a retail turnaround plan, rather than a corporate turnaround or a financial restructuring; is that fair? A. That's fair. I think it's also fair to say, my Lord, we didn't call it a turnaround plan, we called it -- I can't remember what we called it now, but it was -- it was basically designed for a potential -- ideas from -- or initiatives that we felt could eventually turn into a turnaround plan. It's -- in history it's become known as the turnaround plan, though, at the time, you know, we didn't -- when we first presented that pack we didn't call it that. MR JUSTICE LEECH: Just explain a little bit more, Mr Topp. You expected it to -- it was the first steps towards a turnaround plan, is that what you're saying? A. That's right. So it was basically a summary of ideas, thoughts, suggestions -- things that we thought we could do that would help support the turnaround of the business. MR JUSTICE LEECH: Thank you. MR CURL: So it's fair to say it was ideas for a retail turnaround, rather than addressing how you

> would pay for them? A. Correct. Q. And in order to effect a turnaround, you would have to have a sustainable source of working capital, wouldn't you? A. Yes. Q. And it's fair to say that the -- the legacy turnaround plan, as it has been described, takes it as read that there will be a sustainable source of working capital? A. For sure, yes."

684. In my judgment, the Legacy Turnaround Plan was not an Adequate Plan in the sense pleaded by the Joint Liquidators and for the reason given by Mr Topp. It was a retail plan directed at turning around the trading performance of the business but not at obtaining a sustainable working capital facility or maintaining cashflow. However, I accept Mr Chandler's evidence that he believed that the Legacy Turnaround Plan contained exciting opportunities. Moreover, it is clear from both his Points of Defence and his evidence that Mr Chandler understood the limitations of the Legacy Turnaround Plan and that it was not directed at funding the business or the cashflow.

685. Despite these important limitations, I am not satisfied that Mr Chandler either knew or ought to have known that the Legacy Turnaround Plan was not an Adequate Plan. In my judgment, it was reasonable for any recently appointed director to take the view that it would require a number of months for the Directors and the Operations Board to put in place a detailed business plan designed to address the separation from Arcadia.

(2) Mr Henningson

686. Mr Henningson did not refer either to the Legacy Turnaround Plan and I was not taken to any evidence to demonstrate that he received it. However, it is not necessary for me to decide whether he read it or understood its limitations because I take the view that it would also have been reasonable for him to take the view that it would require a number of months for the Directors to put in place a plan of their own to address the corporate restructuring issues such as cashflow and a working capital facility.

Q. Day One: The Realistic Financial Position

"140. The GT Report contained at pages 12 to 29 a section entitled "Cash flow". Its objective was to identify the level of funding required to support the BHS Group for twelve months after Day One. As the Respondents knew or ought to have known on Day One (or where relevant immediately on their appointment as directors of the relevant Companies), no reliance could be placed on that cash flow for the reasons set out below."

"143. By Day One, the Respondents knew (or ought to have known immediately on their appointment) that save for the Dowry, none of the heads of cash flow identified in the GT

Report would be available in the sums identified in that: a. RAL had no means of paying any of the transaction costs associated with the acquisition and intended to have recourse to the proceeds of North West House for that purpose, which meant £32 million would not be available to BHS Group on Day One"

(1) Mr Chandler

687. Mr Chandler placed great reliance on GT and the scope of their work. I have found that he read the GT Report within a few weeks of his appointment and that he did so in depth. He also gave evidence that he studied GT's cashflow reports carefully. I am satisfied, therefore, that he read and understood the assumptions in the summary on page 14 of the GT Report shortly after his appointment and in any event by the 17 April Board Meeting. Mr Curl suggested to Mr Chandler that a number of those assumptions were false:

> "Q. Could I have page {J/3/14}, please. Oh, I'm sorry, could I have bundle {C/359/14}, please. This is the cash flow summary from the GT report. A. Hmm, hmm. Q. And do you see there that in April, in column 8, there is a 25 million working capital facility budgeted in there? A. Hmm, hmm. Q. And then in September, column 1, meaning month 1 of the financial year, about three quarters of the way down, there's Oxford Street sale at 50 million. Do you see that? A. Yes. Yes. Q. Yes. So they're both key elements of the initial cash flow summary, aren't they? A. Yes. Q. Could I have the next page of that document, please. {C/359/15}. And GT say there: "With initial funding of 62.8 million, the potential working capital facility of 25 million is critical to achieving the minimum headroom of 16.1 million in August 2015". And then the next bullet point says: "Following this point, we note the assumed sale of the Oxford Street store in September 2015. Failure to deliver this cash flow (or some other form of financing) will mean the business runs out of headroom at the end of September 2015." Do you see that? A. Hmm, hmm. Q. So these two assumptions: working capital of 25 million and Oxford Street sold for 50 million in September are absolutely critical, aren't they? A. As at that time, yes. Q. And the companies never got a usable working capital facility of 25 million, did they? A. Well, we don't need to, I think, debate the use of the word "usable" in that sentence. There was a 25 million facility. We never really pushed to get the final 12.2 or whatever it was come in. And, yes, in September, there would need to be a sale of the Oxford Street store or some other form of financing. Q. So that's Noah II you're talking about there, is it? A. Yes, if that's the -- the 25-mil working capital, yes. Q. Well, you tell me because the liquidators' case is that you never had a usable 25 million facility; and your position, as you've just expressed it, is that you did. And so I'm just asking you whether that is Noah II that you regard as a 25 million working capital facility? A. It is, yes. Q. Could I have page {C/359/101} in that document, please. This is headed "cash flow assumptions and limitations" and at the bottom of that page it says "RAL

> Capital injection" it says "source: RAL management. The 5 million capital injection from RAL has been modelled to be paid on day 1. The model does not have this amount being removed from the business at a later date. "Do you see that? A. Yes. Q. You knew that that had been funded from the ACE I loan which was secured over Atherstone. You knew that, didn't you? A. Yes. Q. So, by definition, that is going to be removed from the business at a later date because RAL that's no other means of repaying, does it? A. Well, I didn't know that at the time that I read this, in terms of what RAL's position might be in -- well, I say "now" -- December, I don't know, yes, if I knew. Q. How did you think RAL might repay that debt? A. Well, I'm not sure I considered it. Q. Do you think you should have done? A. Well, no. We considered it at a later stage. I -- -- if I should have considered it, I -- well, I don't know. I think not. Q. When did you consider it? A. Well, we finally considered it when we decided to sell Atherstone, but we had been discussing it along the way."

688. I have found that Mr Chandler knew by 24 March 2015 at the latest that RAL had no means of paying any of the transaction costs associated with the acquisition and it that intended to use the proceeds of sale of North West House for that purpose. Mr Curl also put to Mr Chandler an email dated 14 March 2015 which demonstrated that GT had not been instructed about the deductions from the proceeds of sale:

> "Q. Now, the bottom half of this page shows that Mark O'Sullivan from GT, as at 14 March 2015, doesn't know anything about this and doesn't know what's going on, essentially, with the North West House money. He says: "By the way, I'm now seeing numbers of 27 million for North West House. Why is this now so much lower than anticipated?" Do you see that? A. Yes. Q. So GT, on whom all this reliance is being placed, are not being told something basic -- something as basic as: actually, it is not going to be 32 million because we have taken several millions of it? A. Right. Q. Do you agree that GT are not being properly instructed? A. It appears so."

689. I am satisfied that Mr Chandler knew soon after Day One that the £32 million shown in the cashflow summary on slide 14 was not available to the BHS Group. However, I am not satisfied that Mr Chandler knew at that stage that no reliance could be placed on the cashflow summary. He was not copied into the email dated 14 March 2015 and it was not put to him that he knew that GT had been given misleading instructions. I accept that he might have drawn the inference that the summary was wrong if he had gone back and looked at it once he discovered that RAL had misappropriated or misapplied £7 million of the proceeds of sale. But in my judgment, it is unrealistic to have expected him to undertake that kind of forensic exercise shortly after his appointment.

(2) Mr Henningson

690. I have found that Mr Henningson read the GT Report. For the reasons which I set out in the context of the Misfeasance Claims, I am also satisfied that Mr Henningson knew that RAL intended to use £5 million of the proceeds of sale of North West House to pay the costs of acquisition and turned a blind eye to the payments. I find, therefore, that Mr Henningson knew that on or soon after Day One that the £32 million shown in the cashflow summary on page 14 of the GT Report was not available. However, I am not prepared to draw the inference that he knew that the cashflow summary was unreliable for this reason alone.

"b. there was no reasonable prospect that the proceeds from the sale of the Carlisle Property would be available on Day One"

(1) Mr Chandler

691. Mr Chandler accepted that on Day One the BHS Group had not received the proceeds of sale of Carlisle of £4.92 million when he was asked about the Completion Statement. But I am not satisfied that he either knew or should have known that the cashflow summary could not be relied upon when he learnt this information. The proceeds of sale of Carlisle are not identified on the summary page but included in "Cash & Debt like items" totalling £28.7 million. Moreover, it was not suggested to him that this was anything other than a timing issue and the GT Report contained the following qualification: "currently we have no certainty as to whether this cash flow will materialise, or the potential timing".

(2) Mr Henningson

692. Mr Henningson would also have known on Day One that the BHS Group had not received the proceeds of sale of Carlisle. But I am not satisfied that he would also have known that no reliance could be placed on the cashflow summary as a result and for the same reasons. This was a timing issue and the group always expected to receive the money at some time.

"c. the BHS Group had no entitlement to any of the proceeds of sale of Marylebone House"

693. I have found that both Mr Chandler and Mr Henningson knew that the proceeds of sale of Marylebone House had not been included in the SPA but believed that Sir Philip Green had orally agreed with Mr Chappell to procure that £8.5m of the proceeds of sale

would be transferred to BHSGL. Given this finding, I am not satisfied that either of them knew or ought to have known that the cashflow summary was inaccurate. GT's cashflow summary stated that BHSGL would receive £13.5 million (rather than £8.5 million) out of the proceeds of sale of Marylebone House and both had good reason to be concerned that this figure was now incorrect. But I am not satisfied that this was a sufficient reason by itself to challenge or dismiss entirely the cashflow summary.

"d. RAL had no money to contribute other than that borrowed under ACE I at the expense of the BHS Group in the circumstances identified at Paragraphs 113 and 128 and that, as a matter of substance, no equity injection had been or would be made by RAL and in fact RAL would make a net profit from BHS Group in the course of its acquisition."

(1) Mr Chandler

694. I have found that Mr Chandler knew that RAL had no resources of its own. When Mr Curl put the Completion Statement to him, Mr Chandler also accepted that RAL put no equity into the BHS Group and when the GT Report was put to him, he also accepted that the £5 million Capital Injection shown in the cashflow summary had been funded by the ACE I loan and that it was secured over Atherstone. However, he also said that it was only when RAL failed to repay the loan that he realised that RAL had not complied with its obligation to provide the Capital Injection of £5 million.

695. After some hesitation I accept Mr Chandler's evidence on this issue. With the benefit of hindsight, it is clear that RAL was never able to make the second £5 million of the Capital Injection due under the SPA. It can also be said that RAL did not make the first £5 million of the Capital Injection either because it was funded by a loan secured over the assets of the Group itself. However, I am not satisfied that either of these things were so obvious to Mr Chandler on his appointment as a director that he would have reached the conclusion that the cashflow summary was a fiction or unreliable.

(2) Mr Henningson

696. On 11 March 2015 Mr Henningson attended all three meetings of the RAL board and approved RAL's entry into ACE I. Moreover, he knew from the terms of ACE I and his attendance at the meetings that the purpose of the loan was to subscribe for 20 million shares in BHSGL. On 11 March 2015 Mr Chappell and Mr Henningson were also appointed as directors of BHSPL and although there was no minute of a meeting to

approve the ACE I Security Agreement, I find that Mr Henningson knew that ACE I was to be secured over Atherstone. Finally, although the Capital Injection of £5 million was new money, I am satisfied that Mr Henningson knew that RAL was taking over £5 million out of the BHS Group on the sale of North West House. I find, therefore, that the Joint Liquidators have proved the specific allegation in paragraph d (above) against Mr Henningson.

697. In conclusion, I dismiss the allegation that Mr Chandler knew that no reliance could be placed on the cashflow summary on slide 14 of the GT Report or that none of the sources of cash in that summary would be available (apart from the Dowry). After some hesitation, I also dismiss the allegation against Mr Henningson. He knew that GT had not been told the truth about the proceeds of sale of North West House. He also knew how RAL was funding the Capital Injection and that the ACE I loan was to be secured over Atherstone. But I am not satisfied that I can properly find that he knew as a consequence that GT's cashflow summary on Day One was a fiction or wholly unreliable.

"144. The GT Report assumed at page 14 a number of cash out flows, such as £1.2 million with respect to the costs for the sale of North West House. By Day One, the Respondents knew or ought to have known that the costs of the North West House transaction exceeded £1.2 million."

698. The cashflow summary made a provision of £1.2 million for the sale costs of North West House. Mr Curl put a number of payments out of the proceeds of sale to Mr Chandler. But I am not satisfied that they could properly be regarded as "sale costs" or that Mr Chandler or Mr Henningson were even aware of this provision on appointment. I, therefore, dismiss this allegation against both Respondents.

"147. In the premises set out at Paragraphs 143 to 146 above, and as matters stood on Day One, the Respondents knew at that time that (or ought to have known immediately on their appointment): a. other than the Dowry, every one of the relevant presumptions outlined in Paragraphs 142 and 145 above underlying the available cash flow in the GT Report for Day One purposes had been falsified by Day One; b. there was no working capital facility of £25 million in place on Day One; c. if trading was to continue, short term borrowing on onerous terms was inevitable (and was not factored into the cash flow projection in the GT Report); and d. as a consequence of the matters stated at Paragraph 147(a), (b) and (c) above, £37.6 million would not be available from the sale of the Oxford Street Premises in September 2015, even if it could have been sold by that point."

(1) Mr Chandler

699. In the light of my earlier findings, I am not satisfied that Mr Chandler had the knowledge alleged in paragraph 147(a), (b) and (c). The Joint Liquidators also alleged that he knew or ought to have known that cash of £37.6 million would not be released on the sale of Oxford Street (as shown in the cashflow summary) because the assumptions were false, there was no working capital facility of £25 million in place on Day One and because the BHS Group would only be able to obtain short term borrowing on onerous terms. However, I have found that Mr Chandler was not aware that a number of the assumptions were false or that it was unrealistic for him to appreciate that the cashflow summary was a fiction or unreliable on the basis of what he did know. I dismiss this allegation for the same reasons.

(2) Mr Henningson

700. Although I am satisfied that Mr Henningson appreciated that two of the key assumptions underlying GT's cashflow forecast were false, I am not satisfied that I can properly draw the inference that he knew on Day One that £37.6 million would not be available on the sale of Oxford Street. I am not satisfied that I can properly draw this inference either from the fact that Mr Henningson knew that there was no working capital facility in place on Day One. Less than two weeks later Mr Chappell and he approved Noah II and I have found that he did not know that this could not be treated as a proper working capital facility.

R. The 17 April Board Meeting

"170. The GT cashflow report for the week ending 11 April 2015 correctly described the lack of trade credit insurance as "critical". The Respondents all knew or ought to have concluded that there was no reasonable prospect of achieving the restoration of trade credit insurance in the short term."

(1) Mr Chandler

701. By Day One Euler Hermes, Atradius, HSBC and Nexus CIFS Ltd had all withdrawn cover. On 13 March 2015 Mr Chandler made a handwritten note stating: "SPG – Euler Hermes – positive, supportive". Mr Chandler suggested in Chandler 1 that it was Euler Hermes who were supportive although he might have been referring to Sir Philip Green. Mr Curl suggested to him that he was putting an unduly positive spin on this note and put to him Mr Topp's evidence to the Insolvency Service that the withdrawal of credit

insurance was critical to the business and there was no realistic prospect of it being restored. Mr Chandler did not accept this and Mr Curl put to him his own evidence to the Pensions Regulator:

> "Could I have the bottom half of that page, please. And you say, reading from line 32: "The business was shaken really badly by the withdrawal of credit insurance after acquisition. I mean, I understand that credit insurance had begun to be pulled earlier than the acquisition, but, when Philip suggested that he was going to {G/1.1/14} sell it and it became news that he was interested in selling, I think in January of 2015, I understand that credit insurance began to be pulled at that point but, after acquisition, it was pulled much more quickly and radically than anybody could have anticipated. Philip had made representations, I understand, these representations being witnessed by a number of people, including our lawyers, that he would sort out credit insurance and he didn't." Now, that was what you thought on 20 July 2016. Now, I suggest that is -- that is far more pessimistic than what you're saying in your witness statement now. Would you agree with that? A. Well, there I'm speaking with the benefit of hindsight. Q. You agree that a more realistic view is that trade credit insurance being withdrawn finished you off before you even started? A. No, I don't agree with that. Q. Could I have page {G/1.1/26} of that clip, please. Reading from lin21: "I mean, we haven't gone into it, but the reasons, my analysis of why the business failed, is that the credit insurance stuffed us from the start." And that was right, wasn't it? A. Well, that's what I thought in July of 2016. Q. But in July 2016 your view was that it had had that effect from the start, which must mean the acquisition? A. Yes, but it doesn't mean that I thought that from the start."

702. Mr Chandler placed reliance upon the fact that Arcadia had initially agreed to guarantee the letters of credit which the BHS Group was compelled to obtain in place of trade credit insurance. However, he accepted in cross-examination that Arcadia was required to fortify the guarantee by 27 April 2015 and that by 4 May 2015 he knew that Arcadia had failed to do so. He also accepted that he knew that Sir Philip Green had failed to get the cover rewritten and was unwilling to guarantee any future letters of credit. The following exchange then took place:

> "Q. All right. I'd like to show you what you -- what you thought at the time. Could I have, please, bundle {J/16/42}, please. Now, this is a note of a meeting that you attended with Harbottle & Lewis and you were -- it was within the context of something that the Oliver Shah of the Sunday Times had written that you didn't like, and you were interested in getting Harbottle & Lewis to write a letter complaining about it. But the reason I'm taking you to it at the moment is because of what you have there written on or about 4 June 2015. You have put at point 3: "OS [that's Oliver Shah] seems to have it that it's a strip and flip. That's not true". And then an

> arrow, providing what I suggest is your real answer: "Trade credit insurance has fucked us. SPG said he'd fix it. It hasn't. 30 million LCs Cash flow is tight." So that is what you thought on 4 June 2015, didn't you? A. No, that's what somebody else thought. It looks like it's Eddie Parladorio. Q. Well, this is your writing, isn't it? A. It's absolutely my writing. If you look at my notebooks, of which there are plenty, you will see that I write down things that other people are saying. There is, I think, only one something of me writing down something as a self-serving and self-referential document about something that I was thinking. This -- this is me recording what somebody else has said. Q. Did you disagree with what Mr Parladorio was saying? A. Well, I don't agree that the use of that expletive is terminal in the way that you would have us all interpret it. It certainly didn't help. Q. Now, I'm just -- I'm going to suggest to you, Mr Chandler, that the fact that Sir Philip Green had entirely failed to perform on trade credit insurance and you were aware of that by the beginning of June indicated to you that you could not attach any weight at all to any extra-contractual promises that were said to have been given by Sir Philip Green. Do you agree with that? A. No."

703. I accept Mr Chandler's evidence that the view which he expressed to the Pensions Regulator did not reflect his knowledge or belief either on 18 March 2015 or even on 4 May 2015. Indeed, I am not satisfied that Mr Chandler knew or believed that the withdrawal of credit insurance was terminal or even critical for the BHS Group at any time before 4 June 2015. In reaching this conclusion I bear in mind Mr Topp's evidence that it was the suppliers and not the BHS Group which placed the cover and that the group was able to obtain limited cover from QBE and HSBC even though Euler Hermes and Atradius never agreed to restore it.

704. However, I find that by 4 June 2015 Mr Chandler knew that there was no realistic prospect of either Euler Hermes or Atradius restoring trade credit insurance because Sir Philip Green had tried to persuade them to do so and had failed. I also find that Mr Chandler knew by that date that Sir Philip Green was unwilling to provide further guarantees for the BHS Group to obtain letters of credit. I find, therefore, that Mr Chandler knew that there was no reasonable prospect of achieving the restoration of trade credit insurance in the short term by 4 June 2015 but I do not find that he knew that to be the case before that date.

(2) Mr Henningson

705. Mr Henningson was not present at the meeting on 4 June 2015. However, in his amended written responses to the Insolvency Service dated 30 May 2017 he gave the following evidence about trade credit insurance and letters of credit:

> "13. There were many trading difficulties and critical financial events affecting the solvency of BHS between 11 March 2015 and the date of Administration in April 2016. These were mostly brought to my attention in the financial planning material, usually on a weekly basis, provided by the finance team at BHS and part of the preparatory material for the BHS Board Meetings. There would also be the Board Meetings themselves. The person providing most of the material was Harry Carver. All of this material will be with BHS. The most significant trading difficulty was the failure of Sir Philip Green ("SPG") and Arcadia to deliver on promises to assist in the reinstatement of the BHS Trade Credit Insurance ("TCI") and the difficulty of obtaining significant third party financing at reasonable rates whilst managing the cash flow difficulties of the retail business. The timing of the sale of various properties and the CVA were also critical financial events. Darren Topp and the retail team had difficulties from the beginning to live up to the numbers that they were forecasting for the retail side of the business. Most of the suppliers required payment in advance which meant that a large amount of cash had to be retained to cover payments and letters of credit. There were regular cash flow updates and also solvency updates provided by Grant Thornton, Michael Hitchcock as acting CFO of BHS and Adam Plainer of Weil Gotshal & Manges."

706. GT's weekly cashflow update dated 7 May 2015 identified "Supplier credit insurance" as the first headroom key issue and stated that insurance lines remained largely closed. GT also stated that Euler Hermes had said that its credit committee was likely to be reporting the following week. GT's weekly cashflow update dated 16 May 2015 reported that Euler Hermes would not be extending cover but that some smaller credit insurers had confirmed cover although the amounts were small. But in their weekly cashflow updates between 4 June 2015 and 2 July 2015 GT no longer reported that there were any discussions with trade credit insurers and in their weekly cashflow update dated 14 July 2015 GT stopped referring to trade credit insurance altogether.

707. Mr Henningson did not state in his written replies when he became aware that Sir Philip Green and Arcadia had failed to deliver on promises to assist in the reinstatement of trade credit insurance. However, I find that he knew this by 20 May 2015. Mr Henningson is recorded as attending the BHSGL board meeting that day and the minutes record that Mr Chappell told the meeting that Sir Philip Green "had been vague in meeting his previous commitments and had failed to resolve credit insurance as he had

undertaken to do so." I also find that by 4 June 2015 Mr Henningson knew that there was no reasonable prospect of achieving the restoration of trade credit insurance in the short term because GT made no further mention of trade credit insurance in their weekly cashflow updates after that date.

"171. The Respondents knew or ought to have concluded that the GT cashflow report for the week ending 11 April 2015 was unduly optimistic and could not be relied on in that they knew or ought to have known that: a. GT remained wrongly instructed that Marylebone House would be (i) sold in May; and (ii) this would produce £8.5 million, when the true position was as set out at Paragraph 100 above"

(1) Mr Chandler

708. I have found that Mr Chandler knew that RAL was not entitled to the proceeds of sale of Marylebone House under the SPA but that he remained confident that the money would come into the business because he believed Sir Philip Green's assurance. When Mr Curl cross-examined him about the 17 April Board Meeting he accepted again that there was no contractual entitlement to the proceeds of sale. But he denied that he could not attach any weight to Sir Philip's word:

> "Q. Could we go back to {E/20/5}, please. And the next thing on that list is the sale of Marylebone House for circa 7 to 8 million. As at 17 April you knew two things: you knew that the companies had no entitlement to receive anything from the sale of Marylebone House; and you also knew that Sir Philip Green had not performed any of the things that he said he would perform by that time. Do you agree with that? A. That they were two of the things that -- that I knew, yes. Q. So it -- A. Well, save to the fact that he'd said he'd sort credit insurance, he tried and failed. And of course I knew other things about the -- that Marylebone House money, which I reasonably took into account when considering the position on 17 April. Q. So you couldn't properly attach any weight to the possibility of receiving £7 to £8 million in relation to Marylebone House, could you? A. I totally disagree."

709. I accept Mr Chandler's evidence. I am not satisfied that he knew before the 17 April Board Meeting that the weekly cashflow update dated 15 April 2015 for the week ending 11 April 2015 was unduly optimistic because it continued to include the sale proceeds of £8.5 million for Marylebone House or that he knew that GT's instructions were wrong. The fact that Sir Philip Green had been unable to use his influence to restore trade credit insurance was not (or not yet) a reason for doubting his word in relation to Marylebone House.

(2) Mr Henningson

710. I have also found that Mr Henningson knew that RAL was not entitled to the proceeds of sale of Marylebone House under the SPA but also that he relied on the assurances of Sir Philip Green too. As with Mr Chandler, I am not satisfied that by the 17 April Board Meeting Mr Henningson knew or ought to have known that the weekly cashflow update put before that meeting was unduly optimistic because it continued to include the sale proceeds of £8.5 million for Marylebone House.

"b. GT had been wrongly instructed that the £25 million working capital facility provided by HSBC to BHSGL on 26 March 2015 ("**Noah II**") would be drawn in June 2015, when in fact there was no reasonable prospect that the Respondents would be able to fully draw down on that facility at that time"

711. Further, I am not satisfied that either Mr Chandler or Mr Henningson knew that GT's instructions were wrong because that weekly cashflow update included Noah II. I have already found that they both relied on the advice of Mr Roberts on 24 March 2015 (above). Mr Curl put it to Mr Chandler on two occasions that he must have known that Noah II was effectively useless. But he was unable to point to any material change of circumstances before 17 April 2015. Moreover, the weekly cashflow update did not anticipate the BHS Group drawing on Noah II until June 2015 and the group did not request Arcadia's consent to draw down £10 million until 28 April 2015.

"c. GT's projections were premised on a sale of the Oxford Street Property in September 2015 and there was no reasonable basis to assume that that would necessarily eventuate"

(1) Mr Chandler

712. The revised headroom forecast in the weekly cashflow update dated 11 April 2015 assumed that Oxford Street would be sold in September 2015 generating about £40 million of cashflow: see slide 5. The minutes of the 17 April Board Meeting record that the headroom forecast was tabled at the meeting and that it had factored in the sale in September 2015. The minutes then record that Mr Chappell said that "the sale of Oxford Street had to take place post September for tax reasons but was critical to cash flow and the ongoing success of the business". Mr Curl put the minutes to Mr Chandler and suggested to him that he must have known on 17 April 2015 that Oxford Street would not be sold in September that year. Mr Chandler did not accept this and floated the

possibility that the minutes might have been inaccurate and that Mr Chappell had been referring to August and not September 2015.

713. Mr Curl also put it to Mr Chandler that he must have known that Oxford Street would not be sold by September 2015 because he had given evidence to the Pensions Regulator that a decision was taken not to market the property until after September 2015. Mr Chandler could not recall whether this was something he knew at the 17 April Board Meeting but he also gave evidence that he reasonably believed the things discussed at that meeting.

714. I am not satisfied that the minutes of the meeting are fully accurate in recording what Mr Chappell said. In my judgment, it is more likely that Mr Chappell was referring to the end of August rather than the end of September when he referred to the sale of Oxford Street. As Mr Chandler suggested, it is much more likely that BHSGL had a tax reason for delaying the sale until after the year end (which was 31 August 2015) than for delaying it from one month to the next. For these reasons, therefore, I do not accept that on 17 April 2015 Mr Chandler knew or ought to have known that Oxford Street would not be sold for £50 million in September 2015 or that GT's instructions were wrong for that reason.

715. Mr Sherwood's evidence supports this conclusion. Mr Bourne recorded in his notebook that on 19 March 2015 Mr Sherwood was very confident that Oxford Street could be sold in September 2015 for £50 million. When Mr Lightman put this note to Mr Sherwood, he confirmed that he was confident of this at the time although he was later proved wrong:

> "Q. And we -- can we go back to the notes of your conversation with Mr Bourne at {J/38/14}, please. And Mr Bourne's notes record that you were "very confident of £50 million" for Oxford Street "and aiming for July exchange, complete early September". A. That is what it says. Q. And, so far as you're aware, would that accord with what you would have told Mr Bourne at that time? A. What year was this? Q. It's 19 March 2015. A. Okay. Yes, that must -- that was -- would have been reasonable expectations at that time. Q. So if one of the directors of BHS had asked you, on 19 March, that very day, 2015, how much you thought you could sell Oxford Street for and the time frame for that sale, you would have told that person what you told Mr Bourne: that you were confident you could sell it for £50 million with completion in September 2015? A. Yes, I'd have certainly told them September -- I would certainly have told them £50 million and I probably would have told them September, although I was

> proved wrong on that, wasn't I? Q. Well, we're talking about where you were -- A. My thinking. Q. Without thinking about hindsight or anything that you know now. A. No, I think, yes, I would have said that."

(2) Mr Henningson

716. Although he dealt with events which took place on 13, 15 and 16 April 2015, Mr Henningson did not address the 17 April Board Meeting at all in Henningson 1. I find this inexplicable. Moreover, Mr Henningson was a turnaround specialist and much closer to Mr Chappell than Mr Chandler. It would, therefore, have been open to the Court to take the minutes of the meeting at face value as evidence that Mr Henningson was told and understood that Oxford Street would not be sold in September 2015 and that he must have known that the weekly cashflow update dated 15 April 2015 was wrong. However, given my findings in relation to Mr Chandler, I am not able to conclude that Mr Henningson knew by the 17 April Board Meeting that Oxford Street would not be sold for £50 million in September 2015 or that GT's instructions were wrong for that reason.

"d. Noah II was, in any event, secured over Oxford Street (in addition to a number of other properties owned by the BHS Group), and so even if it had been available to be fully drawn, it would simply have eroded the proceeds that might ultimately be available from the Oxford Street Property when it was sold."

(1) Mr Chandler

717. Mr Bourne gave evidence that nine days after the acquisition Mr Chappell took the decision to permit Oxford Street to be used as security for Noah II and that personally he strongly disagreed with that decision:

> "So almost starting at the end, there was a particular event on the Friday, nine days after the acquisition had completed, where I disagreed with a decision that Mr Chappell took to allow the Oxford Street property to be used as security against an HSBC working capital facility. The Oxford Street property was particularly important in the cash flow. It was a valuable property, where the plan had always been to sell it in the summer and generate 40, 50, 60 -- who knows what, but, you know, 50 was a working number, 50 million of cash that would be used in funding the turnaround plan. And by pledging it as security for a new HSBC 40 million loan, that, in my view, meant that it was going to be difficult to use Oxford Street to generate that cash that the business needed. So that was the particular event where it was, you know, the final thing. It was -- that was too big an issue for me. I didn't understand why he was willing to do it;

> and I stopped consulting at that stage, until I said to him I had a chance to sit down and understand what was going on."

718. I have already considered the general advice which Mr Bourne gave to Mr Chandler about becoming a director. But during his cross-examination on that topic Mr Chandler also accepted that Mr Bourne communicated his concern about Mr Chandler's decision to use Oxford Street as security for Noah II:

> "Q. Could I have the bottom half of that page, please.10.30, Mr Bourne writes: "D popped into room where P/MM/Dom 2 and I were and said cheerfully he had spoken to SPG and giving security over Oxford Street was fine, SPG would sort out HSBC when we needed to sell it. Everyone looked incredulous, I asked him what he meant exactly, he babbled the same line, makes no sense". Do you remember that discussion? A. No. Q. Do you doubt that it happened? A. No. Well, this -- this notebook is, I think, a curious document; and I -- I -- I consider it to be a relatively self-serving document that Stephen Bourne created for his own purposes. I've no reason to doubt that that -- that conversation or something of it happened, but I don't know if it's precisely that. Q. Well, none of that was put to Mr Bourne when he was in the box last week, was it? A. I don't -- I don't think so. Q. No. Well, you were in court, weren't you? A. I was. Q. Yes. And he continues: "Called DR" -- pausing there, that must be David Roberts of Olswang, mustn't it? A. I assume. Q. -- "to ask what was going on, what didn't I know. He said SPG calling the shots, no choice. I said Oxford Street was central to funding the turnaround, and this made it unavailable. Not my call as I wasn't a director, but I couldn't see why anyone would do this or how the Board could be satisfied on the availability of funding. Both agreed we could do nothing but wait and see. Dom 2" -- that's you, isn't it? A. I think so, yes. Q. -- "came in, repeated concerns, said I was out if he did this, it is inexplicable, can't work out what is going on but something is." And then could I have, please, tab {J/30/7}, please. This is an Olswang notebook. And the date there, about a third of the way down, says "20/3/15", and it says: "DC -- happy for Oxford Street to be included. "Freedom to sell Oxford Street is critical and then: "Pattern developing -- properties being locked up. "Slipped in MK -- Carmen" -- and that's a reference to security for Noah I being sneaked in without a chance for advice, isn't it? A. I think so. Q. And then next line: "Bristol." Next line: "Now Oxford Street". So you were aware, because you were talking to Stephen Bourne regularly, that this was Olswang's advice, weren't you? Or Olswang's concern -- I'll re-phrase that. A. So your interpretation of that is that that's Olswang's opinion, rather than them writing down what Stephen Bourne is telling them, is it? Q. Do you suggest Olswang were saying something different? A. I -- I don't know, but you're suggesting that that is Olswang's advice. I read that as being them making a note of a conversation that Stephen Bourne is having. It's consistent with what Stephen Bourne thinks at that time. Q. Did you think Stephen Bourne was wrong? A. I did think he was wrong, because Stephen Bourne wasn't a member of the Board and wasn't party to the things that we were talking

> about and thinking about. And Dominic Chappell did say, according to Stephen Bourne's note, that Philip would release the charge when we needed to sell it. So I -- I do think Stephen Bourne was wrong. And I also think that Stephen Bourne when -- at the time that he exited was wanting a meeting with Dominic and Eddie and Mark to discuss all of this. And that meeting never happened. And therefore the outcome of what Stephen Bourne might have thought after that meeting, we do not know."

719. I accept Mr Chandler's evidence that the Olswang note to which he was taken was recording Mr Bourne's views rather than Mr Roberts' advice and I find that Mr Bourne informed Mr Chandler both directly and in conference with Olswang that he believed the freedom to sell Oxford Street was critical and that he was strongly opposed to Mr Chappell's decision to charge it to secure Noah II. However, I also accept Mr Chandler's evidence that he did not accept Mr Bourne's view but instead accepted Mr Chappell's assurance that Sir Philip Green would ensure that the security was released when the BHS Group needed to sell it.

720. Mr Chandler accepted, however, in cross-examination that he understood that the consequence of granting security over Oxford Street was to erode the proceeds that might ultimately be available when it was sold:

> "MR CURL: And you knew, on 17 April, that Oxford Street wouldn't realise 50 million of new money, didn't you? A. I think so, yes. Q. In your defence, you say that drawing down a facility against Oxford Street would have the effect of accelerating the availability of the proceeds of sale of Oxford Street, rather than eroding them. Do you recall that? A. I do, yes. Q. Yes. Now, I suggest that that's wrong in principle because the cash flow assumptions were that you would have a 25 million working capital facility and 50 million for Oxford Street on top -- that these things would be cumulative, not one and the same thing. Do you agree with that? A. The 11 March cash flow said that or some other source of funding for Oxford Street, but, yes, in principle, I accept that. Q. And borrowing on bridging loan terms or any terms against a property is obviously far more expensive than just realising the asset, isn't it? A. Yes."

(2) Mr Henningson

721. I am also satisfied that Mr Henningson knew that Noah II was secured over Oxford Street (in addition to a number of other properties owned by the BHS Group). Mr Henningson was fully aware of the terms of Noah II because he attended the meeting on 24 March 2015 and approved Noah II. Moreover, he knew that security was to be provided over Oxford Street because Mr Roberts sent him the key commercial terms

and the draft facility agreement on 20 March 2015. Indeed, the Noah II Facility Agreement expressly provided that £12,903,226 of the loan amount had been allocated to Oxford Street because Mr Roberts drew his attention to this in the covering email.

722. I also find that Mr Henningson fully appreciated that Noah II would erode the proceeds that might ultimately be available from the Oxford Street Property when it was sold. Mr Henningson would also have understood this because of his financial expertise. But in any event Roberts raised this issue directly in his email dated 20 March 2015 and advised the BHSGL board that it needed to know how much of the proceeds of sale of Oxford Street had to be repaid to HSBC because it was a key asset required for cashflow purposes.

"173. The Respondents were aware or ought to have made themselves aware of GT's views and advice identified at Paragraph 172 above, i.e. that without trade credit insurance: a. the BHS Group faced the "*doomsday scenario*"; b. by which GT meant "*going under*"; and c. in the view of GT, this was by 15 April 2015 "*a fact*"."

723. In support of this allegation the Joint Liquidators relied on an email circulated by Mr O'Sullivan internally within GT. It was not put to Mr Topp or to Mr Chandler and having considered the email itself and the chain of which it formed a part I am not satisfied that Mr O'Sullivan was actually expressing the view that the BHS Group faced the doomsday scenario or that it would go under if trade credit insurance was not restored (as opposed to recommending that the group should take that position in negotiations with third parties). I, therefore, dismiss this allegation against both Mr Chandler and Mr Henningson.

"178. At the board meeting of BHSGL that took place on 17 April 2015, inter alios the Respondents: a. went on to purport to consider solvency and wrongful trading, in particular on the basis that the projections they had available to them indicated that the issue of letters of credit would put BHS Group in a cash negative position in October 2015; and b. purportedly based their decision to continue trading on a series of factors, which were said by the Respondents to have "a real prospect of materialising, that would impact on this assessment"."

(1) Mr Chandler

724. Mr Chandler's evidence in Chandler 1 was that the minutes of the 17 April Board Meeting accorded with his recollection. It was also his evidence that the discussion on the solvency of the BHS Group was taken seriously and that this was especially so after the training from Olswang eight days earlier. Mr Curl suggested to Mr Chandler in

cross-examination that the minutes of the 17 April Board Meeting signed on 4 June 2015 were "window dressing":

> "Q. Okay. Could I have bundle {C/616/2}, please. This is an e-mail from you to Olswang on 29 April 2015; so that's 12 days after a meeting that Olswang didn't attend. Do you agree? A. Yes. Q. And there's a reference in the second paragraph to "your presentation". That's a reference to a high level presentation on duties and liabilities that Olswang had given earlier in April, isn't it? A. Yes. Q. We'll come back to that. But what you've done here is you've -- you've cut and pasted below, into the body of this e-mail, your first go at the minutes. Do you agree with that? Or part of the minutes. A. Yes. Whether it was my first go or Emma's, but, yes. Q. All right. So could I have the next page, please. {C/616/3}. Now, there's a version of what we've just seen in the signed minute, starting about halfway down that page. It says: "Concerned at the solvency of the business and the potential for wrongful trading, in particular in relation to the fact that the intended LoC might take the headroom in October below Zero, the board agreed that they needed to identify factors that would prevent insolvency and had a real likelihood of materialising. The board noted that the following factors needed to borne in mind". And factors are then set out. And then after that it says: "For all of the above reasons, it was considered that the Company was taking all necessary and reasonable steps to ensure that the Company was not trading insolvently." Do you see that? A. Hmm, hmm. Q. Yes. So that is your or Emma Reid's record of what transpired at that meeting; yes? A. Yes. Q. Now, that is materially different from the statutory test for wrongful trading, isn't it? A. Yes. Q. Now, that shows two things. It shows, firstly that, you, as Group General Counsel, didn't understand the statutory test for wrongful trading when you wrote that e-mail on 29 April 2015. Is that fair? A. No, I don't think so. Q. Had you understood the correct legal test then you would have embodied it in the minute, wouldn't you? A. I don't agree. Q. You must have also not understood the correct statutory test for wrongful trading when the meeting took place on 17 April 2015. That's right, isn't it? A. No. Q. And the first attempt at the minute shows that the correct question was not, in fact, addressed at that meeting at all. It shows that, doesn't it? A. I -- I -- it seems to show that, yes. Q. It shows that on 29 April and, therefore, on 17 April, you thought it was a question of making sure you weren't trading insolvently, doesn't it? A. Well, that's what the minute says at that stage, yes. Q. So you didn't appreciate, at the time of the meeting on 17 April 2015, that it is actually a rather different question, namely whether there is a reasonable prospect that the companies would avoid going into insolvent liquidation or insolvent administration. Do you agree? A. No. Q. Now, do you agree that the correct statutory test doesn't simply mean whether you can keep trading today or next week, it requires you to look forward, well into the future, doesn't it? A. Yes. Q. But you weren't doing that on 17 April, were you? A. We -- we were. Q. You were concerned with simply being able to say that the company was taking all necessary and reasonable steps to ensure that the company was not trading insolvently, weren't you? A. What happens at Board meetings is that you talk about things; and then

somebody tries to encapsulate that in -- in the best way to record the conversation. We'd -- we'd had the training on 9 April so, therefore, we all understood the test. And if we've got it wrong in our first draft, that's why I sought the advice that I sought. Q. But the point is the first draft records what transpired, doesn't it? A. I -- I don't -- I don't know if that's fair. It records Emma's first attempt, with me passing it on to Olswang, of trying to make sure that we captured the things that we were talking about in -- in the right way. I really don't think it's reasonable to suggest that a week after all of us were in Board minutes -- sorry, were in a meeting where the right tests were explained to us, that we didn't understand them. I think it's more likely that we just got it wrong on our first drafting as to how we should record this. Q. I see. So you wanted to make sure that it was recorded that you captured things in a way to make it look as if you were asking yourselves the right question, when, in fact, you weren't? A. No. Q. Now, given that you thought that the test was simply making sure that you weren't trading insolvently, that, then, explains why you were so intently focused simply on week by week cash flow headroom, doesn't it? A. Well, we were advised to make sure that we were taking account of cash flow and -- and that -- you know, the central question that you're asking is the matter that we're here to -- you know, to try. Q. Now, I suggest that no weight at all can safely be attached to this part of the signed minutes of 17 April 2015 because you didn't address the correct test. A. All right. Well, we disagree about that. Q. Could I have, please, bundle -- in fact, just before we depart from that page: do you agree that the paragraph that appears in the signed minute concerning the interests of creditors, which appeared -- would appear after the paragraph beginning "for all of the above reasons", doesn't appear in your first draft at all? A. I do. Q. Could I have, please, bundle {C/616/1}. A. We're already there, I think. Q. Ah, yes. Page {C/616/1}. Thank you. This is Julian Turner replying to your e-mail on 1 May. This is now two weeks on from the meeting, which no one from Olswang attended. And Mr Turner provides some advice about the sorts of things that you should be asking. And he also provides some wording, which is at bundle {C/617/1}. And could I have the second page of that, please. {C/617/2}, please. So you will see that he has -- he has redrafted these in a material way and added in a paragraph concerning the company's creditors. Do you see that? A. Yes. Q. Now, although Mr Turner doesn't say that you should, what you do is you simply cut and paste Mr Turner's suggested wording into the minutes for the meeting of 17 April 2015, don't you? A. Yes. Q. And, in doing so, you change the minutes to give the appearance that you had thought about and deliberated about the correct statutory test for wrongful trading when you had not. Do you agree with that? A. No, I don't agree that we had not discussed the right statutory test or the interest of creditors. Q. You didn't mention the interest of creditors at all in the first draft, did you? A. No. Q. The version of the minutes that was ultimately signed on 4 June 2015 was simply window dressing, wasn't it? A. No."

725. Although Mr Curl put "window dressing" to Mr Chandler in cross-examination, Mr Perkins and he did not go so far in their closing submissions. They did not suggest that

the minutes were a sham or deliberately falsified to give the impression that the members of the BHSGL board had considered the question of wrongful trading when they had not. In my judgment, they were right not to do so. I accept Mr Chandler's evidence that the minutes were not intended to be misleading but to record what took place. I also accept his evidence that the board discussed the solvency of the business and identified the Solvency Factors which might avoid the group's insolvency and listed them accurately. Finally, I accept Mr Chandler's evidence that he took the question of solvency seriously himself.

726. However, I do not accept that the changes which Mr Turner made to the text immediately above the bullet points and the text which he suggested below it reflected the actual discussion which took place. Indeed, I would have been very surprised if the individual directors had framed their discussion by reference to the statutory test for wrongful trading without Mr Turner or Mr Roberts being present. But in any event, I am not satisfied that there was a real difference in substance between the wording used in the draft minutes and the version which was ultimately approved and signed. The critical issue was whether there was a real prospect or likelihood that the Solvency Factors would materialise.

727. The draft minutes which Mr Chandler sent to Olswang recorded that the board considered that there was a reasonable prospect that BHSGL would avoid going into insolvent liquidation. In the light of the conclusions (above) I find that these draft minutes accurately recorded the views expressed by the Directors at the 17 April Board Meeting. I also find that Mr Chandler held that view. Finally, I find that Mr Chandler believed at the time of the meeting that there was a real prospect that the Solvency Factors listed in the minutes would materialise.

(2) Mr Henningson

728. It is more difficult to assess whether Mr Henningson applied his mind at all to the question whether there was a reasonable prospect of BHSGL or BHSL going into insolvent liquidation. Given the conclusions which I have reached about his credibility more generally, his close association with Mr Chappell and his failure to deal with the 17 April Board Meeting in either of his witness statements, there were good reasons

why the Court might have been prepared to draw the inference that the minutes signed on 4 June 2015 were window dressing so far as he was concerned.

729. In particular, Mr Henningson knew that Mr Chappell did not have £7 million on deposit at the Bank of China and it is more probable than not that Mr Henningson knew that Mr Chappell's statement to the meeting that he was in talks with the bank for a working capital facility of £120 million was a complete fiction. Nevertheless, given Mr Chandler's evidence and the conclusions which I have drawn about it, I am not prepared to draw such an inference against Mr Henningson.

"179. The factors that purportedly caused the Respondents to conclude that there was a reasonable prospect of BHSGL avoiding insolvent liquidation included: a. the sale of the Oxford Street Property for circa £50 million; b. the sale of Marylebone House would produce circa £7-8 million; c. the sale of the Carlisle Property (owned by Davenbush); d. "talks with Bank of China for a potential £1m overdraft and a £120m draw down facility"."

"180. Moreover, at the meeting on 17 April 2015, the Respondents failed properly to consider factors that they ought to have considered, in that: a. the minutes of the board meeting of BHSGL on 17 April 2015 contain only one passing reference (in the context of a discussion about discontent with the level of GT's fees) to pensions; b. despite their knowledge that insolvent liquidation or administration was unavoidable without a restructuring of the Schemes, the Respondents did not consider that feature at all on 17 April 2015 in their purported consideration of insolvency;"

730. For the reasons which I have set out immediately above, I find that the minutes signed on 4 June 2015 accurately record that the BHSGL board discussed the sale of Oxford Street, Marylebone House and Carlisle and a £120 million facility from the Bank of China. I have also found that both Mr Chandler and Mr Henningson believed that Sir Philip Green had given assurances in relation to Marylebone House. Finally, I have found that Mr Chandler had no reason before the meeting not to believe Mr Chappell's statement that he was in talks with the Bank of China for a potential £1m overdraft and a £120m draw down facility although Mr Henningson knew before the meeting that this statement was false.

731. I also find that the minutes are accurate in recording that no discussion about the Schemes or the pensions deficit took place. In fairness to Mr Chandler he did not suggest otherwise in either his Points of Defence or Chandler 1 and, as I have stated, Mr Henningson did not address the meeting at all. It is necessary, therefore, for me to consider whether the Directors should have considered this issue on 17 April 2015 and,

if so, what impact it would have had on their conclusion that BHSGL could avoid insolvent liquidation. I consider this issue in the context of the Wrongful Trading Claim.

"183. As to the factors identified at Paragraph 179 above, the real position as the Respondents knew or ought to have known was that: a. there was no reasonable prospect on 17 April 2015 that the Oxford Street Property would be sold in September 2015 and no reasonable and/or properly informed director would have thought that there was;"

732. For the reasons which I have given I am not satisfied that either Mr Chandler or Mr Henningson knew or believed at the 17 April Board Meeting that there was no real prospect that Oxford Street would be sold in September whether for £50 million or some other figure.

"b. by 17 April 2015, the Oxford Street Property had already been secured to HSBC for the Noah II facility referred to at Paragraph 171.b above;"

733. Mr Chandler accepted that he knew that Oxford Street had been charged to HSBC to secure the Noah II facility and that as a consequence £50 million of new money would not be available when it was sold and I also find that Mr Henningson understood this. This was obvious to someone of Mr Henningson's experience and expertise.

"c. no entity in the BHS Group had any entitlement to any of the proceeds of Marylebone House and no reasonable and/or properly informed director would have had any regard to those proceeds in their decision-making;

734. I have found that both Mr Chandler and Mr Henningson knew that no entity in the BHS Group had any entitlement to share in the proceeds of sale of Marylebone House under the terms of the SPA. I have also found that they believed that Sir Philip Green had orally agreed with Mr Chappell to procure that £8.5m of the proceeds of sale would be transferred to BHSGL. Finally, I have held that they both understood Mr Roberts' advice and appreciated the risks associated with relying on Sir Philip Green's oral promise.

"d. the proceeds of the sale of the Carlisle Property were not capable of making a decisive or material difference to avoiding insolvent liquidation or administration (the Carlisle Property was not in fact sold until February 2016 and realised only £4.9 million, which would not have made a material difference to the position the BHS Group was in on 17 April 2015 or subsequently);"

735. Mr Sherwood gave detailed evidence about the sale of Carlisle. It was his evidence that a sale had been agreed at £4.92 million either before or at the time of the acquisition but completion was delayed until the BHS Group (or the relevant group company) vacated the store. It was also his evidence that the sale required approval from the local authority and that this was delayed because of a mistake in the papers which were submitted by Arcadia. However, he gave the following evidence about the position anticipated on 17 April 2015:

> "Q. That's at {E/41/4}, if you wanted to just be refreshed of that. And you provided that report, as requested, on 3 July, by means of an e-mail from Emma Reid at {C/850/1}, that we saw before. And with respect to Carlisle -- perhaps we could see the bottom of the page, please -- and the first -- the next page, {C/850/2}, also. You reported -- because we -- you confirmed before that it was -- it was your writing, cut and pasted into this e-mail? A. Yes. Q. "Carlisle -- the documents have all been signed off and we are ready to complete as soon as Primark have finished their final costings on their fit out. This sale should bring 4.2 million into the business at the end of September"? A. 4.92. Q. Sorry. 4.92. Yes. Sorry. Now, this was in accordance with the timescale you had anticipated back on 15 April 2015; correct? A. Yes. Q. So far as you're aware, there was a Council Cabinet meeting that took place in early July; and, at that meeting, they signed off on the deal? A. Yes, I think so."

736. Carlisle's proceeds of sale of £4.92 million were substantial although Mr Chandler accepted that they were not capable of making a decisive or material difference on their own. But he relied on Mr Sherwood's evidence that the property had been sold and that BHSGL was waiting for the money. Even though the amount to be received on the sale of Carlisle would not have been decisive, I am satisfied that it was reasonable for the BHSGL board to treat it as a material Solvency Factor at the 17 April Board Meeting and that the directors had reasonable grounds to believe that the proceeds of sale would be received in September 2015.

"e. even if any "talks" had taken place with Bank of China by 17 April 2015 (and there is no evidence to suggest any such "talks" ever took place), there was no reasonable prospect on 17 April 2015 or subsequently that Bank of China would lend BHS Group any amount of money and no reasonable and/or properly informed director would have thought that there was (to the extent the Respondents rely on any "talks" having taken place with the Bank of China and/or that there was any rational basis to think that Bank of China might lend BHS Group any amount of money at any time, they are put to proof of the same)."

(1) Mr Chandler

737. I have found that Mr Chandler was not aware that Mr Chappell had represented to Sir Philip Green that he had £7 million on deposit at the Bank of China before 22 May 2015. Nevertheless, Mr Curl suggested to Mr Chandler that he should have placed no weight on this factor at the 17 April Board Meeting:

> "Q. And you knew that talks with Bank of China for a potential 1 million overdraft and a 120 million drawdown facility were just more talk from Mr Chappell, didn't you? A. Mr Chappell said it; and I was entitled to believe that he, as somebody who was involved, along with Mike Morris, to deal with getting money, was telling the truth. Q. By 17 April 2015, you knew Mr Chappell was dishonest, didn't you? A. Yes, when it came to getting money for himself. Q. Now, Michael Morris didn't say anything about Bank of China, did he? A. I -- I don't know. I can't remember. Q. You haven't had any talks with Bank of China yourself, have you? A. No. Q. You've seen no documentary evidence that any talks were going on, have you? A. No. Q. You haven't been told the names of any individuals at Bank of China who were involved in these talks, have you? A. No. Q. You're not in a position to put any rational or objective weight on Mr Chappell's assertion here, are you? A. Well, we don't agree on that. Q. But you didn't, in any event, have any reason to think that Bank of China might grant a facility, because you already knew, from the Farallon experience, that it was impossible to get refinancing at that level from mainstream lenders. That's right, isn't it? A. At that stage, you're talking about the Farallon deal that happened during the transaction; is that right? Q. That's the only deal that's been suggested, up to this point. A. Yes, I didn't know anything about that. Q. You didn't take any steps to speak to Bank of China yourself, did you? A. No. Q. Do you think you should have done, given Mr Chappell's track record, before you attached any weight to what he said here? A. No. Q. Could I have bundle {G/48/37}, please. Could I have the second half of that page, please. Thank you. The -- this is Mr Hitchcock being interviewed by the Insolvency Service. A. Okay. Q. And the insolvency examiner says: "One of the, one of the names for funding that's come up, one of the uhm err suppliers of of potential funding was the Bank of China. Is is that anything that you know about? Have you .. ?" And then Mr Hitchcock breaks in: "That was a myth as far as I'm concerned in Dominic Chappell's mythical mind, the world that he lived in, complete fallacy." The next page, please. The examiner says: "So as far as you you were aware, there was no ..."Hitchcock: Nothing. "The Examiner: ... actual ... reaching out and..."Hitchcock: No. "Examiner: ... Talks about". And then Mr Hitchcock says: "It became an internal joke. Every time we needed cash we said well maybe it's in the Bank of China." A. Okay. Q. Do you see that? A. Yes. Q. Mr Hitchcock was right there, wasn't he? A. Mr Hitchcock, firstly, wasn't around on 17 April. Secondly, is giving his account with the benefit of hindsight about everything -- everything that we then knew about Mr Chappell. And he's right about it becoming an internal joke about the Bank of China, because when the short episode of Mr Chappell saying that there was £7 million in the Bank of China, as a means of disguising, to Philip Green, the fact that they'd taken that money,

> it -- it became an internal joke. But it's not in relation to the 120 million, it's in relation to the 7 million."

738. I accept Mr Chandler's evidence that he was unaware of any negotiations with the Bank of China before they were mentioned at the 17 April Board Meeting. After some hesitation, I also accept his evidence that he believed Mr Chappell when he said that he had had talks with the Bank of China for a potential £1 million overdraft and a £120 million drawdown facility. Mr Chandler accepted that he already knew that Mr Chappell was dishonest and was prepared to misappropriate or exploit the assets of the BHS Group for his own benefit. However, Mr Chandler had only been a director of the Companies for one month himself and if he had known that Mr Chappell had been lying or had turned a blind eye to this fact, I consider it highly unlikely that he would have sent the draft minutes to Olswang for comment or later approved them. I, therefore, dismiss this allegation against Mr Chandler.

(2) Mr Henningson

739. Again, Mr Henningson's position is different. I am satisfied that he knew that RAL intended to use £5 million of the proceeds of sale of North West House to pay the costs of acquisition. As a consequence, I have also found that he knew Mr Chappell did not have £7 million on deposit at the Bank of China. Given those findings, I am also satisfied that Mr Henningson did not believe Mr Chappell when he said at the meeting that he was in talks with the Bank of China and did not believe that there was a reasonable prospect that the Bank of China would lend any amount of money to BHSGL.

740. For these detailed reasons I dismiss the allegation that Mr Chandler did not believe that there was a real likelihood of the Solvency Factors materialising. After some hesitation, I also dismiss the allegation against Mr Henningson. The only Solvency Factor which he knew to be a fiction was the negotiations with the Bank of China. But he had no reason to believe that the remaining Solvency Factors had no prospect of materialising and none of them depended on the conduct of Mr Chappell.

S. 6 May 2015: The Second LOC Facility

"196 Accordingly, by 9 May 2015, the sums secured across the First LoC Facility, the Barclays HMRC Facility, and Second LoC Facility exceeded the maximum amount in contemplation (i.e. £6.5 million) at the time of the BHSGL board meeting on 17 April 2015. The Respondents

knew on 17 April 2015 that even £6.5 million was likely to cause the BHS Group to experience negative cash in the premises set out at Paragraph 178 above."

741. The minutes of the 17 April Board Meeting record that as at that date letters of credit worth £6.5 million were required to secure the autumn stock. However, the minutes do not record that this was the maximum which BHSL could afford to pledge as collateral for letters of credit before the group ran out of headroom. Indeed, the weekly cashflow update dated 15 April 2015 showed that the group still had considerable headroom. I therefore dismiss this allegation.

"197. In the premises: a. the use of letters of credit had been unsustainable for the BHS Group when it was contemplated (as it had been on 17 April 2015) that such a facility would extend only to £6.5 million; b. there had been no material improvement in any relevant circumstance since 17 April 2015; and c. accordingly, it was or ought to have been clearer still to the Respondents on 6 May 2015 that there was no reasonable prospect that the Companies would avoid going into insolvent liquidation or entering insolvent administration."

742. The Joint Liquidators' case was that things had deteriorated so fast by 6 May 2015 when BHSL entered into the Second LOC Facility that Mr Chandler and Mr Henningson must have known that there was no reasonable prospect of avoiding liquidation. In the weekly cashflow update dated 13 May 2015 GT were reporting that £31 million of cover was required to secure the stock for the autumn and winter compared with £6.5 million at the 17 April Board Meeting.

743. Mr Chandler also accepted that the Noah II facility was being used to fund letters of credit and that on 29 April 2015 Sir Philip Green was proposing to limit drawdown on that facility to £3 million. Mr Curl suggested to Mr Chandler that by 6 May 2015 he knew or ought to have known that the Companies had no real prospect of avoiding insolvent liquidation and that they ought to have ceased trading and appointed a licensed insolvency practitioner:

> "Q. So by 6 May 2015, when you write the second letter of credit facility, which you signed, you know that Sir Philip Green is not providing anything like sufficient support for the needs of the companies. Do you agree with that? A. No. Q. And so by 6 May 2015, you knew or ought to have concluded that the companies had no reasonable prospect of avoiding insolvent liquidation or administration. That's right, isn't it? A. No. Q. And, further to that, you knew, or should have known, that any continued trading after 6 May 2015 would be adverse to the interests of the companies' creditors and would only be for the purposes of RAL or for your own purposes. Do you agree with that? A. No. Q. And on 6 May 2015 you

> should have immediately instructed a licensed insolvency practitioner or other restructuring professional and taken steps to cease trading. Do you agree? A. Well, I don't agree that we should have done the former. And your -- the second part of your question presupposes that that is the advice that the insolvency practitioner would have given had we done so. And I'm by no means clear that that is the position."

744. I accept Mr Chandler's evidence that despite the worsening position of the BHS Group he did not believe or conclude on 6 May 2015 that the Companies had no real prospect of avoiding insolvent liquidation or that it was necessary to cease trading and to appoint a licensed insolvency practitioner. The minutes of the BHSGL board meeting on 14 May 2015 record that the directors considered that it was in the best interests of creditors to put the Second LOC Facility in place. Mr Curl and Mr Perkins did not challenge the minutes and in the absence of such a challenge I am not prepared to accept that Mr Chandler or Mr Henningson did not believe that the decision was in the interests of creditors.

745. On the other hand, the headroom forecast in the weekly cashflow update gave warning (if any was needed) that the headroom did not include any further collateral to fund more letters of credit which would become necessary unless Euler Hermes agreed to restore cover that week. The minutes also record that in agreeing to the facility "the board agreed that the discussion with SPG had to cover his spoken agreement to provide a guarantee" and that Noah I "needed to be extended beyond £25m to £50m and further amounts drawn down". By 14 May 2015, therefore, it was clear to both Mr Chandler and Mr Henningson that the solvency of the BHS Group was at serious risk if trade credit insurance was not available, Sir Philip Green did not deliver on his promises and the group did not obtain a sustainable working capital facility in the immediate future.

T. 26 June 2015: Ace II

"204. As to the grant of security over the Oxford Street Property, each of the Respondents knew or ought to have known that: a. a primary assumption underlying the GT Report was that the Oxford Street Property would be sold for £50 million and realise at least £37.6 million in cash in September 2015; and b. that feature had also been relied upon at the board meeting of BHSGL on 17 April 2015 referred to at Paragraph 179 above as a purported ground to think that insolvent liquidation or administration could be avoided."

746. I have found that Mr Chandler and Mr Henningson both read the GT Report carefully and I am satisfied that they knew that it was a primary assumption underlying the GT

> Report that Oxford Street would be sold for £50 million in September 2015 and that this would generate £37.6 million in cash for the BHS Group. The minutes of the 17 April Board Meeting were signed on 4 June 2015 and I am also satisfied that they would have had the discussion at the meeting well in mind.

"207. Such consideration as identified at Paragraph 206 above was particularly important, in that the GT cashflow report as at 17 June 2015 correctly described (once again) the trade credit insurance and letter of credit position as "critical". Each of the Respondents knew or ought to have concluded when they caused BHSGL to enter into ACE II that there was no prospect of restoring the trade credit insurance."

747. I have found that both Mr Chandler and Mr Henningson knew that there was no reasonable prospect of restoring trade credit insurance by 4 June 2015. I am satisfied, therefore, that on 26 June 2015 when BHSGL entered into ACE II they knew this to be the case.

"208. Further, each of the Respondents knew or ought to have concluded when they caused or permitted BHSGL to enter into ACE II that the GT cashflow report as at 17 June 2015 was unduly optimistic and could not be relied on in that they knew or ought to have known that: a. GT remained wrongly instructed that Marylebone House would be (i) sold in the week commencing 29 June 2015; and (ii) this would produce £8.5 million, when the true position was as set out at Paragraph 100 above; and"

(1) Mr Chandler

748. Mr Chandler's pleaded case was that although Marylebone House was not referred to in the SPA, he understood that Mr Chappell and Sir Philip Green entered into a side agreement under which Sir Philip Green would procure that £8.5 million would be transferred to the BHS Group on the sale of Marylebone House by Taveta. It was also his pleaded case that Sir Philip Green and Taveta did procure that £8.5 million was received by the BHS Group, namely, the £6.5 million paid to HSBC under the Framework Agreement and £3.5 million paid to HSBC under the Loan Agreement. Mr Chandler's written evidence was as follows:

> "…I had always expected that the sale of Marylebone House would result in BHS getting at least £8.5 million. That happened in June 2015 as a result of a series of agreements: the Framework Agreement between Taveta and RAL for £6.5 million dated 26 June 2015 ("the Framework Agreement") and the Loan Agreement between BHSGL and Arcadia for £3.5 million also dated 26 June 2015 ("the Loan Agreement", but which was also referred to internally as 'the Tina Green Loan'). Through those

> agreements, Arcadia/Taveta paid £10 million to HSBC to pay down £10 million of the Noah II facility (a liability of BHSGL)."

749. Mr Chandler also gave written evidence that on 28 June 2015 he saw both agreements for the first time and noticed that they were incorrect in two important respects: first, the Loan Agreement was expressed to be a loan made to BHSGL when it should have been to RAL and, secondly, the Framework Agreement provided for RAL to receive £6.5 million and subscribe for shares to the same value in BHSGL. He explained this problem in the following way:

> "A further problem was that the Framework Agreement provided for RAL to receive £6.5 million so that it could subscribe for shares in BHSGL. However, there were only £5 million of BHSGL shares unpaid, and not £6.5 million, as the Framework Agreement seemed to envisage. In my view, this meant that RAL had, in effect, paid BHSGL £1.5 million for no documented reason, this was RAL' s money to which it was entitled, and this amount therefore needed to be accounted for. Furthermore, the payments under this agreement represented what Sir Philip Green had promised to provide to RAL for the sale of Marylebone House (i.e. £8.5 million). It was for these reasons that I thought that RAL was entitled to £1.5 million (being the remainder of the £10 million that had been paid via the two agreements and the difference between the £6.5 million paid under the Framework Agreement and the £5 million shares that were in fact unpaid)."

750. There is no dispute that the SPA did not contain any obligation upon Taveta either to sell Marylebone House or to pay any part of the proceeds of sale to the BHS Group and Mr Chandler accepted this a number of times in evidence. In my judgment, it is unnecessary for me to decide whether or not Sir Philip Green gave a binding undertaking to Mr Chappell to pay £8.5 million out of the proceeds of sale of Marylebone House and, if so, what its precise terms were. For present purposes, it is enough for me to decide whether Mr Chandler and Mr Henningson believed Mr Chappell when he said that Sir Philip had done so and I have found that they did believe him.

751. I also accept Mr Chandler's evidence that as at the date of ACE II he believed that Arcadia had paid £10 million to HSBC under the Loan and Framework Agreements in satisfaction or discharge of that commitment. Although there is no mention of Marylebone House in either of the two agreements themselves, Mr Chandler's evidence is supported by the email exchanges between Mr Chappell, Mr Budge and Mr Roberts

on 21 June 2015. Moreover, Sir Philip Green was in a strong bargaining position and, in my judgment, it is more probable than not that he used BHSGL's urgent need for Arcadia's consent to ACE II and assistance with HSBC as an opportunity to obtain a release from any further commitment (whatever assurances he had given and whether he considered them binding). To this extent, therefore, I accept Mr Chandler's defence.

752. Even so, I find that the Loan and Framework Agreements involved a significant variation to the terms of the SPA and the Completion Statement which contemplated that BHSGL would receive £38.5 million of new money (£10 million in equity and £28.5 million in loans) on or shortly after Day One. £8.5 million of this remained outstanding on 26 June 2015. However, BHSGL never received it because Arcadia paid the £8.5 million directly to HSBC to repay Noah II. Moreover, the effect of both agreements was to prevent BHSL drawing down the remaining £12.8 million of Noah II and to release Arcadia from its guarantee.

753. I am satisfied that Mr Chandler understood all of this on 26 June 2015. He placed particular reliance on the Completion Statement in his written evidence and it is clear from that single page document that BHSGL expected to get total cash and assets of £94.16 million in additional cash or new money on completion of which £8.5 million was attributable to Marylebone House and £25 million to the "Goldman's Facility" which ultimately became Noah II. I am satisfied that Mr Chandler understood that the practical effect of the Loan and Framework Agreements was that BHSGL never received the £8.5 million from the sale of Marylebone House or the balance of £12.8 million of the working capital facility shown on the Completion Statement.

754. I have set out the assumptions made by GT in their weekly cashflow update dated 17 June 2015. Mr Curl put those assumptions and paragraph 208 (above) in terms to Mr Chandler. After some prevarication Mr Chandler accepted that he knew that the cashflow update was unduly optimistic (my emphasis):

> "Q. Could I have {D/15/3}, please. Well, if it is not being received cumulatively, if it's being double counted, then it's not new money, and so it shouldn't be included in a cash flow report, should it? A. No, my point was about your pleading, but we can leave that perhaps. Q. Do you see the equity injection at the bottom there? A. Yes. Q. Could I have the next page, please. And then Marylebone House at 8.5 million. {D/15/4}. Do you see that? A. Yes. Q. So you're well aware by the time you enter into ACE II that that's wrong, aren't you? A. I can't now recall if I knew that that was

> wrong or not. I -- I might be getting confused with the documents that you've been showing me. I don't know if we've established already, by this stage, that I should have known that these things were not cumulative and if I should have known it then I presume Grant Thornton should have known it. But, sorry, I'm confused. Q. Grant Thornton should have known it because you should have told them, but no one from the companies' side had told them, because this cash flow report is based solely on information that the companies tell Grant Thornton to include. Do you agree? A. Yes, which function was not mine. Q. And do you see in the last bullet point under "property sales" it says: "60 million proceeds from Oxford Street sale in week commencing 30 August". Now, you know by this stage that there is no proposal to sell Oxford Street in week commencing 30 August, don't you? A. I think -- yes, I think the evidence is that at 4 June we were talking about this other alternative for Oxford Street. I also think that when we're talking about proceeds from Oxford Street it's very much with the parentheses from the original Grant Thornton report in mind, which is that or something else. Q. Could I have page {D/15/7}, please. What did you think the something else might comprise? A. Well, a loan. Q. Finding a Rembrandt in the attic? A. Yes, that's exactly what I thought, Mr Curl. Something else. A loan. Q. From? A. Well, for instance, from Grovepoint. Q. Produced 33 million. A. Well ...Q. At exorbitant cost. All right. So this is the headroom forecast, revised again at 17 June. Now, this actually doesn't look too bad compared with the others, but that is because it's based on getting the Farallon refinancing, isn't it? A. If that's the 41.6 on 28 June, yes. Q. Now, by the time ACE II was entered into, you knew that the Farallon refinancing was not going to be entered into, didn't you? A. Yes. Q. So you certainly knew, by 26 June, that this forecast was unduly optimistic, didn't you? A. I suppose. Q. Now, shortly after this document was available, you became aware that Farallon had withdrawn from the discussions, didn't you? A. Shortly after this document we're looking at? Q. Yes. A. What's the date of this document? Is it the 20th of ...? Q. It's 17 June."

755. I have carefully considered whether Mr Chandler did accept the proposition that the weekly cashflow update dated 17 June 2015 was unduly optimistic and I am satisfied that he did so despite his slightly equivocal answer. In reaching this conclusion I have ignored his answer about the Rembrandt in the attic which was plainly sarcastic. I have also taken into account the fact that he was not entirely clear about the date on which the update would have been available to him. But I am satisfied that he made this admission and I find that on 26 June 2015 Mr Chandler knew that GT's weekly cashflow update dated 17 June 2015 was unduly optimistic and could not be relied upon.

(2) Mr Henningson

756. I consider Mr Henningson's evidence about his involvement in the negotiations between RAL and Mr Alex Dellal of ACE and set out my findings in dealing with the Misfeasance Claims. For present purposes, it is enough to record that I am satisfied that Mr Henningson was a party to those negotiations and that he knew the terms of ACE II. In particular, in a text message to Mr Chappell on 17 June 2015 Mr Dellal recorded that he had agreed to a £45 million loan at an IRR of 25% and a fee of £1 million together with what became the ACE Profit Share. Mr Henningson received that message too. Moreover, on the same day Mr Morris sent a draft term sheet to Mr Henningson confirming the terms.

757. It is likely that Mr Henningson was also aware of the Loan and Framework Agreements and knew that the BHS Group could no longer expect to receive any new money from Arcadia whether in relation to the sale of Marylebone House, the Tina Green Loan or the Capital Injection. However, I was not taken to any documents to establish that Mr Henningson received or saw either document or that he was told that the payment of £10 million to HSBC was intended to satisfy or discharge Sir Philip Green's assurances in relation to Marylebone House. I therefore dismiss this allegation that Mr Henningson ought to have known that the GT cashflow update dated 17 June 2015 was unduly optimistic for the reasons alleged above.

"b. GT's projections were premised on a sale of the Carlisle Property in the week commencing 20 September 2015 for £4.92 million and the Oxford Street Property in the week commencing 30 August 2015 for £60 million and there was no reasonable prospect of either of those things eventuating."

758. Mr Sherwood gave evidence that he presented his ideas for the sale of Oxford Street to the BHSGL board for the first time on 4 June 2015. Mr Lightman took him to the minutes of the meeting and he accepted that the following summary of the position was accurate:

> "Q. It's quite dense, the way it's been presented in the document. I wondered if I could just step back and try and summarise the key point -- key points that you were making. You were telling the Board that there were three options to achieve maximum value for Oxford Street. The first option was to sell the lease on the open market to another retailer. And you thought that could be for 50 to 60 million. Later on it's recorded that you said between £45 and £60 million; correct? That's one of the options? A. That -- yes. Absolutely. Q. At that time? A. Yes. Q. The second was to sell it to the freeholder, negotiating via Lancer. And you thought that would be for between £35 and £40 million? A. Yes. That's what I said. Q. At that

> time? A. Yes. Q. And the third option was to convert and sublet the first and second floors to offices, which would provide a higher rent and, therefore, value for BHS's lease. This would provide a value closer to £100 million? A. Yes. Q. You told the Board that you were confident the third option would work; yes? A. Yes. Q. But you thought it would take around a year and the time frame you needed to work within was uncertain? A. Yes. Q. And if we go to the next page, the page {E/35/7}. It says -- the second sentence: "The board considered the proposal made by [you] and agreed that it was in the best interests of the Company to allow [you] to run with all strands of the proposal to ensure that the maximum value were achieved." A. Yes. Q. And you did then go ahead and run with all strands of the proposal? A. Yes. Absolutely. Q. The three different options -- A. Yes."

759. GT's weekly cashflow update dated 17 June 2015 stated that management had assumed that the BHS Group would receive £60 million as the proceeds of sale of Oxford Street in the week beginning 30 August 2015 and £4.92 million from the sale of Carlisle in the week commencing 20 September 2015. Their update dated 2 July 2015 (and less than two weeks later) now stated that the model assumed no sale of Oxford Street. It also stated that the value of Oxford Street had "in effect been advanced tranche 1 and 2 to the amount of £45m" and that any proceeds of sale above that figure would be split between the BHS Group and ACE. This update covered the week of ACE II but was circulated almost a week after the transaction.

760. The Joint Liquidators' case was that no board meeting of BHSGL or BHSL took place to approve ACE II. I accept that no formal minutes were taken of a board meeting to consider and approve ACE II. However, I accept that Mr Chandler's handwritten notes record that a meeting took place on 23 June 2015 at which the members of the BHSGL and BHSL boards present resolved to enter into ACE II. It is clear, however, that they did so although they understood that it was an expensive loan and that it required BHSL to share the proceeds of sale with ACE if Oxford Street was sold for in excess of £60 million. It is also clear that no sales process had begun at all by that date. In particular, Mr Chandler's notes record: "We have full control of sale process" and "Don't need to sell if re-develop".

761. Mr Lightman did not suggest to Mr Sherwood that BHSL ever agreed (even subject to contract) to sell Oxford Street for £60 million in the week beginning 30 August 2015. Nor did he take me to any evidence of such an agreement. Moreover, it is clear from Mr Chandler's notes that nobody present at the meeting on 23 June 2015 was contemplating

a sale of Oxford Street for £60 million in the week beginning the 30 August 2015. I find, therefore, that there was no real prospect of such a sale taking place. I am also satisfied that it was obvious to both Mr Chandler and Mr Henningson from the discussion on 4 June 2015 that no such agreement was in place because Mr Sherwood presented three different options to the board and they authorised him to explore all three options.

762. I have already reached the conclusion that Mr Chandler admitted in evidence that the weekly cashflow update dated 17 June 2015 was unduly optimistic. However, if I am wrong and he did not make that admission I find that both he and Mr Henningson either knew or ought to have known that the update was unduly optimistic in continuing to make the assumption that Oxford Street would be sold for £60 million at the end of August. I also find that they and the other members of the BHSGL board had abandoned that assumption within a week of entering into ACE II because it was obviously wrong.

"213. The consequences of ACE II were accordingly entirely negative for the Companies and their respective creditors, in that it simply provided a further opportunity for the net asset deficiency to be increased by continuing trading losses in circumstances where there was no rational basis to think that matters would be any better on the next quarter day."

(i) The June quarter's rents

763. The Joint Liquidators' case was that the BHSGL board entered into ACE II on such onerous terms because BHSL was unable to discharge its rent roll of approximately £15.5 million on the June quarter day. Mr Pilgrem accepted that the BHS Group paid total rent of £93.14 million in the year ended 31 August 2015 and, on the assumption that it was all paid quarterly, the amount due each quarter would have been £23.29 million. When Mr Curl put his notes of the meeting to Mr Chandler, I raised this point with him:

> "Q. Could I have bundle {H/16/59}, please. Sorry. Bundle {J/16/59}. Sorry. This is from your notebook -- A. Yes. Q. -- a meeting dated 23 June 2015? A. Yes. Q. And it says: "DC1 -- big decisions. "Dellal's ready to go" -- and this is a reference to ACE II, isn't it? A. Yes. Q. "Could have money today. "45, 15 million -- expensive. "DC1 -- let's do it. "DT [that's Mr Topp] write cheques today". "DC1 -- 12 million today". And then the next line but one: "EP -- do bailiffs go in that day?" And then -- and that's because you were anticipating missing the quarter day, wasn't it? A. I think it was a question as to what would happen if we did miss the quarter day. Q. Yes, which you did, in fact, didn't you? A. I don't now recall that. Q.

> And then Mr Sherwood says: "Not usually if one day". And then Kathryn Morgan says: "80/400 cheques today"? A. I think that's 100. Q. Oh 100, yes, "80/100 cheques today". And then could you scroll down, please. MR JUSTICE LEECH: Can we just -- before we leave that bit, so you say "balance today 27.5 million"; is that right? A. That's what that says, yes. MR JUSTICE LEECH: And what was that the balance of? Was that the amount, the 80 to 100 cheques that had to be written, totalled that figure? A. I don't know if it's that or if it's what the cash balance was on that day."

764. It is understandable that Mr Chandler could not recall whether the balance of £27.5 million referred to the amount of rent which the BHS Group had to pay on the June quarter day. But I am satisfied that he was referring to the rents due on the quarter day. This finding is broadly consistent with Mr O'Sullivan's email dated 19 June 2015 in which he stated that Arcadia would normally send out the rent cheques on 23 June and that £8 million were likely to clear in the same week and £16 million to £17 million a week later. But in any event, I am satisfied that BHSGL had to write cheques for at least £12 million that very day because Mr Topp stated that clearly to the meeting and Mr Chandler confirmed it from his notes in evidence.

765. On 23 June 2015, therefore, the position of the Companies had become acute. Mr Chandler accepted that on any view the BHS Group was cashflow insolvent unless it was able to get access to finance. He also confirmed that once the negotiations with Farallon had fallen through the BHS Group had no cash to pay the rent on 23 June 2015. I find, therefore, that on that day the BHSGL board resolved to enter into ACE II because it would be unable to cover rent cheques for approximately £12 million which had to be written that day.

(ii) ACE II: the terms

766. Not only did Mr Chandler accept that the BHS Group was cashflow insolvent, he accepted that his own appreciation was that ACE II did not permit management to turnaround the business and that something more would be required by the September quarter date. He also accepted that ACE II was very expensive. Because of its importance I set out the relevant passage from Mr Chandler's evidence in full:

> "MR CURL: Not at all, my Lord. You accept that you are, on any view, cash flow insolvent at this moment, aren't you? A. Well, unless we could access this finance, yes. Q. Could I have the next page, please, {J/16/60}. Mr Morris there goes through the headline terms: "25% internal rate of

return. 1 million set up fee paid at end." Now, on any view, that is extremely expensive, isn't it? A. Yes. Q. And then there's a profit share on Oxford Street as well, isn't there? A. And Manchester, by the looks of it, at that stage. Q. Yes. So valuable properties are being very heavily encumbered by these proposed terms, or they will be very heavily encumbered by those proposed terms, won't they? A. Yes. Q. You've said in your witness statement that you considered using Noah II, but that would not be enough to turn the business around. A. Hmm, hmm. Q. And the suggestion -- A. Yes. Sorry. Q. The suggestion is that ACE II would have been. Is that your evidence? A. That ACE II would provide more money at that time. Darren was very focused on some capex, I think, as I say, for food stores. It's in my notebook. It's on a later page. But, yes. Q. Now, I suggest that ACE II, which, on the – on your deliberations on that day you thought was going to bring in very slightly over 19 million, would not have permitted the turnaround either. Do you accept that? A. Well, firstly, I think it was the following day that we had that discussion that you're talking about, about the 19 million; but, no, I don't. I don't agree. Q. Could I have page {J/16/67} in that document, please. Now, it says: "19.1 million today." And there's a reference to Atherstone at 10 million? A. Hmm, hmm. Q. Which we'll come back to. A. Hmm, hmm. Q. And then towards the bottom of the page, it says: "DT" -- this is Mr Topp -- "we need some money today. "If we do this deal, will get through June ... July ... most of August"? A. Yes. Q. And then: "[something] good money". A. No, it's an arrow "spend money". Q. Ah. "Spend money LCs capex. "It pushes out cash flow, but doesn't allow the turnaround". Now, Mr Topp is talking about ACE II there, isn't he? A. Yes. Q. So Mr Topp is saying that ACE II doesn't allow the turnaround; yes? A. Well, in the sense, that not taking ACE II would definitely not have allowed the turnaround; and taking ACE II would allow the ability to then do what we did, which was Grovepoint or something like that. Q. Yes. So what Mr Topp is saying: that ACE II pushing out cash flow but doesn't allow the turnaround? A. Right. Q. Can we agree on that? A. That's my note of what Darren said. Q. Yes. Can we have the next page, please, {J/16/68}. And then Mr Topp says: "Why not draw down HSBC money." And that's Noah II, presumably? A. Hmm, hmm. Q. And it says: "SPG won't override it. "Collapsed the loan". And then someone asks: "Why not get draw down the 12.8 million." And that's what's left notionally in Noah II? A. Yes. Q. And the answer: "'Coz that's not enough -- I could pay the rent but not implement the turnaround plan." Also the releases secured by this deal might never have been repeated." So what -- what is being said there is that neither ACE II nor Noah II allow the turnaround plan to be implemented. Do you agree with that? A. Yes, in the sense that I've just explained. Can -- yesterday, my Lord, I made reference to the fact that my notebooks are generally me writing everything down, not writing things down that I say or I think, except for one example. This is the example. So nobody asked that question. This is a record of the conversation that Darren and I had; and the note that I took. And I suppose, in all honesty, anticipating that I might be here answering your questions about it at some point; and I wanted to have a record as to why we did what we did. Q. Now, the cost of ACE II was extremely high, wasn't it? A. It was. Q. You

> -- you held ACE II for 11 weeks, until it was repaid from Grovepoint on 11 September 2015. Do you agree with that? A. Yes. Q. And you had to -- you had to pay 3.4 million to obtain a release of the Oxford Street profit share on 11 September, didn't you? A. Yes. Q. And you had to pay 27.4 million to repay ACE II on the same date, didn't you? A. Yes. Q. So the total cost of funds for 11 weeks, 17 million of new money, was 5.9 million, wasn't it? A. Yes. Q. There was no Board meeting to approve ACE II, was there? A. There was no formal documented Board meeting. Q. And you had no reason to think that the position would be any better by the next quarter day, did you? A. Well, I knew that we would have to do something else by the next quarter date."

767. Mr Chandler accepted that the finance costs of ACE II were £5.9 million. There was nevertheless an issue about how to calculate or represent those costs. Mr Curl and Mr Perkins submitted that in addition to the ACE Profit Share on the sale of Oxford Street ACE II had an APR of 46% and carried default interest of 30% per annum compounded daily. Mr Perkins put this to Mr Pilgrem and his evidence was as follows:

> "Q. Can we turn to {B/20/249}. This is in your report. And it -- if we can zoom in, please. Paragraph 5-2.6 says, at the second sentence, correctly, about £12 million of the proceeds from the ACE II loan were used to partly repay the Noah II loan and the debt to BHS (Jersey), resulting in net proceeds of about £12 million? A. Right. Q. Does that sound right to you? A. That does sound right. Q. Do you recall the implied APR of ACE II? A. I think it's of the order of 30%. But if you -- I think I calculated it -- Q. We think it was more. A. You think it was more. Q. We think it was 46%. A. Ah, okay. Q. Instead of arguing about the APR, let's consider this: if there was a default on this loan, do you recall what the interest payable would be? A. Was it about 32%? Q. It was 30%. A. 30%. Okay. Q. Can you recall the frequency of compounding? A. Quarterly. Q. Daily. A. Daily. Okay. Q. A gentleman called Mr Hitchcock was appointed as the CFO -- A. And that was the default interest, just to be clear. Q. Oh it was. But a default was almost certain on this loan absent a refinancing; and we'll come on to that. I'm not trying to throw that on to the transcript. But let me ask this: do you recall the gentleman by the name of Mr Hitchcock? Do you remember what his role was? A. He was the finance person who was recruited by Mr Topp some time in summer -- in July 2015. Q. That's right. I just wanted to show you one of the comments that he made about ACE II. Can we go to {G/48/31}. And can we assume into line 28, please. Now, this is Mr Hitchcock -- who was appointed a couple of days after ACE II. So he's not criticising his own financing, but he says: "The APR on that was just stupid. I mean it was just crazy. How in God's name can a good corporate finance professional come in and get that. That is just nonsense. The ACE loan, the big ACE loan at the beginning was farcical". And then if you see line 40 and onwards there's reference to a Wonga loan. Now, although Mr Hitchcock has spoken in colloquial language, he has provided a fair assessment of the exorbitant pricing of ACE II, hasn't he? A. ACE II

> was very expensive. It was needed in a hurry though. Q. It was. And we'll come on to that, very shortly. Now, ACE II was again secured over Oxford Street, wasn't it? A. Yes. Q. And, in fact, there were other securities put in place, but Oxford Street was the -- was the key item. A. Yes. Q. And so, again, therefore, the lender was not exposed to the credit risk of the BHS business as such. What happened was that ACE advanced money on the security of a valuable property portfolio. That's right, isn't it? A. It wasn't an unsecured loan; and, therefore, the exposure of the lender was reduced by the nature of the security that was offered. Q. Doesn't that slightly understate it, in a somewhat political way? I mean, the reality is that the loan was over-secured by 100% or more. A. It was fully secured, yes. Q. It was over-secured? A. Over-secured then, if you want to."

768. Although Mr Pilgrem was prepared to accept that the APR for ACE II was 46%, Mr Perkins did not take him to any evidence to that effect and I was unable to find any calculation which showed precisely how the figures in the IRR Calculation Schedule produced an APR of 46% or, indeed, how that represented an IRR of 25%. In a footnote in Pilgrem 1, Mr Pilgrem produced a brief summary of the terms of ACE II which I found helpful:

> "The ACE II loan agreement scheduled a repayment of £ 23.2 million on a drawdown of £ 20.0 million over the 189-day period between 24 June 2015 and 31 December 2015. This is a 16.2% return over 189 days, which translates to a 33.7% return annually. Return over 189 days: (£ 23.2 million /£20.0 million) - 1 = 16.2%; implied annual return: ((1 + 16.2%) ^ (365/ 189)) - 1 = 33.7%)."

769. Although it probably does not matter much, I prefer this evidence and I find that the annual percentage rate of ACE II was 33.7% (ignoring the ACE Profit Share) and that it carried default interest at 30%. I also find that ACE's position was fully secured and that it was fair to describe it as "over-secured" in the sense that the risk that ACE would not be paid in full if it had to enforce its security was a small one. In the light of these conclusions, I also find that the consequences of ACE II were both negative and very expensive.

"214. Moreover, the negative consequences of ACE II were known to and impliedly acknowledged by the Respondents, in that by early July 2015 they were already seeking replacement third party financing with alternative lenders, including Brockton Capital, Worldpay and Wells Fargo, in order to refinance and replace the ACE II loan."

(1) Mr Chandler

770. Mr Morris explained the terms of the facility to the meeting on 23 June 2015 and Mr Chandler accepted that he understood that it was very expensive. Moreover, on the same day Mr Morris circulated ACE II Senior Loan Agreement for execution and Mr Chandler would have seen that BHSGL was liable to pay interest of £1,660,958.90 for one quarter and the Facility Fee of £1 million. Mr Chandler also accepted that Mr Topp told him on the following day that ACE II would not permit the BHS Group to implement the July 2015 Turnaround Plan. Finally, he accepted that he knew that Oxford Street would be heavily encumbered as a result of ACE II and that something else would be required by the next quarter day.

771. I find, therefore, that Mr Chandler fully understood the consequences of ACE II. In particular, I find that on 23 June 2015 he knew that BHSGL was cashflow insolvent and that if it did not enter into ACE II it would be unable to pay the June quarter's rents of £27.5 million or cover rent cheques for £12 million that day. I also find that he knew that ACE II was negative and that in return for a short term loan which produced £17 million of new money, ACE II increased the net asset deficiency by £5.9 million in circumstances where the facility did not enable the BHS Group to implement the July 2015 Turnaround Plan and that he had no reason to think that the position would be any better by the next quarter day.

(2) Mr Henningson

772. I also find that Mr Henningson had the same knowledge. On 17 June 2015 he negotiated the principal terms of ACE II with Mr Dellal and agreed an IRR of 25% and the Facility Fee of £1 million and, although there was no evidence before me that Mr Henningson saw the IRR Calculation Schedule, I am satisfied that as a corporate finance professional and experienced turnaround specialist he understood the total cost of borrowing and how expensive an IRR of 25% would be.

773. I am also satisfied that he knew that the Companies were cashflow insolvent and would be unable to pay the June quarter's rents if BHSGL did not enter into ACE II and that he had no reason to think that the position would be any better by the next quarter day. At the BHSGL board meeting on 2 July 2015 at which Mr Henningson was present Mr Crane told the meeting that ACE II would see the remainder of the rent cheques cleared

at the end of that week but that an additional loan of £20 million was required from Sir Philip Green even if Facility B for £15 million was available to BHSGL.

U. 13 July 2015: The July 2015 Turnaround Plan

"224. As the Respondents knew or ought to have known by 13 July 2015, the July 2015 Turnaround Plan was not an Adequate Plan and no reliance could be placed on it for at least the following reasons:"

(1) Mr Chandler

774. Mr Chandler gave evidence in Chandler 1 that he reviewed the July 2015 Turnaround Plan in depth and he confirmed this in cross-examination. He also confirmed that he did so on about 13 July 2015. He also gave evidence in Chandler 1 that he thought that the plan was very impressive, that it was thorough, professional and sensible and that he trusted that it could be implemented successfully. Mr Curl challenged this evidence for four principal reasons which I assess first.

(i) Base Case

775. I have set out the BC and TBP assumptions in section II. I have also set out Ms Dale's email dated 23 July 2015 to Ms Morgan which Mr Curl put to Mr Chandler: see [253]. This email and the follow up email the same day show that both Mr Topp and GT were nervous about the Base Case itself and whether it remained achievable. As a consequence, the July 2015 Turnaround Plan did not contain a headroom graph for the BC but only one for the TBP. Mr Perkins put this graph to Mr Pilgrem whose evidence was as follows:

> "Now, if we then turn to the next page. {C/869/14}. That slide shows the projected cash flow position under the TBP, doesn't it? A. It does, yes. Q. Now, can you see that this slide forecasts a cash shortfall of negative £20 million in September/October 2015? A. It does, yes. Q. In fact, the box at the bottom says that the peak funding requirement is 21.6 million in February/March 2016. Do you see that? A. Yes. Q. In other words, putting this in simple terms, the business would need to borrow more than £20 million on top of its existing indebtedness just to avoid running out of money under the TBP; do you agree? A. So if we could just go back to the previous page where you started. If we may do that. Q. Yes, please do. {C/869/13}. A. Okay. And in fact this is the second of two pages that deal with cash flow but this is getting down to closing cash. Underlying this presentation is, as you are probably aware, a detailed spreadsheet that forecasts out at least three years on a monthly basis. For the purposes of

> the presentation that's been distilled into these annual numbers. And, as you can see, annually, at the end of each year, there's positive closing cash, albeit very little at the end of financial year 2017 -- 0.1 million. And so the -- the paragraph at the bottom right is saying: okay, this is the position at the year end, but we're conscious that there's stuff we need to finance intra year. And then we turn over the page to see the intra year position, which is the graph. So we turn to the graph{C/869/14}. And we can see, yes, intra year there are troughs followed by peaks of positive cash and those need to be financed intra year. Q. You talk about intra year financing. But the answer to the question is: yes, the group needed access to financing of over £20 million to survive on the target business plan, didn't it? A. It did, because it had troughs in cash need followed by peaks in cash need. Q. Yes. A. So it had a liquidity problem. Q. Yes. A. And borrowing is the usual solution to liquidity problems."

776. Mr Perkins asked Mr Pilgrem why no headroom graph had been produced for the BC and the only explanation which he could give was that it would have looked dreadful. Indeed, Mr Shaw had produced his own headroom graph and this confirmed Mr Pilgrem's evidence. It showed that there was no headroom after March 2016 and the business remained cashflow negative until July 2018. When Mr Perkins put this graph to Mr Pilgrem his evidence was as follows:

> "Q. Now, let's take a look at what that would mean in the base case. Fortunately, Mr Shaw has extrapolated what the base case looks like. If we go to {B/19.2/92} then we can see what that is. Can we just blow up figure 4. Now, can you see that, at the beginning, there's a similar forecast shortfall in the base case and the TBP of £20-odd million, at September/ October 2015? A. Yes. Q. And can you then see that the peak cash flow shortfall in the base case and thus the peak funding requirement in the base case is around £60 million at two points in 2017 and 2018? A. Yes. Q. Now, the problem, as you're doubtless aware, is that on the basis of what we've seen from the turnaround plan, that the additional financing sources -- which we dispute -- but even assuming that they are realistic -- would not be enough to meet the shortfall in the base case. Do you agree with that? A. Yes. And I think the authors of the detailed business plan made that clear, to my reading of it. Q. Yes. Now, what that means, therefore, is that if the business meets the base case -- in other words what was described as "our three year forecast" -- then the business plan itself contemplates that the business will fail, because it will run out of money? A. Yes."

777. Ms Hilliard returned to Mr Shaw's graph in re-examination. She suggested to Mr Pilgrem that there was a stark difference between the TBP and the BC and that this was clear from the figures on slide 12 and that this would have been obvious to any reader of the July 2015 Turnaround Plan:

> "A. And if you turn over to the next page, page 6 {C/869/12}, you start the discussion of the view under those further initiatives. And so the corresponding able to the one we've just seen has "free cash flow" at the bottom, and again years 1 to 3 is positive 44.6 million. So there's this stark substantial huge difference between the outcome under the base case and the outcome under the target business plan, which is apparent to -- which should be apparent to any reader of this document and is identified in it as being -- that it's critical that they achieve what they're targeting. And then you move on to the graph. I think there's another page which deals with free cash flows to equity. {C/869/13}. And this is where we entered the discussion with Mr Perkins yesterday. Q. Do you want to look at the graph? A. Well, I -- we could just turn to the graph one more time. {C/869/14} I think we've seen it many times. Q. Is this the graph? A. This is the graph. So the question that was put to me was: is this document not -- sorry, in terms -- I'm sorry if I mangle what I was put to me, but I understood it to be, in terms: is this document not useful because it doesn't present a similar graph for the base case? And I think my answer, in terms, was: no. And what I had in mind was that's because there had been a narrative and numerical discussion of the base case and the criticality of achieving what was targeted beyond the foundation of the base. MR JUSTICE LEECH: Can I make sure you've understood your evidence? You've said it should be apparent to a reader of this document that the -- that they had to achieve the target business plan in order to effectively get rid of the cash deficiency? A. Yes."

778. Mr Curl also put Mr Shaw's graph to Mr Chandler himself. He suggested that it was obvious that the July 2015 Turnaround Plan could not work even on its own numbers. Mr Chandler did not accept this:

> "Q. Yes. So the turnaround plan for the company shows that the company will run out of access to cash from other sources, ie non-trading sources, before it becomes profitable. And so if -- if that is -- if those premises are satisfied -- A. Understand. Q. Yes. A. Yes, I agree with that proposition. Q. Could I have, please, bundle {B/19/92}. This shows -- this is our expert's graph but it's derived from the underlying data that Grant Thornton used in the July 2015 turnaround plan. A. Okay. Q. And the TBP closing cash shows cash requirements where those are circled in red. The base case shows from early 2016 a persistent funding gap. Do you agree that that's what that graph shows? A. Yes. Q. And so if you fail to make base case then there is no reasonable prospect of avoiding insolvent liquidation or administration, is there? A. If you fail to make base case? Q. Yes. A. Yes. Q. So anything less than base case will certainly mean insolvent liquidation or administration? A. Yes. Q. Even base case would -- would have that outcome? A. Yes. Q. So I suggest to you that, without going any further, on the basis of the information reasonably available to you on 13 July 2016, there was no reasonable prospect of the companies avoiding insolvent liquidation or administration. Do you agree with that? A. No. Q. And so the liquidators' case is that we don't actually need to look at any of

> the other shortcomings in the plan because it couldn't work even on your own numbers. Do you agree with that? 15 A. Well, you're talking about the base case, but we were aiming for the target business plan. Q. So you knew by 13 July 2016 that you had been persistently failing to achieve base case relentlessly since day 1. So there was no reason -- no basis for you to think that you might achieve the turnaround business plan -- sorry, target business plan, TBP. Do you agree with that? A. No, I don't."

779. There appeared to be a dispute between the parties about the relevance of the Base Case. Mr Curl and Mr Perkins submitted that it was management's forecast for the performance of the BHS Group over the next three years and that Mr Chandler either knew or ought to have known that even if the BHS Group met Base Case, it would lead to an insolvent collapse of the Companies. Both Mr Lightman and Ms Hilliard submitted that this criticism was misplaced because it was the Target Business Plan and not the Base Case which was the benchmark. As Mr Lightman put it, the TBP was "critical and therefore the focus".

780. In my judgment, there was no real dispute between the parties and these submissions reflected a difference of emphasis. The July 2015 Turnaround Plan stated in terms that the Base Case was "our three year forecast ending 25 August 2018" and that it incorporated six initiatives. The TBP was the BC plus further opportunities and initiatives and it was clear from the plan itself that to a very large extent it was based on the same assumptions: see slides 5 and 9. However, I accept Mr Lightman's submission that the TBP was critical to the achievement of a positive enterprise value and the focus of the turnaround plan. Its purpose was to demonstrate that the BHS Group could be turned around and generate a positive value within three years.

781. On the other hand, I accept Mr Pilgrem's evidence to me that it was apparent to a reader of the July 2015 Turnaround Plan that the BHS Group had to achieve absolutely all of the initiatives (both the BC and the TBP initiatives) to avoid the cash deficiency over those three years. Put another way, if the group achieved the BC but not the TBP, it would go into insolvent liquidation. The real question for the reader, therefore, was whether the underlying initiatives were realistic and, if so, whether it was realistic that they could all be achieved within three years. The document itself describes this as a "stretch" and it was. I turn therefore to this issue.

(ii) Mr Topp's Evidence

782. In April 2016 Mr Richard Voice of D&P and Mr Colin Ashford of DLA Piper LLP ("**DLA**") interviewed Mr Topp. The attendance note of that meeting records that Mr Topp told them that the July 2015 Turnaround Plan was "a document of fantasy and never realistic". Mr Topp did not accept that the note was accurate although he accepted that he used those words:

> "Q. Could I have page {G/95/2}, please. And then about halfway down, it says: "Pre-sale there was a business plan which set out various things which needed to be done. DC1 instructed GT to do a new business plan to provide equity value of £250 million in three years time. How do you achieve that? £500,000 was charged by GT to the end of summer. It was a document of fantasy and never realistic. It had previously been losing £60 million a year. Like-for-like was down 0.8 in the 12 months which was not too bad but the plan was for it to be 6% to 7% up! What they really needed to do was reduce costs and change the structure of the landlord. They spent eight to nine weeks with KPMG envisaged a £45 million saving." Now, that, it doesn't purport to be a verbatim transcript -- A. No. Q. But that is an accurate record of the gist of what you said, isn't it? A. It's not, I'm afraid. A bit like a number of things in this document, it's clearly somebody who has made some notes after the meeting. So, you know, it's -- this page starts with "big salaries were paid -- possibly [half a 5 million] each"; and the only person on half a million was Dominic Chappell. Nobody else was on a half a million. I -- I certainly reflected on the turnaround plan in comments; and I may well have said: you know, looking back, it now looks like fantasy and never realistic, but that's definitely not what I felt at the time. Q. Well, "it was a document of fantasy and never realistic" is a pretty vivid phrase; and I suggest that that can only have come from you. That's not a phrase that a solicitor would have used as a paraphrase -- A. I'm not saying I didn't use the word "fantasy and never realistic", but in the context of it now looks like fantasy and it was never realistic, as opposed to that's what I thought at the time; and I'm sure you know, Mr Curl, from all my evidence, whether it be the Select Committee or whoever, I've been pretty consistent in my belief that the turnaround plan, in my view, had a reasonable prospect of being successful. Q. Well, as a -- from a retail point of view perhaps -- perhaps, but from a funding point of view it was always a document of fantasy and never realistic, because there was never a funding path to get you to profitability. And so that's why it was a document of fantasy and never realistic. A. Well, you -- you've obviously got the turnaround plan; and Helen details cash that can be generated in order to fund that plan. Now, I -- listen, it was -- it was -- it was challenging, without a doubt. I've got no issues about that. But we genuinely believed we had a realistic prospect of getting this business turned around. I was less concerned about the equity value of 250 million; that -- that did not occupy my mind particularly. What I was really concerned about was demonstrating that we could make some improvements because I think, in those circumstances, you know, we were likely to get additional funding or a funder that would potentially invest in equity in the business. Q. Could I have -- MR JUSTICE LEECH: Is it fair

> to say that utterly -- ultimately the funding gap or -- which Mr Curl is talking about required somebody else to come in? You needed to do well enough to persuade -- to persuade some -- some -- a new funder to come in? A. Well, certainly, my Lord, ultimately, that's where we hoped we would get to. But the actual plan itself did detail, you know, where the -- certainly the initial funding would come from; and -- and where the funding would come from over a period of time. It also highlighted that, you know, included in it wasn't the ABL facility; there were other unencumbered properties. And I'm sure Mr Curl will go on to it, but we -- you know, I felt there was sufficient funds to fund the turnaround."

783. Mr Curl also put Mr Topp's statement that the July 2015 Turnaround Plan was a document of fantasy to Mr Chandler, who did not accept this or that it was an accurate reflection of the views expressed by Mr Topp at the time. I accept that evidence and I attach little weight to the views which Mr Topp and Ms Morgan expressed later and once BHSGL and BHSL had gone into liquidation. I found Mr Topp to be an honest and reliable witness and I accept his evidence that he did not consider the plan to be a document of fantasy in July 2015.

(iii) Reverse engineering

784. Mr Curl and Mr Perkins also submitted in their closing submissions that the stated objective of the July 2015 Turnaround Plan was to achieve an enterprise value of £250 million on an EBITDA multiple of 6.6 (or 8 if only 75% of the TBP initiatives were achieved). It was also Mr Shaw's evidence that the BHS Group had to implement 23 separate initiatives successfully in order to achieve that enterprise value: see the chart at Shaw 1, ¶2.33. Mr Curl and Mr Perkins also submitted that the plan itself was "reverse engineered" to achieve the stated objective. They placed particular reliance on the costs savings of £7.5 million identified on slides 10 and 71.

785. I accept that submission. Mr Chandler accepted that the authors of the plan had worked backwards from Mr Chappell's instructions that he wanted a business plan to show £250 million equity in 2018. Ms Morgan also confirmed this in an interview with Mr Voice and Mr Ashford on 10 May 2016 stating: "The business plan forecast a £7.5 million cost saving. There was no foundation for this it was just a number to drive the top line outcome. It was crazy." Finally, Mr Pilgrem also accepted that his conclusion that there was a reasonable or rational basis for the plan needed some qualification when Mr Perkins took him to Ms Morgan's statement.

(iv) GT's role

786. Finally, Mr Curl and Mr Perkins also drew attention to the fact that GT are not mentioned in the July 2015 Turnaround Plan. They also relied on the limitations in the Fourth GT Engagement Letter dated 21 May 2015 and when Mr Curl put them to Mr Chandler, he accepted that GT had not validated the key assumptions. I quote the relevant passage from his cross-examination below at [909](7).

787. I consider GT's role in more detail below. But in the context of the July 2015 Turnaround Plan I attach little weight to the fact that GT are not actually mentioned in the plan. This was the BHS Group's business plan and it would be unusual to see a corporate business plan prepared for circulation to third parties (or the assumptions on which it was based) to be supported or "validated" by consultants or accountants engaged to assist management however much input they had in producing the plan. It would normally be for an investor or lender to carry out its own due diligence.

(v) Board Approval

788. The July 2015 Turnaround Plan was considered at a BHSGL board meeting which took place on 16 September 2015 and after the Grovepoint Facility had been drawn down. The minutes of that meeting record that both Mr Chandler and Mr Henningson were present and that despite the Grovepoint financing there remained a cash shortfall which Sir Philip Green had agreed to fund. The minutes also record that the costs savings of £7.5 million assumed in the plan had not been identified. Finally, they record that the board would consider the plan and budget with a view to providing approval at a later meeting. These minutes provide the first record of any discussion of the plan by the BHSGL board.

789. The plan was considered and then approved at a BHSGL board meeting on 14 October 2015. Again, the minutes record that both Mr Chandler and Mr Henningson were present and that Mr Hitchcock presented a paper and that a plan was now in place to achieve savings or create new growth (although pensions had been left deliberately blank). The minutes also record that Mr Topp told the meeting that on 25 November 2015 the BHSGL board was to meet with the Operations Board to discuss the turnaround plan in more detail. On this basis, the BHSGL board approved the July 2015 Turnaround Plan.

790. By 16 September 2015, however, the forecasts had changed very significantly. The TBP cashflow forecast in the July 2015 Turnaround Plan projected a funding requirement of about £20 million in October and a similar funding requirement in March 2016: see slide 13. GT's headroom forecast in their weekly cashflow update dated 15 August 2015 showed a funding requirement of £44.5 million: see slide 9. It also showed that the Hudson Facility was now critical: see slide 3. GT's headroom forecast in their weekly cashflow update dated 26 August 2015 showed an increased funding requirement of £31.5 million even after applying a number of Mitigating Cashflow Levers and a headroom low point of £4.3 million on 4 October 2015.

791. Moreover, by 14 October 2015 the TBP cashflow forecast had become unachievable. BHSGL's internal weekly cashflow update dated 12 October 2015 now showed that the BHS Group would have a funding gap of between about £5 million and £8 million for most of October and November 2015 even after the Grovepoint Facility had been utilised. It was also clear by that meeting that the BHS Group was dependent on the Hudson Facility just to continue trading.

792. Mr Perkins put all of these figures to Mr Pilgrem and he did not dispute them. He then suggested to Mr Pilgrem that it was completely irrational to approve the July 2015 Turnaround Plan in October 2015. Mr Pilgrem did not accept this although he accepted that the EBITDA figure in the plan was overstated by about £10 million:

> "Q. Now, I suggest that, at this point, the group's financial problems can be seen in quite sharp relief. Around a month after the July 2015 turnaround plan was released, the group essentially finds itself in a state of abject crisis, the severity of which was not predicted by the turnaround plan cash flow projection. Do you agree with that? A. Well, you've peppered that with all sorts of adjectives. There's clearly a critical cash need at this point in time -- 1 September. It's identified in the charts. The charts are being prepared on a basis that --that underlines it in -- for a reader of these documents. The cash flows coming out of the July -- sorry, the July 15 detailed business plan also have a cash need in October/September identified. Q. But not that big. Not that large. Not even on the TBP. A. No, it's a -- they're lower. They're lower. Absolutely. So something has happened between those two dates -- Q. Yes. And here's the most -- A. -- to change expectations. Q. Here is the most extraordinary part. Are you aware that the July 2015 turnaround plan was then approved by the BHS directors in mid-October? A. I think -- Q. Shall I show you the page? A. I think the court was taken to that this morning. I was in the room for that. Q. It was. It was. It was completely irrational, wasn't it, for the Board to approve in October a document prepared in July which had been shown by

> Grant Thornton, in a document which actually had Grant Thornton's name on it, to be hopelessly inaccurate, wasn't it? A. No, I -- I -- I don't think so."
>
> "Q. Well, let's just talk about the strategic vision then. Returning to this point on the page that I've pulled out. I think we all agree that the EBITDA, down to the 29 August 2015, was overstated by £10 million? A. Yes. Q. And we agree, don't we, that £10.3 million is a highly material amount, in the context of the BHS' -- the BHS Group's financial position at that time? A. It's a material amount. Q. And you also say, at 5-4.71 on this page "The summer trading season had been adversely affected by: "They are, but the extent of that effect was not known to the management ... until August 2015"? A. Yes. Q. So it's -- it wasn't long after the July business plan that they -- they realised that it was all a bit too optimistic for their historical figures. Do you agree with that? Certainly before October. A. It's shortly -- shortly after they'd settled the detailed business plan they'd had the experience of a disappointing August due to weather, yes."

793. In my judgment, there was no rational basis for the BHSGL board to approve the July 2015 Turnaround Plan at the board meeting on 14 October 2015. By this date it was clear that both the EBITDA and cashflow assumptions upon which it was based were false and that a plan had only just been developed to achieve the costs savings of £7.5 million. Although it is a question of fact for the Court, I take comfort from Mr Pilgrem's evidence. He accepted that the July 2015 Turnaround Plan was overtaken by poor trading and that by October it was too optimistic.

794. The Joint Liquidators' case is that both Mr Chandler and Mr Henningson knew that the July 2015 Turnaround Plan was not an Adequate Plan and no reliance could be placed on it. My difficulty in addressing this case is that it is difficult to assess what (if any) reliance either of them (or the BHSGL board as a whole) placed on the plan in July 2015 since it was not even considered until September 2015 or approved until October 2015. It was briefly tabled for discussion at a board meeting in July 2015 and discussion was postponed until Mr Hitchcock had considered it. But I was not taken to any emails or messages to suggest that there was any detailed discussion between board members about its contents before the meetings in September and October 2015.

795. In that context, I accept Mr Chandler's evidence that on or about 13 July 2015 he reviewed the July 2015 Turnaround Plan and that he did not consider it to be a document of fantasy or unrealistic. I also accept his evidence that he "trusted" (his word) that it could be implemented successfully. However, I am not satisfied that he subjected the plan to any critical scrutiny or, indeed, that he used it to test the prospects that BHSGL

or any of the other Companies might go into insolvent liquidation or administration. Indeed, it is clear from his own discussion of the plan that he relied on Mr Topp, Mr Hitchcock, GT and the Operations Board and took an optimistic view of the plan. It is also clear from his cross-examination that he paid little attention to the Base Case or the assumptions on which it was based and that he either hoped or assumed that the Target Business Plan would be achievable.

796. Moreover, I do consider it to be of real significance that he knew that the July 2015 Turnaround Plan had been reverse engineered on the instructions of Mr Chappell to achieve a £250 million enterprise value. I stress that there is nothing sinister about this. It is often the case that the management of a large business will set demanding targets in a business plan or use an aggressive plan with "stretch" to attract external funding or investment. Both Mr Chandler and Mr Topp accepted that the plan was to be used for that purpose and that it assumed that funding would be available.

(2) Mr Henningson

797. Mr Henningson did not mention the July 2015 Turnaround Plan in either of his witness statements and he did not admit to receiving or reading it in his Points of Defence. He averred that he had no involvement in its preparation and that he was working in Hong Kong in June and July 2015 when it was developed. It is necessary, therefore, for me to decide whether Mr Henningson did receive the plan and, if so, whether he read it in July 2015 or later.

798. On 2 July 2015 Mr Henningson attended the BHSGL board meeting. On 14 July 2015 Mr Topp forwarded to him an email from Ms Dale attaching a version of the July 2015 Turnaround Plan and during July 2015 the BHS Group produced the Bridge Funding Slides and a series of mini-turnaround plans for discussions which it was currently holding with a series of potential lenders, namely, Worldpay, Wells Fargo, Brockton Capital and Tufton Oceanic all of which were derived from the July 2015 Turnaround Plan itself.

799. It is clear that Mr Henningson was involved in those discussions. For example, by email dated 23 July 2015 Mr Henningson wrote to Mr Ted Kalborg of Tufton Oceanic stating: "The material we will send to you is quite detailed and since we are in a restructuring phase with Grant Thornton as advisor, it is essential that this material remains intact."

It is also clear that he was arranging to meet Mr Kalborg the following Wednesday in London. I find, therefore, that Mr Henningson received, read and reviewed the July 2015 Turnaround Plan and that he fully understood it. He could not have met potential funders unless he had done so.

800. However, I am not prepared to draw the inference that Mr Henningson knew that no reliance could be placed on the plan when he saw it in July 2015 because it was not the subject matter of discussion by the BHSGL board until September and October 2015. However, I am prepared to draw the inference that Mr Henningson saw it primarily as a tool for raising further funding and I find that he used it for that purpose during July and August 2015. Having found that both Mr Henningson and Mr Chandler saw and understood the plan, I turn next to the specific allegations which the Joint Liquidators made about the content and detail of the plan.

"a. despite the Respondents' knowledge in the premises set out at Paragraphs 50 to 57 above that the 2015 Triennial Valuation would disclose an increase in the funding deficits in relation to the Schemes and/or occasion a significant increase to the level of Annual Contribution, the July 2015 Turnaround Plan:

i. included only the funding deficit figures from the 2012 Triennial Valuation, despite the Trustees and GT having categorically advised that the funding deficits had increased in the premises set out at Paragraph 102.p and 102.q above;

ii. expressly assumed that the existing level of Annual Contribution (i.e. £10 million per year) would continue throughout the forecast period and took no account of and/or made no provision for the inevitable increase;

iii. failed to recognise that simply paying Annual Contributions was not in and of itself a solution to the funding deficits in relation to the Schemes;

iv. failed to include any proposal for any restructuring of the Schemes, without which insolvent liquidation or administration was inevitable in the premises set out at Paragraph 82 above;"

801. I find that both Mr Chandler and Mr Henningson knew and understood these assumptions. They both knew that BHSL was making DRCs of £10 million per annum and that when the Triennial Valuation was carried out, it was likely that both they and the PPF Levy would increase. I am also satisfied that they both knew that the 2015 July Turnaround Plan did not reflect these assumptions but assumed that DRCs would continue at the existing level of £10 million per annum. Mr Chandler accepted in cross-examination that pressure would be put on BHSL to increase the amount of its contributions and that the present level would not lead to a repair of the deficits. He also accepted that the plan itself contained no provision for restructuring the deficits:

> "Q. The eighth key assumption in the July 2015 turnaround plan was pension obligations. Could I have, please, bundle {C/869/11}. And under "PENSION CONTRIBUTIONS" on the right-hand side it says: "The largest outflows over the forecast period are pension contributions and PPF levies totalling 27.5 million. Under the terms of the previous 2012 triennial valuation, BHS agreed to make annual deficit repair contributions of 10 million (9.5 million BPS and 0.5 million BSMS) for 22 years and 8 months". Pausing there. Those are the two schemes, aren't they, that he's distinguishing between there? A. Yes. Q. And then the next bullet point says: "We have assumed this level of contribution (10 million per annum) continues throughout the forecast period". Now, you knew, as at 13 July 2015, that deficit repair contributions had to increase to of to order of 20 to 25 million. Do you agree with that? A. No, I knew that there was going to be some pressure for them to increase. I -- two days before this plan, we had a meeting with the pension trustees and the TPR and the PPF, I think, where we said: the plan only has that in. And I appreciate, my Lord, it's a double edged sword, as you pointed out earlier on. But we were making it clear that our plan had that -- had that in there and, therefore, the pensions needed to be sorted out. Q. Even if the trustees had shown forbearance for a period, and held the deficit repair contributions at 10 million -- A. Yes. Q. -- at that level, they would not be effecting a repair of the deficit, would they? A. I assume -- I assume not, when those discussions would have taken place, yes. Q. So any forbearance can, by definition, only be temporary because at some point the companies will have to answer for the pension liabilities that they have. Do you agree with that? A. Yes; and at some point there would have been a moral hazard obligation on Sir Philip Green to write a big cheque. Q. There's nothing in here, in the July 2015 turnaround plan, about restructuring the pension deficit, is there? A. I -- no, I don't think there is. Q. No. So you're just assuming that problem away for the purposes of the turnaround plan, aren't you? A. No."

b. the July 2015 Turnaround Plan was conditional on a 1.4% annual increase in sales in years one, two and three, which had no reasonable rationale in light of the fact that the BHS Group no longer benefited from being part of the wider Taveta Group, the lack of any funds for investment in stores and the fact that RAL had no retail experience;"

802. Again, I find that both Mr Chandler and Mr Henningson knew and understood this assumption. Mr Chandler's written evidence was that on a number of occasions Mr Topp told him that the 1.4% annual increase in sales was conservative and eminently achievable and that he had no reason in July 2015 to question or doubt Mr Topp because of his experience, credibility and skills. Mr Curl did not challenge this evidence and I accept it. I can see no reason why Mr Topp would not have shared the same views with Mr Henningson and I am satisfied that he had no reason in July 2015 to doubt Mr Topp either.

"c. the July 2015 Turnaround Plan assumed a funding requirement of £19.8 million in October 2015 yet:

i. did not forecast any further funding to meet that requirement;

ii. expressly assumed that there would be no new debt once ACE II was paid off, which was an assumption for which there was no reasonable basis, as subsequently borne out by the need to take on the Grovepoint Facility to discharge ACE II (see Paragraphs 229 to 238 below);

iii. it was assumed that by October 2015 the BHS Group's remaining three most valuable properties (the Oxford Street Property, the Atherstone Distribution Centre, and the Liverpool store) would all have been sold and as such there was no reasonable basis to think that the necessary further funding could have been achieved without the available collateral;

iv. unencumbered properties worth only £13.3 million were identified, which was self-evidently insufficient to generate the required £19.8 million cash;"

(1) Mr Chandler

803. In broad terms, I accept that the July 2015 Turnaround Plan contained these pleaded assumptions. The headroom forecast for the TBP expressly stated that there was a first funding requirement of £19.8 million in September or October 2015 and a peak funding requirement of £21.6 million in February or March 2016: see slide 14. The plan also assumed that Oxford Street and Liverpool would both be sold in the first year to repay ACE II and Noah I and that this would generate free cash of £26 million: see slide 13. However, although that slide did not assume any new debt, the plan identified seven properties which could be sold to generate £13.3 million cash and stated that management were exploring the possibility of a stock-based working capital facility for up to £40 million: see slide 15. The plan mentioned Atherstone as a warehouse facility but not as an asset or a source of cash.

804. Mr Curl did not put these assumptions to Mr Chandler and in closing submissions he and Mr Perkins relied on the fact that his evidence was that he reviewed the plan and the cashflow forecasts with care. I am satisfied that Mr Chandler read and understood slides 13, 14 and 15 of the July 2015 Turnaround Plan. Mr Curl took him to a number of slides in the plan and Mr Chandler did not suggest that he did not read or understand them. I am satisfied that Mr Curl put his case on this point sufficiently to Mr Chandler and I find that Mr Chandler read slides 13, 14 and 15 and I am satisfied that he understood that there was a funding requirement of £19.8 million in September or October 2015 and also the relevant assumptions upon which the headroom graph was based.

(2) Mr Henningson

805. I also find that Mr Henningson read and understood slides 13 to 15. Each of those slides appeared in the same or substantially the same form in the version of the July 2015 Turnaround Plan which was sent to him on 14 July 2015 and I am satisfied that he read and understood them to enable him to participate in the new funding round in August 2015.

d. in absence of the funding identified at 224.c, there was no reasonable basis to assume that initiatives to improve cash flow requiring capital expenditure could be achieved;"

(1) Mr Chandler

806. Mr Curl and Mr Perkins submitted in closing that Mr Chandler must have appreciated that the funding requirement of £19.8 million could not be met. Mr Curl did not put this point to him directly. However, he put to Mr Chandler a transcript of the evidence which Mr Hitchcock gave to the Insolvency Service. The transcript recorded that his view was that the GT models were rendered useless quite quickly. Mr Curl also put to Mr Chandler two emails dated 24 and 25 June 2015 from Mr O'Sullivan to Ms Morgan:

> "Q. Could I have bundle {C/809.1/1}, please. Sorry, tab 809.1. This is an e-mail from Mark O'Sullivan of Grant Thornton to Kathryn Morgan of BHS. And it's -- it's dated 24 June 2015. And they're discussing a meeting with HSBC the next day. And in the third paragraph he says: "The most important part to get across is how do you fund the 86.6 million peak funding requirement. You will see that the graph still assumes the sale of Oxford Street before the peak funding requirement in mid-October. In the absence of specific detail from the agreement, we have made the following estimates in terms of the cash flows from the refinancing, based on the discussions we have been involved in so far." And he puts in there a value of Oxford Street of 85 million. Now, you agree that that is well in excess of what it was worth? A. I've seen -- I've seen and I was told various different amounts for the likely outcome of the sale of Oxford Street. Actually, I don't remember seeing one that's 85, but I -- I don't know -- I -- I appreciate you're needing to show these documents, but I don't know how I can comment on this document that I don't know anything about. Q. The -- the point of showing it to you is that it shows that Grant Thornton, on instructions, put in whatever number is required to plug the funding gap. Do you agree with that? A. I don't know where Grant Thornton got that 85 number from. I assume that they got it from someone at BHS, but I don't know. Q. Could I have, please, bundle {C/821/1}. This is another e-mail from Mark O'Sullivan to Mr Topp, copied to Kathryn Morgan. And this one is about a weekly cash flow forecast. So we've been looking at the approach to figures in the turnaround plan business plan. We've just seen

> one on a meeting with HSBC. And now we're looking at one concerning a weekly cash flow forecast. And Mr O'Sullivan says: "Darren. As discussed" -- so he's doing it on instructions -- "we have pushed the assumptions you fed through into the forecast and have reattached. To give you the best picture, we have: 5. Assumed that Oxford Street is sold for 85 million at the end of November and that any arrangement fees (estimated at 5 million) and commissioning (15 million) to the agent are paid at that point and netted off the remaining 40 million receivable. Based on that assumptions what it shows is that the pinch point in October is less than 1 million and therefore you would have some options re: withholding capex, further letters etc to try and manage this through without having to sell Oxford Street before then." So do you agree that it's a consistent feature of all Grant Thornton's work that the numbers are simply made up, reverse engineered, to fill the gap? A. I don't know. I wasn't responsible for them. Q. Now, I suggest, Mr Chandler, that by 13 July 2015, you knew or ought to have concluded that the companies had no reasonable prospect of avoiding insolvent liquidation or administration. Do you accept that? A. No, I don't accept that. Q. And distinctly you also knew or should have known that any continued trading by the companies would be adverse to the interests of the companies' creditors and would be only for the purposes of RAL or for your own purposes. Do you accept that? A. No, I don't. Q. Based on the conclusions that you ought to have drawn on seeing the July 2015 turnaround plan, you should have instructed licensed insolvency practitioners or another restructuring expert in order to take steps to cease trading. Do you agree? A. No, I don't agree."

807. I find that Mr Chandler appreciated that the July 2015 Turnaround Plan did not explain how BHSGL would be able to meet the funding requirement of £19.8 million in September or October 2015. However, I make that finding subject to an important qualification. The principal purpose of the plan was to raise the funding which would enable the group to do so and it presented the Target Business Plan on the assumption that the necessary funding was available. Both Mr Topp and Mr Chandler accepted that the plan was directed at funders and one of its functions was to identify the funding gap and potential sources of security (as it did).

808. But this purpose also explains why GT had prepared the plan and the underlying Model on aggressive and challenging assumptions. They assumed not only that the BHS Group would obtain a sustainable working capital facility but also that this would restore sufficient confidence so that, for instance, trade credit insurance would be restored. The July 2015 Turnaround Plan was not irrational, therefore, but the forecasts which it contained could not be achieved unless BHSGL was able to obtain a long term sustainable working capital facility which would provide sufficient funding to enable

the BHS Group to carry out the identified initiatives. I find that Mr Chandler understood this and, if he did not, that he should have done.

(2) Mr Henningson

809. I also find that Mr Henningson understood that the July 2015 Turnaround Plan did not explain how BHSGL would be able to meet the funding requirement of £19.8 million in September or October 2015 and that it was based on very aggressive assumptions. I am satisfied that as an experienced adviser in relation to corporate finance and turnaround planning, Mr Henningson understood that the forecasts in the July 2015 Turnaround Plan were meaningless without a sustainable working capital facility.

"e. the July 2015 Turnaround Plan assumed there would be no further cash collateralisation for letters of credit, which had no reasonable rationale in light of:

i. there being no solution to the trade credit insurance issue (see Paragraphs 149 to 156 above), and the express recognition in the July 2015 Turnaround Plan that cover would not be available until April 2016; and

ii. the fact that the availability of the only letter of credit facilities which BHSL had in place by this date (the First LoC Facility and Second LoC Facility totalling £21.9 million referenced in Paragraphs 195 to 196 above) were entirely conditional on the equivalent amount of cash being held in a blocked BHSL account secured in favour of Barclays;"

(1) Mr Chandler

810. In an email dated 10 July 2015 Ms Dale confirmed that GT's instructions were to assume that trade credit insurance would be "back on" in April 2016. The July 2015 Turnaround Plan also provided for £25.2 million cash to be used to fund letters of credit in Year 1 (FY 2016) but not in Year 2 (FY 2017) or Year 3 (FY 2018): see slide 13. The text next to the table stated that no further cash collateralisation of letters was assumed in the forecast period which allowed the £25.2 million of restricted cash to become available for the business. Mr Curl put both points to Mr Chandler. He had an explanation for one point but not the other:

> "Q. A fourth key assumption of the plan was on letters of credit. GT, as we saw, were instructed to assume that trade credit would be restored by April 2016. And there was simply no basis for that whatsoever, was there?
> A. As I said earlier, I think we were forecasting -- sorry, that's not the right word for us -- I think we were anticipating that our continued presence on the high street, after a year or so, would have given the trade credit insurers confidence that they could start to write cover again and/or Alex Morrison and his team would have sourced different suppliers who didn't require

> trade credit insurance. Q. And the turnaround plan business plan also assumed that no further cash collateralisation for letters of credit would be required; and I suggest to you that there was no basis for that assumption, given that, even on your own figures, you considered that letters of credit would be required until April 2016. A. I -- I -- I don't know."

811. Again, I accept Mr Chandler's evidence in relation to this issue. It does not seem to me illogical for him to assume that trade credit insurance would be restored if the BHS Group had been able to obtain long-term, sustainable funding, to pay its suppliers and to continue trading until April 2016. This is also a point on which Mr Chandler would have deferred to Mr Topp given his retail experience. Furthermore, if trade credit insurance had been restored in April 2016, then it ought to have been unnecessary for the BHS Group to keep the First and Second LOC Facilities in place and to provide the cash collateral for them. But I am not surprised that Mr Chandler could not recall this level of detail after so long.

(2) Mr Henningson

812. I find that Mr Henningson read slide 13. The assumption was clearly stated and I am satisfied that as an experienced corporate finance adviser Mr Henningson understood the assumption and the rationale for it. I am also satisfied that he would have considered that rationale logical but also that it was dependent upon the BHS Group's ability to attract long-term funding.

"f. the July 2015 Turnaround Plan was conditional on the sale of the Oxford Street Property occurring in September 2015, realising £22.1 million net for the BHS Group after repayment of ACE II and there was no realistic prospect of that eventuating in that:

i. the net figure of £22.1 million did not take account of the ACE Profit Share or the need to buy ACE out of the ACE Profit Share (the latter course was ultimately taken and cost a further £3,490,674: see Paragraph 238 below);

(1) Mr Chandler

813. The July 2015 Turnaround Plan assumed that Oxford Street would be sold for £50 million in September 2015: see slide 11. It also assumed that it would realise £22.1 million after the pre-payment of ACE II for £27.9 million: see slide 13. This figure was not broken down but I am satisfied that it did not contain the ACE Profit Share. Mr Chandler confirmed in his cross-examination about ACE II (above) that £27.4 million was required to redeem ACE II and £3.4 million to obtain a release from the ACE Profit

Share. I have also found that Mr Chandler read slide 13. I am also satisfied that he understood the terms of the ACE II Mezzanine Agreement because Mr Morris explained them at the meeting on 23 June 2015. Mr Chandler's evidence was that he read the July 2015 Turnaround Plan on about 13 July 2015 and that meeting would have been fresh in his mind. I am satisfied that Mr Chandler either did or should have appreciated that the 2015 Turnaround Plan did not include the payment of the ACE Profit Share.

(2) Mr Henningson

814. I have found that Mr Henningson negotiated ACE II with Mr Dellal and that he understood the terms of repayment. I have also found that he read the July 2015 Turnaround Plan on or about 14 July 2015 when his negotiations with Mr Dellal would also have been fresh in his mind. I am satisfied that he either did or should have appreciated that the plan did not take into account the ACE Profit Share.

"ii. it was likely that the onerous cost of short-term borrowing (whether under ACE II or otherwise) would extinguish the asset before it could be sold (which is what in fact happened: see Paragraph 274 below);"

(1) Mr Chandler

815. When he was cross-examined about GT's cashflow weekly update dated 17 June 2015 Mr Chandler accepted that by 4 June 2015 the Board was contemplating a loan secured on Oxford Street from a lender such as Grovepoint as an alternative to sale. When the July 2015 Turnaround Plan was put to him, he gave a similar answer, namely, that it was no longer definitely the plan and that the Board was exploring other opportunities. The July 2015 Turnaround Plan was directed at long-term, sustainable funding and did not include the additional costs of any further short-term borrowing in the meantime. Again, I am satisfied that Mr Chandler understood this. I am also satisfied that he appreciated from the discussions about ACE II that the cost of any further short-term borrowing was likely to be onerous and that it would reduce significantly the proceeds of sale of Oxford Street if it was not sold in September 2015.

(2) Mr Henningson

816. I am also satisfied that Mr Henningson understood from his negotiations with Mr Dellal that the cost of any further short-term funding was likely to be short term and onerous,

that it would reduce significantly the proceeds of sale of Oxford Street if it was not sold in September 2015 and that the July 2015 Turnaround Plan did not include these additional costs.

"iii. the established pattern of conduct by July 2015 as set out above on the part of the Respondents was to cause or allow cash to be paid away by the BHS Group to RAL or others whenever it was available to be applied in that way and there was no reasonable or rational basis for any of the Respondents to think that their conduct would change (it did not change: see, for instance, Paragraphs 226, 241, 248, 250, 283 and 291 below);"

(1) Mr Chandler

817. Mr Chandler accepted that he was aware that Mr Chappell had misappropriated funds from the BHS Group dishonestly by the 17 April Board Meeting. He also accepted that he became aware that Mr Parladorio had misled Mr Davis at about the same time. Mr Chandler also gave evidence in Chandler 1 that Mr Topp and he confronted Mr Chappell about the £2 million payment to RAL at the Landmark Hotel. His evidence in cross-examination was as follows:

> "Q. No, you may not have done. All right. Could I have that document back. I'll -- we'll use Mr Topp's summary. Ah, {G/95/1}. If I could have {G/95/1} please. It looks from this as if you did meet DLA. Do you see that? A. Yes. And I do now remember meeting Mr Voice. Q. The passage I should like to take you to is just by the second hole punch. And it says: "They were £35 million down on cash flow. ACE were the only show in town. Mike Morris negotiated it. We were told that BHS would net £19 million. A meeting at Olswang DC1 told us this on a Thursday or Friday. When it arrived it was only £17 million. DC1 said something about VAT and rent and don't worry it will come back. Over the next week there was a suggestion that RAL were due a £2 million fee. It was a £60 million facility but the drawdown was only 25 million." Is that an accurate reflection of what you said to DLA? A. I've no reason to suspect otherwise. Q. Is that the gist of what happened? A. That's a gist of some of what happened, yes. Q. Yes. Now, you accept, then, that DC1 -- sorry, Mr Chappell's explanation about VAT and rent was, again, untrue? A. Yes. Q. Yes. So he was, again, dishonest? A. Yes. Q. Now, this was really an action replay of what he had done with the 521,000, wasn't it? A. A little different; and significantly for me he lied to my face and he allowed me and Darren to make a decision based on information that was not correct. Q. What was the decision you made? A. To -- to proceed on the basis that we would get 19 million and we only ended up getting 17.5. Q. And when you found out then that you had only got 17, and that Mr Chappell had misappropriated 2 million, why did you continue? A. Why did I continue what? Q. Being a director of the companies? A. Because it wasn't all about Mr Chappell. Q. You say in your witness statement that there was a -- a discussion at the

> Landmark Hotel when you found out. And you said to Mr Chappell that he couldn't lie to you. Do you remember that? A. I do. Q. Now, do you accept that, really, the point is that he -- he knows that he can lie to you because he knows you're not going to do anything? A. I don't accept that, no."

818. I return to the evidence which Mr Chandler gave about this incident in addressing the Individual Misfeasance Claims. For present purposes, however, I am satisfied that by 13 July 2015 Mr Chandler was aware that Mr Chappell had dishonestly misappropriated funds from the BHS Group on at least two occasions for the benefit of himself and RAL. I am also satisfied that Mr Chandler had no confidence that this conduct would change. I say this because in September 2015 he was involved in changing the bank mandates of the BHS Group to ensure that there were two signatories. He gave the following evidence in Chandler 1 in the context of the management fee of £600,000 paid to RAL on 1 April 2016:

> "259. We had understood that the banking mandates would not have allowed for a payment to be made in this way by just Mr Chappell. Mr Topp, Mr Hitchcock and I had arranged for transactions of any significance to require two signatures; and it had to include at least one person from the operational side of the business (such as Mr Topp) and not two RAL (or RAL-associated) people. This restriction had been put in place in or around September 2015."

(2) Mr Henningson

819. I consider Mr Henningson's role in the diversion of the proceeds of sale of North West House, the payment to Swiss Rock of £521,976 and the payment of £2 million to RAL on the completion of ACE II in addressing the Individual Misfeasance Claims. For present purposes, it is enough to state that I am satisfied that by 13 July 2015 Mr Henningson knew that Mr Chappell had dishonestly misappropriated funds from the BHS Group on three separate occasions for his own benefit and for the benefit of RAL and Swiss Rock. I am also satisfied that he had no honest or rational belief that this conduct would change.

"g. even if the sale of Oxford Street had occurred in September 2015, the July 2015 Turnaround Plan forecast showed that there would nonetheless be a net cash deficit in October 2015 after including the sale proceeds of Oxford Street (the sale did not in fact eventuate until 31 March 2016, producing net cash after accounting for VAT of £0: see Paragraphs 273 and 274 below);"

820. The headroom forecast for the TBP showed a first funding requirement of £19.8 million in September or October 2015 on the assumption that Oxford Street was sold in September 2015 generating net proceeds of sale of £22.5 million: see slides 13 and 14. I am satisfied that both Mr Chandler and Mr Henningson understood this from reading the July 2015 Turnaround Plan. As Mr Chandler accepted, further funding was required by the next quarter day. Indeed, I find that the primary purpose of the July 2015 Turnaround Plan was to attract new funding which would enable the BHS Group both to meet the first and subsequent funding requirements.

"h. the cash flow forecast in the July 2015 Turnaround Plan assumed that £25 million would be received from ACE II when in fact (as the Respondents knew or ought to have known: see Paragraphs 216 to 222 above) £2 million of the loan principal had been paid to RAL; and"

821. Mr Shaw's evidence was that the model underlying the July 2015 Turnaround Plan assumed that £25 million was received from ACE II in June 2015. I accept this evidence. It was unchallenged and the spreadsheet referred to in his footnotes confirms that the Model assumed the receipt of £25 million on 27 June 2015. However, Mr Chandler was not taken to the Model itself or to any statement in the plan to this effect. I am not satisfied, therefore, that Mr Chandler or Mr Henningson understood that the plan was based on this assumption.

822. Mr Chandler's case was that the BHS Group did receive the full £25 million because £1.5 million of the £2 million paid to RAL was the repayment of the loan made by RAL under the Framework Agreement and £500,000 was repaid by RAL to BHS Group. In my judgment, this was an ex post facto rationalisation designed to paper over Mr Chappell's unauthorised misappropriation of funds. But in any event, only £500,000 represented free cash by the BHS Group which it could use either as working capital or to repay its existing borrowings. I therefore reject Mr Chandler's case that BHSGL received the full £25 million and I find that on 26 June 2015 it received funds of £17 million from ACE II and later £500,000 from Mr Chappell.

"i. the July 2015 Turnaround Plan assumed a uniform 11.9% rent reduction from FY2016 and there was no reasonable basis to assume all landlords would agree to such a reduction and at the same time."

823. The July 2015 Turnaround Plan assumed savings of £7.2 million in Year 2 (FY17). The text also stated that this would be achieved by seeking a uniform 11.9% reduction for

each property: see slide 22. Mr Curl put to Mr Chandler an email dated 27 May 2015 in which Mr Simpson reported to Ms Dale that it was Mr Sherwood's view that this would be very difficult to deliver. Mr Chandler's evidence was that Mr Sherwood did not say this to him or to anyone else (to his knowledge). I accept that evidence. Mr Curl did not suggest that this internal email was copied to him or that GT communicated this view to him in any other way.

824. Moreover, I am not satisfied that this was Mr Sherwood's view by the date of the July 2015 Turnaround Plan. In cross-examination Mr Lightman pointed out to him that he had taken a rather pessimistic view before the appointment of Mr Hitchcock but that after his appointment they had worked together to try and achieve the assumed savings. Mr Lightman also took Mr Sherwood to his evidence to the Select Committee:

> "Q. So if we go, let's say, to your Select Committee testimony at {G/60/19}. We see at the top of the page, my Lord, it's 29 June 2016. Question 2918 said: "... there was an immediate need for cash flow. Certainly when Michael Hitchcock came on board and you were talking to him, he absolutely measured something by cash flow demands ...", etc. "I thought Michael coming on board was very helpful because there was a gap when we did not have a CFO role filled and also he was very convinced that we could negotiate down the rents. I had a conversation with him and he said that when he was at Beales he had negotiated down the rents by £3 million and that was on a much smaller portfolio, so this portfolio was wrong and we would be able to go and do it." So when Mr Hitchcock became CFO you and he discussed how BHS could try to negotiate rent reductions? A. We did. Q. And he told you he thought you and he could do something similar at BHS, whose portfolio was much bigger than Beales? A. He did. Q. And would it be right to say you -- you believed him? A. I was nervous about it, but he said he'd done it. So it seemed reasonable to think that, actually, it was something that we could do together. Q. And, in response to questions 2918 and 2919 to the Select Committee, we've seen the bit where you said: "I thought Michael coming on board was very helpful because there was a gap and he was very convinced we could negotiate down the rents", and the conversation that we talked about. In answer to question 2919: "Did you believe him at that point?" You said: "He said it with such utter conviction that I did." So that reflects your -- A. Yes. Q. -- understanding. And, to be clear, what you understood Mr Hitchcock to be saying was he thought the rent reductions could be achieved without a CVA; correct? A. Yes. He thought that we could go and see the landlords and effectively -- and which we did -- and allude to a CVA and tell them they needed to reduce the rent and that they would agree it. Q. Were you aware that Mr Hitchcock shared his optimism about achieving rent reductions with Grant Thornton in July 2015? A. Not specifically, but it wouldn't surprise me."

825. Mr Sherwood gave evidence that GT prepared slide 22 (above) based on discussions with him but that discussions on store closures were due to happen before discussions on rent. He also gave evidence that he started working with Mr Hitchcock on a sales pitch to landlords and that Mr Hitchcock and he were engaged in discussions with a number of landlords between July and September 2015. In view of Mr Sherwood's evidence I am not satisfied that there was no reasonable basis to assume that landlords would agree to reductions of £7.2 million or that either Mr Chandler and Mr Henningson knew or ought to have known that this was the case.

826. I have now completed my findings in relation to the detailed contents of the July 2015 Turnaround Plan. I am not satisfied that the detailed knowledge which I have found Mr Chandler and Mr Henningson to have leads to the conclusion that in July 2015 either or both of them ought to have known that the plan could not be relied on. However, in reaching this conclusion I take into account the purpose for which it was prepared. GT did not prepare it for the purpose of enabling the BHSGL board to reach an informed decision on whether the group could continue trading and they did not use it for that purpose. The purpose for which they relied on it or used it was to promote a new funding round.

827. On the other hand, I am satisfied that both Mr Chandler and Mr Henningson knew that it was not an Adequate Plan in the sense pleaded by the Joint Liquidators. As Mr Topp accepted, it addressed the consistently loss-making business. But it did not address the liability under the Schemes, the trade credit insurance issues, the need for a working capital facility and the ongoing cashflow requirements. It assumed that these issues would be successfully resolved if the BHS Group obtained long-term funding for the three years of the plan. However, as both Mr Chandler and Mr Henningson knew, ACE II did not provide this funding and the plan itself was dependent upon BHSGL finding a long-term and sustainable working capital facility.

V. 26 August 2015: Atherstone

"228. In causing or permitting £6,177,000 to be lent by BHSGL to RAL or otherwise applied for the benefit of RAL whether to repay ACE I or for some other purpose, the Respondents breached their duties to BHSGL in that: a. it was against the interests of BHSGL either to make any payment or advance any loan to RAL, in that: a. the Respondents knew or ought to have known that there was no prospect of RAL ever making repayment"

(1) Mr Chandler

828. On 26 August 2015 BHSPL used £6,157,588.24 of the proceeds of the sale of Atherstone to discharge ACE I. There was no dispute that RAL was the principal debtor and, although it was really a matter of law for the Court, Mr Curl put it to Mr Chandler that upon the sale BHSPL had an immediate right of indemnity under the law of suretyship. In case there is any doubt, I am satisfied that BHSPL was entitled to an immediate right of indemnity when it discharged ACE I. BHSPL was not expressed to be a principal debtor in the ACE I Mortgage and the security which it granted only became enforceable once RAL committed an Event of Default: see clause 9.1. In my judgment, BHSPL had an immediate right to an indemnity from RAL for £6,157,588.24: see *Chitty on Contracts* 35th ed (2023) Vol 2 at 48—135.

829. Mr Curl put a series of emails to Mr Chandler to demonstrate that there was no prospect of RAL repaying this sum including an email from Mr Parladorio to Mr Roberts copying in Mr Chandler dated 27 April 2015 in which Mr Parladorio stated: "A big fear for us around this is that RAL is significantly, and unexpectedly, under water and this needs urgent fixing." After putting an internal GT email to him as well, Mr Curl suggested to Mr Chandler that the position remained unchanged:

> "Now, I don't suggest that you saw that e-mail at the time, but I am going to suggest that that issue of RAL being underwater, which you were aware of, informed really the whole of the trading strategy of the BHS Group. Do you agree with that? A. No. Q. The preoccupation, all the way through, of Mr Parladorio was that RAL was underwater and was exposed in the case of an insolvency of the companies. Do you agree with that? A. I don't know if it was his preoccupation. He was certainly, I think, interested in it."

830. Mr Lightman submitted in closing that the existence of the ACE I Charge over Atherstone was nothing new on 26 August 2015 and that it "was always known as part of the sale of Atherstone, the amount owed [by] RAL would need to be repaid."[6] He also relied on the weekly cashflow update dated 1 July 2015 which assumed that the BHS Group would receive £10 million on the sale of Atherstone when it was known that negotiations were taking place to sell the property for £15 million and the ACE I

[6] His closing submissions state "the outstanding amount owed to RAL" but I assume that this must be a mistake.

debt was £5.17 million. He submitted, therefore, that the repayment of ACE I was factored into the forecasts.

831. I accept Mr Lightman's submission that the Board always assumed that ACE I would have to be repaid out of the proceeds of sale of Atherstone. Indeed, it is striking that at no stage from 11 March 2015 to 26 August 2015 did any of the directors of RAL suggest to GT or Mr Chandler that RAL had any independent funds available to meet its obligations under ACE I or that it was making any effort to raise independent funds to do so. Indeed, it appears to have been treated by all of them as perfectly acceptable for RAL to use the BHS Group's assets to pay its debts. I am satisfied, therefore, that Mr Chandler knew by 1 July 2015 at the latest that there was no prospect of RAL ever making repayment of ACE I except out of the proceeds of sale of Atherstone.

(2) Mr Henningson

832. I have found that Mr Henningson knew that RAL had no financial resources at completion. I am also satisfied that he too assumed that ACE I would be paid out of the proceeds of sale of Atherstone. On 30 April 2015 Mr Roberts wrote to the RAL board explaining the terms of the Deed of Amendment and Variation and the ACE Loan Note II. Mr Roberts reported that Mr Parladorio was proposing to discuss with Mr Chappell "a potential early sale and lease back of Atherstone to clear the ACE debt." Moreover, Mr Henningson does not suggest in either of his witness statements that he was ever aware that RAL had any other funds out of which it could repay ACE I.

R. 8 September 2015: The Grovepoint Facility

"233. The decision by the Respondents to cause or allow BHSL to grant security over the Oxford Street Property falsified the primary assumption underlying the July 2015 Turnaround Plan identified at Paragraph 224.f above, which was that the Oxford Street Property would be sold and realise at least £22.1 million in cash. Having been offered as security for the Grovepoint Facility, the Respondents knew or ought to have known that the availability of any net proceeds from the sale of the Oxford Street Property was unlikely in the short term.

234. The BHSGL, BHSL and Davenbush boards (Mr Chappell and Mr Chandler in attendance) considered entering into the Grovepoint Facility at a series of board meetings on 8 September 2015. There was no adequate consideration by the Respondents in their capacity as directors of BHSGL, BHSL and Davenbush or any of them of the terms of the Grovepoint Facility or whether the decision to enter into the Grovepoint Facility could be regarded as being in the interests of each of the Companies' creditors. Such consideration was particularly important given the falsification of the assumption at Paragraph 224.f above."

(1) Mr Chandler

833. The headroom forecast for the Target Business Plan in the July 2015 Turnaround Plan showed a first funding requirement of £19.8 million in September or October 2015 and a second funding requirement of £21.6 million in February or March 2016: see slide 11. This headroom forecast assumed that the BHS Group would achieve property disposals of £54.9 million in September 2015, namely, £50 million for Oxford Street and £4.9 million for Carlisle: see slide 11. Although these property sales were stated to be assumptions underlying the Base Case, it is clear from the text that they were also assumptions underlying the Target Business Plan: see slide 12 (which also assumed sales of Liverpool, Milton Keynes and Manchester in FY 2016).

834. However, by the date of their very last cashflow weekly update dated 1 September 2015 GT were no longer making the assumption that Oxford Street would be sold for £50 million in FY 2016. They stated instead that management had assumed that the group would receive £9.52 million between September 2015 and January 2016 from the sales of Carlisle and Liverpool. As a consequence, the revised headroom forecast for 1 September 2015 looked very different. GT presented their figures in the usual graph on slide 10 but they stated in clear terms at the top of the slide: "Excluding the potential refinancing, peak funding requirement is now at £31.5m in w/c 4 Oct, including the use of mitigating cash flow levers." They also stated that: "Including the proposed refinancing of £64.5m, headroom low point is £4.3m w/c 4 Oct". These "levers" included the deferral of rental payments and VAT.

835. GT set out a more detailed schedule of the weekly cashflows on slide 2. This schedule now assumed that the BHS Group would receive £88.25 million in the week ending 13 March 2016. The notes to this entry stated: "Net proceeds of sale of properties, after repayment of full loan and interest". The schedule did not break down this figure but GT had prepared a spreadsheet of valuations for Mr Morris and he circulated it to a potential funder on 25 August 2015. This table continued to value Oxford Street at £50 million and it included the other properties available to the BHS Group including Milton Keynes but excluding Liverpool, Carlisle and Atherstone. In the DTZ Valuation Report, DTZ valued all nine properties (Blackpool, Exeter, Carmarthen, Oxford Street, Manchester, Milton Keynes, Scunthorpe, Sunderland and Taunton) at a total market

value of £89,195,000. However, they valued Oxford Street at £60 million rather than £50 million.

836. In their opening submissions Mr Curl and Mr Perkins stated that the total amount of interest payable under the Grovepoint Facility including the Make Whole Payment was £9,934,230. This figure was not challenged and I accept it. It also tallies with a later BHS cashflow forecast which Mr Carver sent to Mr Morris on 1 April 2016. One of the stated assumptions in that forecast was that the total cost to repay the Grovepoint Facility was £72,730,730 (which is the sum of £62,436,500 and £9,934,230). This means that the total cost of the Grovepoint Facility was £11,182,990 for a one year loan of £62.4 million of which almost £50 million was repaid within six months.

837. GT did not state the total cost of the Grovepoint Facility in their last cashflow update but they stated that "funding of £64.5 million" was received in the week commencing on 13 September 2015. They also set out this figure on the headroom forecast. Moreover, it was obvious from the loan documentation itself that BHSGL was required to pay a structuring fee of £1,248,730 and interest at LIBOR plus 15% for the whole term of the loan whether or not it was repaid early.

838. Mr Chandler's evidence was that the BHSGL board had received a valuation of £61.5 million and that Mr Sherwood was confident that a deal in the region of £80 million was possible. He also said that he knew that the Board had the option of using Oxford Street as security in order to obtain what he called "attractive financing" and that he thought that this was one way to obtain the money needed for the business whilst retaining the flexibility to get the best possible price. He said that for this reason he was unconcerned that Oxford Street had not been sold and that this issue was discussed at the Board meeting on 1 September 2015 (footnotes omitted):

> "150. This was in fact discussed at the board meeting for BHSGL on 1 September 2015. As I will go on to explain, this was around the time that we were in negotiations with Grovepoint about a large facility. That loan was to be partly secured against the Oxford Street Property. The board minutes for this meeting record the conversation, which I recall, where we noted that the Grovepoint deal gave us the funds from the Oxford Street Property in a way that also gave us more time to explore the options that were being explored. This meant that the possible value for the Oxford Street Property could be maximised. I thought this all made perfect sense. I also remember that Grovepoint had obtained their own valuation for the property and this was for £60 million. I am not sure if I saw the valuation

> itself (and so I was not shown it during the preparation of my statement) but I recorded this fact in my handwritten notes."

839. Mr Chandler also gave evidence that he received Mr Turner's memo dated 25 August 2015 on 11 September 2015 but that he could not recall reading it. Nevertheless, he quoted paragraph 4 (see [271]) and stated that he had no doubt that it was "an apt summary of what my thinking was at the time". He then gave the following evidence about the Grovepoint Facility:

> "183. As I said above, Mr Morris was in charge of finding a new facility agreement and I understood that between the entry into ACE II (on 26 June 2015) and September 2015, he was in discussions with a variety of lenders. Mr Morris would keep the board updated on how those negotiations were going. Having reviewed the board minutes for BHSGL, I noticed a particular example of this on 1 September 2015. In addition to the board meetings, I would often hear from Mr Morris how things were going when I saw him in the office at Marylebone House.
>
> 184. We ended up signing with Grovepoint and used the funds to pay off the ACE II loan. It provided additional working capital for the implementation of the Detailed Business Plan. I had no doubt that this was a positive step.
>
> 185. The Grovepoint Facility was partly secured against the Oxford Street Property. I have already explained how I thought this was a good thing: it meant that we could utilise some of the value of the Oxford Street Property immediately whilst allowing us more time to explore as many options as possible to realise its maximum value, whether by re-development, sub-letting, or the sale of the lease. That added time and flexibility meant that there was a greater chance of maximising the possible value of the Oxford Street Property; that is something that I thought was in the best interests of the Companies and the creditors."

840. Mr Curl challenged this evidence. He suggested to Mr Chandler that he knew or ought to have realised that Oxford Street had been extinguished as an asset by 8 September 2015 when Mr Chappell and he authorised BHSGL, BHSL and Davenbush to enter into the Grovepoint Facility:

> "Q. The Grovepoint Facility was entered into on 8 September 2015. Now, do you agree that that was a further very expensive and unsustainable facility? A. It -- I understand it was expensive. I don't think it was unsustainable. Q. And do you agree that Grovepoint yielded you 33 million of new money at the expense of extinguishing Oxford Street as an asset? A. No, not extinguishing. Q. In your witness statement, you suggest that giving Grovepoint security over Oxford Street meant that the best -- meant that the possible value for the Oxford Street property could be maximised

> "I thought this all made perfect sense". Can I suggest to you that that was an irrational view to have held, because, in fact, using the property for expensive short-term finance meant that the possible value would be minimised, not maximised. Do you agree with that? A. No. Q. Do you agree that anyone who owns property can obtain finance on fully securitised terms? A. I'm not sure the main, but probably most people, yes. Q. Do you accept that is just an incredibly expensive way of realising property? A. Well, it's not just an incredibly -- it is an expensive way of raising money on property, yes. Q. Now, can I suggest to you, Mr Chandler, that by the time Grovepoint was entered into, on 8 September 2015, and by which time you knew or ought to have realised that Oxford Street was extinguished as an asset, you knew or ought to have concluded that the companies had no reasonable prospect of avoiding insolvent liquidation or administration? A. I don't agree with that. Q. Do you accept that by 13 September 2015 you knew or should have known that any continued trading by the companies would be adverse to the interests of the companies' creditors and would be only for the purposes of RAL or for your own purposes? A. I'm not sure the relevance of 13 September. Did you mean the 11th or is ...Q. In fact 8 September. A. The 8th. Q. I apologise. A. Okay. No, I don't agree with that. Q. And do you agree that on 8 September, in light of everything you knew, you ought to have instructed licensed insolvency practitioner or other restructuring professional to take steps to cease to trade? A. No, I don't."

841. I am satisfied that by the board meeting on 1 September 2015 Mr Chandler knew that the July 2015 Turnaround Plan was based on the assumption that the sale of Oxford Street would generate a surplus of £22.1 million in September 2015 and also the significance of that assumption. I am also satisfied that by that date he knew that the Operations Board and the wider management of the BHS Group were no longer making that assumption because Oxford Street was charged to secure ACE II and about to be charged to secure the Grovepoint Facility and could not be sold in the short term. This was obvious from GT's last weekly cashflow update and Mr Chandler accepted in Chandler 1 that no sale of Oxford Street had been agreed or was anticipated in the immediate future.

842. I also find that Mr Chandler knew or believed that it was highly unlikely that there would be any surplus available from the sale of Oxford Street once the Grovepoint Facility had been repaid and that there was no prospect of it producing a surplus of £22.1 million. He knew these facts by making a simple comparison between the amount of the loan shown in GT's cashflow update (£64.5 million) and the valuation of Oxford Street which the board had received (£61.5 million) or which Grovepoint had received from DTZ (£60 million). Moreover, he knew that even if Mr Sherwood turned out to be

right and Oxford Street was later sold for £80 million, the total cost of the loan would not produce a surplus of £22.1 million but far less than this once the structuring fee, interest and the Make Whole Payment were taken into account.

843. Moreover, even if Mr Chandler did not understand these figures, he should have done. Mr Carver or GT would have been able to calculate that the total cost of the facility was £72.7 million and Mr Morris could also have told Mr Chandler that the total value of the BHS Group's "property collateral pool" was £88.25 million and that this was consistent with DTZ's valuations for Grovepoint. If he had asked for these figures, Mr Chandler would have known that the sale of the BHS Group's entire property portfolio would leave the group with a surplus of £15.55 million after repayment of the Grovepoint Facility (based on Mr Morris's own figures).

844. I turn next to Mr Chandler's evidence in relation to Olswang's memorandum dated 25 August 2015. Although I have found Mr Chandler to be an honest witness and I accept that he was not attempting to mislead the Court, I do not accept that he read that memorandum with care or that it reflected his thinking either before or after 8 September 2015. I have reached this conclusion for the following reasons:

(1) On 8 September 2015 Mr Chappell and Mr Chandler authorised BHSGL, BHSL and Davenbush to enter into the Grovepoint Facility in their capacity as a sub-committee of the BHSGL board and pursuant to written resolutions. The minutes of each meeting clearly demonstrate that there was no detailed consideration of the interest of creditors at any of them because they were formal meetings only and each one lasted about five or ten minutes at most.

(2) Mr Chandler was correct to say that he received Olswang's memo on 11 September 2015 because Mr Roberts sent it to him by email at 6.31 pm that day. However, he could not recall reading it. This was a Friday evening and he received the memo over a week after the Board had considered whether in principle to re-finance the existing debt and had authorised him to execute the Grovepoint Facility with Mr Chappell. It was also three days after Mr Chappell and he had passed the relevant resolutions and signed the relevant documents.

(3) Moreover, there is no evidence that the Board considered Olswang's memo at either of the subsequent board meetings on 16 September 2015 and 14 October

2015. If Mr Chandler had read Olswang's memo dated 25 August 2015 with care, then in my judgment he would have appreciated its importance and tabled that memo for discussion at one or other of those meetings.

(4) In particular, Mr Chandler would have appreciated that the Board had not addressed the particular questions raised by Mr Turner in paragraphs 4.2 and 5 (see [271]). Mr Chandler did not refer to either paragraph in his written evidence but they raised the very question which Mr Curl put to him in cross-examination and which the Board ought to have been considering before entering into the Grovepoint Facility. That question was whether the surplus available to unsecured creditors on the sale of Oxford Street, Liverpool and Milton Keynes would be lost as a consequence of entering into the Grovepoint Facility.

(5) As I have stated, Mr Chandler could not recall reading the document at the time and, in my judgment, evidence that the memorandum was an apt summary of his own thinking was coloured by hindsight and re-reading the document now in the light of the allegations now made.

845. It is also convenient for me to consider at the same time the Joint Liquidators' allegation that there was no adequate consideration of the interests of creditors at the meetings on 8 September 2015. I find that Mr Chappell and Mr Chandler did not consider the interests of the creditors of BHSGL, BHSL and Davenbush at the meetings of those companies on 8 September 2015 and I do so for the following reasons:

(1) All three board meetings took place at Olswang's offices to approve the Grovepoint Facility. The minutes recite that Mr Chappell and Mr Chandler were the only directors present. They also go on to recite the matters in S.172(1)(a) to (f) before recording as follows:

> "After careful consideration IT WAS RESOLVED that, in entering into the Documents and undertaking the other obligations contained in the Documents as part of the overall arrangements described above, the directors would be acting in the way they considered would be most likely to promote the success of the Company for the benefit of its members as a whole, as set out above;..."

(2) The minutes of the three meetings also record that three meetings took place at 12.45 pm, 12.50 pm and 1 pm. The inference which I draw is that Olswang prepared

all three sets of minutes in standard form ahead of the meetings and that they were formal only. Mr Chandler did not rely on any of these meetings in either of his witness statements or suggest that the minutes genuinely reflected what took place at these meetings. I do not accept, therefore, that Mr Chappell and Mr Chandler gave any of the matters in S.172(1)(a) to (f) any consideration far less the "careful consideration" recorded in the minutes. Moreover, Mr Chandler gave no evidence to that effect in either Chandler 1 or Chandler 2.

(3) But even if Mr Chappell and Mr Chandler genuinely considered their duty under S.172 and the matters in S.172(1)(a) to (f) and reached the conclusion in good faith that the Grovepoint Facility would be most likely to promote the success of each of the three Companies, the minutes do not record that they considered the duty to creditors or balanced it against the interests of RAL.

(4) Given that the Joint Liquidators advanced a positive case that no adequate consideration was given to the interests of creditors at these meetings, I would have expected him to answer this allegation in one or other of his witness statements if he was able to do so. However, he gave no evidence about these meetings in either Chandler 1 or Chandler 2.

846. Further, I do not accept Mr Chandler's characterisation of the Grovepoint Facility as a "positive step" or that he genuinely believed that it was in the interests of creditors. Again, I do not consider that Mr Chandler was deliberately attempting to mislead the Court. But, in my judgment, he was attempting to present the Grovepoint Facility in a very favourable light in much the same way as he presented the negotiations with the Trustees. It was a one year facility, it was expensive (as he accepted) and at the BHSGL board meeting on 1 September 2015 it was forecast that it would only enable the BHS Group to pay the rent due on the September quarter day whilst retaining a cushion of £4.2 million. Indeed, even this proved to be unachievable and by 16 September 2015 the weekly cashflow forecast produced by Mr Carver and the in-house team was forecasting a negative cash balance of £4,778,000.

847. Finally, I have considered whether I should place any reliance on the minutes of the BHSGL board meeting on 1 September 2015. At that meeting the board authorised the Grovepoint Facility in principle. The last paragraph before any other business contained

a very similar form of words to that which Mr Turner had introduced in the minutes for the 17 April Board Meeting ending with the statement: "Furthermore, the directors considered that they were acting in the best interests of the Company's creditors." I attach no weight to that statement. Although Mr Chandler discussed that meeting twice in Chandler 1, he did not suggest that any discussion had taken place about the interests of creditors at that meeting and the minutes themselves suggest that Mr Turner's formulation was simply adapted and tacked on at the end before "Any Other Business". I find, therefore, that Mr Chandler did not consider the interests of creditors and conclude in good faith that it was in their interests to enter into the Grovepoint Facility.

(2) Mr Henningson

848. Mr Henningson did not accept that he was involved in approving the Grovepoint Facility. I reject this evidence. He attended the BHSGL board meeting on 1 September 2015 at which he and the other members delegated authority to Mr Chappell and Mr Chandler to enter into the relevant documents. Whilst the minutes of the meeting do not refer to Grovepoint by name, they record that the board was told about the discussions with a number of potential funders. Moreover, Mr Chandler's evidence above was that the Grovepoint facility was discussed at the meeting and Ms Hilliard did not challenge this evidence. Finally, on 3 September 2015 Mr Morris sent Mr Henningson the current draft of the facility agreement. I find, therefore, that Mr Henningson knew and understood the terms of the Grovepoint Facility and approved it in principle at the meeting on 1 September 2015.

849. I am also satisfied that by the board meeting on 1 September 2015 Mr Henningson knew that the July 2015 Turnaround Plan was based on the assumption that the sale of Oxford Street would generate a surplus of £22.1 million in September 2015 and that the Operations Board and the wider management of the BHS Group were no longer making that assumption because Oxford Street was to be charged to secure the Grovepoint Facility and it was unlikely to be sold in the short term. As I have found in relation to Mr Chandler, this was obvious from GT's last weekly cashflow update and Mr Chandler accepted in Chandler 1 that no sale of Oxford Street had been agreed or was anticipated in the immediate future.

850. I also find that by 1 September 2015 Mr Henningson knew or believed that it was highly unlikely that there would be any surplus available from the sale of Oxford Street once the Grovepoint Facility had been repaid and, in particular, that there was no prospect of it producing a surplus of £22.1 million. Again, these facts were obvious from the GT cashflow update and the valuation provided to the board. Unlike Mr Chandler, Mr Henningson did not suggest that he believed that Oxford Street could be sold for more than £61.5 million and I am not prepared to make that assumption in his favour.

851. Finally, I find that Mr Henningson did not consider the interests of creditors and conclude in good faith that it was in their interests to enter into the Grovepoint Facility. There is no evidence that Mr Henningson saw or considered Olswang's memo dated 25 August 2015 and he did not rely on it. Moreover, although he was present at the meeting on 1 September 2015 he did not refer to the meeting or place any reliance upon it in evidence. Indeed, he tried to distance himself from the decision.

VI. Wrongful Trading

852. There is no dispute that each of the Companies went into administration and then creditors' voluntary liquidation on the dates which I have set out in section II (above). In his Skeleton Argument Mr Lightman pointed out that there is no express allegation that the Companies went into insolvent liquidation. However, in their Second Joint Statement Mr Shaw and Mr Pilgrem agreed that both BHSGL and BHSL were insolvent as at 10 April 2016 and that Davenbush was dependent upon BHSL. I also accept Mr Shaw's evidence that from August 2015 onwards Lowland was dependent upon BHSL because from that date onwards all of the cash on its balance sheet was replaced by intra-group debt. Accordingly, I am satisfied that as at 10 April 2016 both Davenbush and Lowland were also insolvent.

853. There is no dispute either that Mr Chandler and Mr Henningson held office for the periods which I have also set out in section II. These allegations were expressly admitted by both of them in their Points of Defence. Accordingly, I am satisfied that the Court has jurisdiction to make a declaration under S.214(1) on the basis that both Mr Chandler and Mr Henningson were directors of the Companies at each of the Knowledge Dates and also that the Companies went into insolvent liquidation.

X. Functions

854. I turn next to consider the functions carried out by Mr Chandler and Mr Henningson in discharging their duties as directors of the Companies. I consider those functions in the light of both the general evidence which they gave about their roles but also in the light of the detailed findings which I have made in relation to their knowledge at the Knowledge Dates in section V.

(1) Mr Chandler

855. Mr Chandler's evidence was that he was originally engaged for three days a week but that it quickly became apparent that his role would require his full-time attention. He described himself as the General Counsel of the BHS Group handling all legal matters (which he described) with the assistance of Ms Emma Reid, the company secretary, and a paralegal. He stated that he was not directly involved in the sales, trading and operations side of the business nor the financial side of the business. For working as a director from his appointment until 30 April 2016 he was paid £253,819.25 in salary and bonus and received £1,761.80 as benefits in kind. He also accepted that he was in charge of responding to the S.72 Notice.

856. I accept that evidence. Mr Curl did not seriously challenge it and, in my judgment, it is a fair reflection of the documents to which I was taken in the course of the trial and of Mr Chandler's evidence. The real issue between the parties was whether Mr Chandler was competent to discharge the duties of General Counsel of the BHS Group given his background and expertise as a criminal barrister and the very limited resources of Ms Reid and a paralegal. Mr Curl put it to Mr Chandler that he would not have been appointed had it not been for Parladorio and that he was not qualified for the role:

> "Q. Yes. Mr Parladorio was the senior man between you and he, wasn't he? A. Yes. Q. And he was to prove a powerful voice in BHS Board meetings, wasn't he? A. Well, I don't know what you're intending to mean by the word "powerful". He was in Board meetings and he spoke and gave his opinion on occasions. Q. People tended to defer to what he said, didn't he? A. No. Q. It was at Mr Parladorio's instigation that you took over as Group General Counsel of the BHS companies, wasn't it? A. What do you mean "took over"? Q. The BHS companies were being left without a legal department on the RAL acquisition, weren't they? A. Yes. Q. So they needed to have a legal function put in place, didn't they? A. Yes. Q. And you took over, on your appointment on 18 March 2015, as Group General Counsel of the BHS companies, didn't you? A. I don't know when I began to use that title. I -- I assumed that role. Q. Yes. I mean, it's not a trick question. I mean, you have described yourself, in important documents,

Group General Counsel, haven't you? A. Yes, it was just your use of the phrase "took over" that I didn't quite understand. Q. By a process of elimination, who else was there? There was Emma Reid, the Company Secretary; and you had a paralegal legal or trainee. And who else was there on the legal side? A. I -- well, Eddie was involved as well. I'm not disputing that I was General Counsel. Q. You were formally at least, leaving aside Mr Parladorio, the senior lawyer in the BHS Group following the RAL takeover, weren't you? A. Well, yes, but I'm not sure it's right to leave aside Mr Parladorio, given that you've just described him as being the senior man in our relationship. But, yes, I'm quite happy to accept that I was leading the BHS legal function. Q. Yes. Well, on the -- on the first part of your answer there, the liquidators certainly don't disagree with you on that. Now, this was -- Group General Counsel of the BHS Group, that was not a role you would ever have expected to be offered or regarded yourself as qualified to do but for your relationship with Mr Parladorio; that's right, isn't it? A. I wouldn't have got that job were it not for my relationship with Mr Parladorio. Whether or not I was suitable to carry out that function, we may disagree on that. Q. Well, that was my next question. You weren't suitable to carry out that function, were you? You were seriously and significantly under-qualified to do it, weren't you? A. During my time with PSB and Manleys I'd had some exposure to commercial work. I'd also understood, perhaps for the first time, the analogy about solicitors and barristers that solicitors are more like general practitioners and counsel are more like surgeons. And Mr Parladorio had clients; and, as I said earlier, we would service their needs, whatever they may be, in particular by using experts in fields that we weren't available -- sorry, weren't experienced in. I met, very early on, with the Arcadia legal team; and we went through the types of work that were going to be required and they highlighted the external legal firms that were used by the business to deal with particular issues. The job of General Counsel, essentially, in the legal side of it, is to identify problems and to find their solution, whether on one's own or with the existence of experts. And I was entirely comfortable that there was sufficient support around for me to be able to function in that -- in that role and be effective and I was. Q. You were -- when you started your reading in, in the early part of March 2015, when you read the GT report and the Olswang report, you were, essentially, starting from scratch in your knowledge of directors' duties and corporate governance, weren't you? A. No. Well, yes and no, I suppose. When we incorporated MGP Sports, that was my first involvement in limited companies. I did some very high level diligence in relation to directors' duties in that regard. And -- but, otherwise -- otherwise, yes, I -- I recognise that corporate governance was important, which was why the first substantive thing I did was hire a Company Secretary. And, yes, I -- I'm not sure if I -- if the early part of March 2015 was when I read the Grant Thornton and Olswang report. It may have been towards the second half of the month. I don't recall. But, other than that, yes, I -- I tend to agree. Q. You must agree, though, that, usually, someone would need many years or even decades of experience in that field, ie corporate governance, before contemplating taking on a GC role at a company like BHS? A. Yes, except that I think that there's a danger of over-complicating corporate governance. Corporate governance to me,

> essentially, is just doing -- doing the right thing and documenting it and taking into account things you should take into account, giving them appropriate priority and making decisions based on the available material. So -- but, yes, I don't disagree that in other circumstances the candidate for General Counsel of that business would not have had my profile."

857. I find that Mr Chandler was engaged to discharge the function of General Counsel of the BHS Group and that he did discharge that function. I also find that in that role he had the following specific functions: he dealt with all contractual matters, instructed specialist law firms to advise (as and when necessary), ensured that proper records of board meetings were kept and led the negotiations with the Pensions Regulator. I also find that it was not part of Mr Chandler's role to manage or supervise the trading, operations or financial functions and that he was entitled to rely on the trading and financial information which was provided to him for board meetings and to defer to the views expressed by Mr Topp, Mr Hitchcock, Mr Morris and Ms Morgan in relation to those matters. Finally, I also find that it was not part of Mr Chandler's role to manage or supervise the property side of the business and that he was entitled to rely on the information provided to him by Mr Sherwood in relation to property matters.

858. I am not satisfied, however, that Mr Chandler had the general knowledge, skill or experience that may reasonably be expected of the General Counsel of a group of companies of the size and complexity of the BHS Group. He had no corporate background or training as a lawyer and he had not practised in a specialist firm for any length of time. I reject his analogy that solicitors are like general practitioners and I do not accept that his experience at Manleys gave him sufficient experience for the role of General Counsel of the BHS Group. In relation to each of the Knowledge Dates, therefore, I will have to consider whether a reasonably diligent person who had the general knowledge, skill and experience to be reasonably expected of the General Counsel of the BHS Group would have obtained further information or reached different conclusions from Mr Chandler.

(2) Mr Henningson

859. Mr Henningson was an executive director of BHSGL. On 28 April 2015 Mr Chandler sent his service contract in draft to Mr Henningson for review and approval. Mr Henningson did not suggest that he did not read or sign the contract or that it was not binding on him although he stated in Henningson 1 that he did not pay very close

attention to it. The contract was in the same form as the draft contracts provided to Mr Chandler and Mr Chappell and on 21 May 2016 Mr Henningson forwarded it to his BHS email account. It provided as follows:

> "3.1 The Executive shall be employed as an Executive Director of the Company but the Company reserves the right to move him to any other role within his capabilities either in addition to or instead of the role of Executive Director provided any new role is commensurate with the Executive s status.
>
> 3.2 The Company may require the Executive to carry out some or all of his duties jointly with any other person or persons appointed by the Company.
>
> 3.3 The Executive shall be responsible to the Board and its nominees and shall undertake the duties and exercise the powers assigned to or vested in him by the Board and shall, during the continuance of the Employment, faithfully and diligently serve the Company and use his best endeavours to promote the interests of the Company and any Group Company.
>
> 3.4 The Executive shall promptly give to the Board (in writing if requested) all information explanations and assistance as it may require in connection with the business and affairs of the Company and any Group Companies for whom he is required to perform services.
>
> 3.5 The Executive shall observe and comply with the Articles of Association of the Company and shall comply with all lawful resolutions, regulations and directions made or given to him by the Board.
>
> 3.6 The Executive shall if reasonably requested by the Board hold office in and/or perform services for any Group Company without any additional remuneration.
>
> 3.7 Unless otherwise directed by the Board or prevented by Incapacity the Executive shall devote the whole of his working time, attention and abilities to the business of the Company and such Group Companies for whom he is required to perform services and (whether he is prevented by Incapacity from performing his duties hereunder or not) shall not undertake any work (paid or unpaid) for any third party (other than a Group Company).
>
> 3.8 The Executive shall not at any time during the Employment directly or indirectly and whether on his own account or as principal, shareholder, partner, employee, agent or otherwise entice or encourage or seek to entice or encourage any other employee, director or consultant of the Company or any Group Company to terminate their employment or engagement.

860. Clause 4 provided that Mr Henningson's place of work was Marylebone House, that his normal working hours would be five days a week from 9 am to 5 pm and that his remuneration would be £150,000 per annum. Mr Henningson also accepts in evidence that when he was not travelling on business he attended Marylebone House

approximately two or three times a week. He accepted that he was a signatory on certain BHS Group bank accounts but asserted that he was very rarely asked to sign cheques. He also asserted that from May 2015 he sat on the sixth floor of Marylebone House in the international department.

861. Mr Henningson's positive case in his Points of Defence was that his role as a director of the Companies was limited to two functions: (i) to oversee, assist and advise the BHS Group's international department and (ii) to introduce Mr Chappell and the group to his contacts in the finance industry. He gave evidence to the same effect in Henningson 1. He also stated as follows:

> "Mr Chappell did not require me to be involved in the day-to-day activities of the BHS Group in the UK. Although 1 was often copied into emai1s for information, unless those emails related directly to a financial introduction that I had made or to BHS international business, I would not have considered (based upon what had been agreed in relation to my role) that it was for me to respond or deal with such emails. That is because there were different professional teams dealing with different areas of the BHS Group's business. From time to time I did raise questions with Mr Chappell and/or Mr Parladorio and/or Mr Morris but I was always assured that I need only stick to my agreed role and that there were legal or financial or other advisers dealing with everything else."

862. I reject Mr Henningson's case and his evidence that his function as a director was limited to overseeing the international department and to introducing contacts in the finance industry for the following reasons:

(1) These limitations are not reflected in Mr Henningson's service contract or in the minutes of any of the board meetings of the Companies. If Mr Chappell had agreed to limit Mr Henningson's function in this way and these limitations had been approved by the BHSGL board or the BHSL board, I have no doubt that this agreement would have been recorded in the minutes and his service contract would have expressly limited his duties as an executive.

(2) Mr Henningson's evidence in Henningson 1 was inconsistent with the evidence which he gave to the Insolvency Service. In his amended replies dated 30 May 2017 he stated as follows:

> "My input into the BHS turnaround plan came as a result of my previous experience as a senior adviser to River Rock, in various family offices

> and 10 years at HSH Nord Bank AG. I had experience in what was necessary for similar turnaround plans and advised on this with the Board at BHS and its advisors, principally, Grant Thornton and Olswang. I was a working member of the Board, attending Board Meetings and reviewing reports prepared by various parts of BHS and external advisors. I believe that the Minutes of BHS would be the best guide to what was happening at a senior level within BHS on a regular basis. I do not have copies of the BHS minutes, but these will be available from the Administrators of BHS."

(3) His evidence is also inconsistent with the affidavit which he swore on 9 November 2018 in his disqualification proceedings. In that affidavit he stated that he worked on the second floor at Marylebone House and only moved to the international department on the sixth floor in November 2015. He also stated that he was hired in part because of "my previous experience with turnarounds, which was a central focus of my role". He continued as follows:

> "18. For the first seven or eight months of being employed at BHS, I would more often than not be based at BHS Head Quarters on the second floor, i.e. the executive floor, In Marylebone. I usually worked four days per week In London and one day per week (i.e. Friday) in ·Stockholm. However, from approximately November 2015, I was asked by Dominic and Darren Topp ("Mr Topp"), the CEO, to work closely with the International department, which was based on the sixth floor. After this, I travelled abroad much more frequently. Over the relevant 13 month-period, I would estimate that I was at BHS HQ for about 50% of the time. As a result of my focus on developing the international division, I was not so involved in the day-to-day activities of the UK side of the business.
>
> 19. However, I generally attended board meetings, either in person or by telephone and kept up-to-date with what was going on, by reading board meeting agendas and information packs, and minutes of meetings and speaking to colleagues.
>
> 20. The problems that BHS encountered while a turnaround of the business was being pursued were substantial and are well-documented. My fellow BHS directors and I worked very hard to seek to achieve a turnaround of the business, but in the end it would prove too challenging."

(4) I have already quoted Mr Henningson's statement that the best evidence of his function was the minutes of the board meetings of the Companies. Mr Curl and Mr Perkins also attached to their closing submissions a schedule showing that Mr Henningson attended 59 meetings between 11 March 2015 and 21 April 2016. Moreover, in section V I have placed significant reliance on the minutes of those

meetings in making findings about the extent of his knowledge. In the light of those findings, I am satisfied that the description which he gave to the Insolvency Service was an accurate one.

(5) I also reject Mr Henningson's evidence that he was very rarely asked to sign cheques or approve transactions. For example, on 20 March 2015 the BHSGL board authorised him to sign cheques and on 16 April 2015 he authorised the payment of £521,976. Moreover, in his affidavit sworn on 9 November 2018 Mr Henningson admitted that on 19 April 2016 he authorised the Swedish Payment of £1.5 million.

863. I find, therefore, that Mr Henningson was a full-time executive director of BHSGL and that until November 2015 his function was to manage and supervise the business and operations of the BHS Group and, in particular, to focus on its turnaround. I also find that he had the general knowledge and skills of a corporate finance adviser with experience in the turnaround of companies.

864. Finally, Mr Henningson's evidence was that documents were not provided to him in advance of board meetings but always provided shortly before meetings started or left on the boardroom table. He also stated that often document packs were approximately 40 to 50 pages long and that he never had time to read or properly digest information before meetings but was heavily reliant on his colleagues and external advisers. Again, I reject that evidence. It is inconsistent with the evidence which he gave in his first responses to the Insolvency Service dated 24 October 2016:

> "12. I reported to the BHS board daily via email, on the telephone and in person. There were also board meetings on a frequent basis, usually weekly. 13. I ran the international business with David Anderson. We had a team of approximately 50 people. We were attempting to open up 20 new stores in China together with a number of other stores in Iran. Kenya, Chile, Canada, South Africa, Finland and Sweden. 14. Darren Topp produced regular management accounting information together with Catherine Morgan. A number of the financial repor1s came from the head of the finance department - Harry Carver. 15. The BHS board would review management accounts on a weekly basis. 16. External accountants would carry out final accounts and audit procedures. 17. I received and examined management accounting information on a regular basis, both in board meetings and when sent material by the OHS finance department and by Darren Topp. There were also board discussions during which further information was disseminated. There were a number of detailed

> reports from external advisors, including GT, Olswang, KPMG and Adam Plainer of Weil Gotshal and Manges (AP)."

865. Nevertheless, I have given Mr Henningson the benefit of the doubt and I have only found that he read and digested information which was sent to him for review. In the event, the contemporaneous documents to which I have referred extensively in section V show that most of the critical legal and financial information upon which the Joint Liquidators rely was sent or copied to Mr Henningson.

Y. The Knowledge Condition

(1) Were the Companies insolvent at each Knowledge Date?

866. It was common ground that it was not necessary for the Joint Liquidators to prove that the Companies were insolvent on each Knowledge Date. However, I consider it to be a useful cross-check against my conclusions about the knowledge of Mr Chandler and Mr Henningson. Moreover, the experts differed on this issue and the debate between them provides assistance in framing the issues which a Notional Director would or should have considered at each date.

(i) Balance sheet insolvency

867. Mr Shaw's evidence was that the Companies were insolvent at each of the Knowledge Dates on the balance sheet test because of the pension deficit calculated on two alternative bases. In his corrective statement dated 25 October 2015 he also gave evidence that Lowland was insolvent from August 2015 onwards. He summarised his reasoning in the Second Joint Statement:

> "In assessing insolvency under the balance sheet test, it is in MS's opinion more appropriate to use the on-going basis to assess the true likely going concern deficit of the Pension Schemes. See Part D7. However, on either measure (MS1 Table 30 and Table 31), according to its own management accounts, BHSL was in a significant net liabilities position at all relevant times between Day One and at each of the month ends either side of each of the Alternative Dates for Wrongful Trading. BHSL was therefore materially insolvent applying the Balance Sheet Basis. This is without taking into account any further contingent or prospective liabilities. There is no known adjustment to asset values which could offset this position. Indeed, the reference point given by the sale dowry reinforces it (MS2 ¶10.5 to 10.22)."

868. Mr Shaw accepted, however, in the Joint Statement that it was rare for companies to be deemed insolvent or to enter insolvency as a result of reporting a net deficiency. He also accepted in cross-examination that directors would not be advised to cease trading if they had a rational plan for dealing with the pension deficit:

> "Q. So, in any event, looking at your initial report, at {B/19.2/41}, paragraph 5.6 -- paragraph 5.6. You say -- you mention prospective and contingent liabilities? A. Yes. Q. But you go on to say: "It should be noted that, in practice, it is rare for companies to be deemed insolvent and enter an insolvency process as a result of reporting a net asset deficiency." A. Hmm. Q. Do you see that? A. I do. Q. So if the directors had a reasonable and rational plan for dealing with the pensions' liability, do you agree it would be rare for directors to be advised to cease trading just because there's a balance sheet deficiency? A. If, on the premise of the question you've just asked me, and if the company is otherwise viable, then I would say it is rare, yes. And the language "be deemed insolvent and enter an insolvency process" are deliberate there."

869. Mr Pilgrem did not accept that any of the Companies were balance sheet insolvent at any of the Knowledge Dates. However, his evidence was that this depended on the view which the Court took of the July 2015 Turnaround Plan:

> "As at the dates during 2015 that MP has been asked to consider, the 'balance sheet' solvency of BHSGL, BHS and Davenbush depended on whether or not a court would conclude that it could have a high degree of confidence that the management of the BHSGL Group would substantially meet the challenge of its plans to make changes to the past business of the BHSGL Group such that the business would have value of about £250 million by 31 August 2018. If it would, BHSGL, BHS and Davenbush were not 'balance sheet' insolvent. Otherwise, they were 'balance sheet' insolvent. (MP1 ¶2.6, 2.7, 2.8, 2.9, 3.29, 3.30; MP2 ¶4.7 to 4.9)."
>
> "As at 26 August 2015, 8 September 2015 and 5 November 2015, the 'balance sheet' solvency of Lowland depended on whether or not a court would conclude that it could have a high degree of confidence that the management of the BHSGL Group would substantially meet the challenge of its plans to make changes to the past business of the BHSGL Group such that the business would have value of about £250 million by 31 August 2018. If it would, Lowland was not 'balance sheet' insolvent. Otherwise, Lowland was 'balance sheet' insolvent. (MP1 ¶2.6, 2.7, 2.8, 2.9; MP2 ¶4.23)"

870. On this issue, I agree with Mr Shaw. On a straightforward application of the balance sheet test BHSGL, BHSL and Davenbush were insolvent at each of the Knowledge Dates because their liabilities under the Schemes substantially exceeded their assets

without taking into account any contingent or prospective liabilities. In circumstances where the pensions deficit was unfunded and BHSL had not reached agreement with the Trustees, the Pensions Regulator or Sir Philip Green, I am satisfied that it could not reasonably be expected to be able to meet those liabilities at each of the Knowledge Dates: see *BNY Corporate Trustee Services Ltd v Eurosail-UK-2007-3BL plc* [2013] 1 WLR 1408 at [42] (Lord Walker).

871. But even if I approach this question by adopting Mr Pilgrem's wider test, I would not have had a high degree of confidence that BHSGL could meet the Target Business Plan at any of the Knowledge Dates. I have held that it was not an Adequate Plan and principally a marketing tool to raise funding. Moreover, Mr Pilgrem accepted that if the BHS Group only achieved Base Case, it would run out of money. Moreover, I would not have had a high degree of confidence that all 23 TBP initiatives could be achieved given that the plan had been reverse-engineered and no plan had been developed to achieve at least one of them, namely, the costs savings of £7.5 million. Accordingly, I am satisfied that on the tests adopted by both experts, BHSGL, BHSL and Davenbush were balance sheet insolvent at all of the Knowledge Dates and Lowland balance sheet insolvent at KD5 and KD6.

(ii) Cashflow or commercial insolvency

872. Mr Shaw gave evidence that each of BHSL, BHSGL and Davenbush were cashflow insolvent at each Knowledge Date and that Lowland was cashflow insolvent at KD5 and KD6. He summarised his conclusions very clearly in the following paragraphs:

> "15.56 Put simply, in the year to March 2015, Taveta funded the business to the tune of £72 million. The dowry arrangements on sale provided for £24 million of cash to be left in the business and £5 million per annum of pension contributions for three years. In the year to March 2016, we would have seen the following broad illustrative starting point:
>
> (a) A net cash out flow run-rate of circa £10 million per month. This equates to £120 million per annum.
>
> (b) Working capital requirements of £25 million or more, from LoCs.
>
> (c) An additional, say, £10 million of pension contributions.
>
> (d) Deducting the dowry of £24 million and £5 million of pension payments, leaves a funding gap of nearly £130 million. The only way that could be funded is to sell or borrow against assets, which is a degenerative strategy.

> (e) A turnaround plan which any sceptical adviser, for the reasons set out in sections 10 to 12 above, would not have seen as coherent, credible, fully worked or achievable, and which did not have headroom for contingencies or sensitivities.
>
> 15.57 Under RAL ownership, the business had no means of support to fund these continuing losses, regardless of the need incrementally to fund the July 2015 Turnaround Plan. Absent some form of external financing, BHSL was not a viable business and was hence insolvent on a Cash Flow Basis."

873. Ms Hilliard challenged this evidence. In particular, she challenged Mr Shaw's evidence that a company which was able to fund a cashflow shortfall for a period of three years was cashflow insolvent. His evidence in response is important and for that reason I set out in full:

> "Q. What you seem to be saying here, Mr Shaw, is that a forecast cash flow shortfall over a three year period, even one that can be met through financing -- finance by selling property or borrowing against property, that indicates that the company is cash flow insolvent? A. No, that's not what I'm saying. Q. Well, that's what it looks like you're saying. A. So you just talked about three year period. And I frame this in the year to March 2016, because if you sell the assets under the turnaround plan, which was struck before Grovepoint, you can sell them once, before that -- the peak funding requirements happen. We were running behind the base case even, not behind the target business plan, at this point, remember. There are -- you can't do that twice. And if you finance them, you're never going to get the face value, you're always going to get a percentage of them and have the degenerative interest cost. You can't do it twice. So that's the why it is framed in the way it is. And it's also framed for the triangulation point that, before the RAL acquisition there was, on average, £70 million a month funding by Taveta. And the logical starting point is: why would that not continue? Q. Well, because -- and it won't be the first time in the world, will it, Mr Shaw -- BHS, as a standalone business, had plans to reshape the business so that it would become profitable? That's the whole point. That's why the acquisition took place. And that's why Mr Topp became the CEO. That's the reason, isn't it, Mr Shaw? A. I think 15.56(e) and the expansion of that in paragraphs 10 and 12 are relevant to this point. Both the 23 initiatives and the speed with which they're to be done matter. And, secondly, if we look at my second report, I think I make clear that you have to get there. Q. But we've already seen, anyway, in relation to financing -- because you're -- you're saying that they wouldn't have been able to finance -- continue to obtain financing -- we've already seen that even at the end, when BHSL went into administration, there was still a significant amount of property that was unencumbered, wasn't there? A. There was an amount. I can't remember the exact amount. But whatever the funding requirement set out in the turnaround business plan is, as at July the losses -- which were not contemplated -- and on top of that the interest cost which was not

> contemplated -- those two items alone would make that trough, by the same amount, bigger. Q. Mr Shaw, the losses were contemplated. That's the whole point. The trading losses were contemplated. A. No, they weren't. Q. We will have to disagree? A. There were some trading losses contemplated in a dramatic turnaround, but those losses -- not only – the only evidence I've seen, not only did they not hit the target business plan, they didn't hit the base case. They were running behind that. And it is not a simple matter of clicking your fingers and moving from the base case to the base case, let alone the target business plan. Direction and momentum matter in this too. You have to recover those losses and come back out to change direction and speed. Q. But you're not saying, are you, that the turnaround plan -- the assumptions in the turnaround plan were not reasonable assumptions? It's just your position is that as the -- as the scenario played out, as the trading played out, the assumptions were not always met at the time that they were expected to be met; isn't that right? Isn't that really what you're saying? You're not saying that the turnaround plan in itself was fatally flawed, are you? A. What I'm saying is it's -- when one goes into a turnaround situation, one is often presented -- we do something called an independent business review, frequently, which is analogous to due diligence. It's: this plan has been presented to us and does it hold water? Does it stack up when you pull it apart? Those plans are often, on their face, very credible, but when you pick at them and say: are they deliverable? You start to have questions. So we have a business here which was losing, in 2014, from memory, about 25 million at the EBITDA level. In 2015 it ultimate -- it was forecast at about the point of takeover to lose about 50 million. That very -- by the time the plan came into place, it was 55. It was ultimately 70 million at the EBITDA level. That's pure cash outflow without anything else, around interest, capex or pensions. To turn that around that quickly is, in my experience, highly unlikely -- highly unlikely to happen. Now, we also have to take into account the fact that Arcadia were astute. They knew what -- I think it's suggested that they're not astute and don't know what they're doing. Q. No, I don't think I suggest that at all. A. I am -- my evidence is that; and it, to me, beggars belief that, rather than keep funding £10 million a month, the previous owners wouldn't have put these measures in place themselves or, rather than sell it, wouldn't have done them themselves, if it could be done from the company's own assets so simply. Now, might it have been that these initiatives, over time, given time and funding, could have borne fruit? But there were 23 initiatives, separate, but nevertheless some of which were inconsistent with each other. In my experience for 23 such initiatives to come into play against that backdrop as smoothly as intended is not credible. So that's why you need the time and the headroom and the space to do it. And that's the thing that wasn't present."

874. Mr Pilgrem's evidence was that none of the Companies were cashflow insolvent at any of the Knowledge Dates because there was no evidence that BHSGL, BHSL and Davenbush were unable to pay their debts as they fell due and Lowland was not commercially insolvent. However, in the Second Joint Statement he agreed that the

working capital arrangements which the BHS Group put in place to maintain liquidity were not sustainable:

> "1. The Companies secured various short-term loans, in some cases to bring forward the cash inflow from an asset intended to be sold. Most of those loans incurred significant finance costs but provided short-term liquidity. (MS1 ¶2.42; MP1 ¶5.22, 5.26)
>
> 2. Working capital arrangements put in place between 11 March 2015 and 25 April 2016 had the effect of maintaining liquidity in the short-term but were not sustainable. (MS1 ¶14.14, MS2 ¶9.3; MP1 ¶5.27; MP2 ¶2.27(2))
>
> 3. From early 2016, working capital arrangements put in place were inadequate. (MS1 ¶14.23, MS2 ¶9.3; MP1 ¶5.27)"

875. Mr Perkins put the terms of both ACE II and the Grovepoint Facility to Mr Pilgrem. He also put to Mr Pilgrem that these working capital arrangements involved a "degenerative strategy" (to adopt Mr Shaw's description):

> "Q. Since the loan cannot be repaid out of profits, because there are no profits, the only way to repay the loan is either to sell or to encumber, at additional cost, the remaining unencumbered assets of the group. That's right, isn't it? A. Yes. Q. And meanwhile more rent will need to be paid in subsequent quarters, won't it? It's not a one-off expense? A. No, rent is an ongoing expense. Q. Now, since the stores are loss-making and are going to remain loss-making for years, those additional quarterly rental instalments will also have to be paid through the proceeds of further borrowing or selling of what remains of the unencumbered assets, won't they? A. Yes. Q. Now, this, essentially, involves burning through the equity in the group's property portfolio to pay rent, doesn't it? A. No. Q. Why? A. Because nothing has been burnt here. Q. Well, I think we've established that the funds from the group's property portfolio will be used to continually refinance and finance successive instalments of rent, where no profits are generated for a period of years. That is properly to be described as burning through the property portfolio, isn't it? A. So this is a loss-making business until such time as it's profitable. While it's loss-making you need other sources of financial capital, which you can obtain by either selling your assets or by borrowing against your assets. So, in one sense, yes, as time passes, while you're loss-making, you are loss-making. So, in that sense, if you want to use the term "burning" as a substitute for "losses", then, yes, there's losses. Q. I'll put it in a more neutral way: It is an inherently degenerative process because it involves repetitive short-term borrowing, at extortionate cost, for the purpose of paying rent on stores which make further losses and cannot return to profitability before the loans fall due and the process is repeated on each rent quarter until profitability is restored. A. Well, that's -- that's a long statement, but -- Q. Well, is it inaccurate in any way? A. So you've got a plan, where you hope that the business will be transformed to be sustainably profitable by financial year 2018. Until you reach that point,

> you're incurring operating losses; and so your operations are not -- are not throwing out cash. You need to obtain cash from somewhere else. There's -- there's two sources for that: you can borrow against your assets or you can realise your assets -- your capital assets."

876. Finally, Mr Perkins suggested to Mr Pilgrem that the effect of this degenerative strategy over time was to increase the BHS Group's debt by £70 million over two quarters and Mr Pilgrem accepted that in the absence of a credible plan to turnaround the business, this strategy was foolish:

> "Q. We start off, before ACE II, with no money and no real debt. We now have 62.4 million of debt, plus 12 million of pricing; and we've paid two rent quarters. I mean, in very simple terms, that's what has happened here, isn't it? A. Can you say that again? Sorry. Q. So at the time when ACE II is entered into, there is no money in the companies' offers. They have no money to pay the quarter rent. There's no money. A. Right. Q. They then borrow the first Wonga loan. A. Yes. Q. To pay the first quarter of rent in June. But they've spent that money. It's gone and they've frittered it away on various other things. So then we come to the next quarter of rent. They have to do the same thing again. But they then have to pay the previous loan. So what has happened, I suggest, is you have a business with no cash and no debt which is now in a position where it has over £70 million of Wonga debt. And that's in a period of two rent quarters. That's fair, isn't it? A. So I think what I'm objecting to is your term "frittering away", because, as I understand it -- and ultimately these are questions of fact for my Lord -- this business was -- this business and the people in it were trying to implement the turnaround plan. They've got a loss-making business. So they're not frittering away the money. They're maintaining their loss-making business in the hope of transforming it to become sustainably profitable. So I don't think it is helpful to describe it as frittering it away. Q. Okay. Let's use this phrase then -- I've just focused on two quarters. And this business survived for so little time that we only have a few case studies. But that's what happened in two quarters. And by this point we have reached September 2015. Do you accept that similar financing and refinancing processes are going to have to take place in subsequent rent quarters as well. Because where are they going to get £62 million to repay this debt in a year's time? A. They -- they will need future finance before they become sustainably profitable. The -- the closer they get to that goal, and the greater the confidence they have that they'll achieve that goal, the greater the value of the business, the greater debt capacity of the group. Q. But they have to get there? A. They have to get there. They have to get there. Right. So if they have, for example, a disappointing peak sales experience in December 2015, they may never get there. Q. Hmm. But even without a disappointing sales period relative to their forecast, we are still talking about somewhere between eight and twelve quarters of this degenerative process, aren't we? We can see how the debt has snowballed in an incredibly short period of time? A. Again, you're using, I think, pejorative language. The debt has certainly increased. I don't think it's a

> question of snowballing. Q. But -- I mean, I see that you don't want to use some of the evaluative terms. But I'm asking you as an independent expert whether -- just ignoring the interests of Mr Chandler for the moment: do you accept my characterisation of this process as being an extremely concerning one, where a business is loaded up with massive quantities of debt to pay rent that is a repetitive expense -- comes up every quarter -- with no incoming profits. I mean -- A. Right. Q. -- I don't think that should be a contentious proposition. A. In the absence of a plan to transform the business to be sustainably profitable, yes, that would be foolish. In the presence of a plan -- a costed plan -- of getting to that objective, then it's -- you know, it's not necessarily irrational."

877. I agree with Mr Shaw that absent external finance BHSL was cashflow insolvent. On 23 June 2015 the BHSGL board was unable to pay the rents on all its stores without ACE II. If anything, the position was worse on 8 September 2015. BHSL was only able to pay its debts as they fell due by adopting "mitigating cashflow levers" including the failure to pay VAT on time. However, BHSL was able to obtain external finance just in time to enable it to pay its debts as they fell due. It is important, therefore, to consider the statutory test more closely. In *BNY Corporate Trustee Services Ltd v Eurosail-UK-2007-3BL plc* (above) Lord Walker stated this at [37]:

> "Despite the difference of form, the provisions of section 123(1) and (2) should in my view be seen, as the Government spokesman in the House of Lords indicated, as making little significant change in the law. The changes in form served, in my view, to underline that the "cash-flow" test is concerned, not simply with the petitioner's own presently-due debt, nor only with other presently-due debt owed by the company, but also with debts falling due from time to time in the reasonably near future. What is the reasonably near future, for this purpose, will depend on all the circumstances, but especially on the nature of the company's business. That is consistent with the *Bond Jewellers* case (*In re A Company (No 006794 of 1983)*) [1986] BCLC 261, *Byblos Bank SAL v Al-Khudhairy* [1987] BCLC 232 and *In re Cheyne Finance plc (No 2)* [2008] Bus LR 1562. The express reference to assets and liabilities is in my view a practical recognition that once the court has to move beyond the reasonably near future (the length of which depends, again, on all the circumstances) any attempt to apply a cash-flow test will become completely speculative, and a comparison of present assets with present and future liabilities (discounted for contingencies and deferment) becomes the only sensible test."

878. Applying this test I am not satisfied that BHSL or any of the other Companies were cashflow insolvent on the first four Knowledge Dates. In my judgment, however, the Companies were cashflow insolvent on the last two Knowledge Dates and on each of

those dates it was more probable than not that the Companies would go into insolvent liquidation or administration at the end of March 2016 by the latest. Although it was likely that BHSL would be able to pay the September and December quarter's rents and generate sufficient cashflow to meet its other liabilities until Christmas, the effect of the degenerative strategy was that it would have no cash in the reasonably near future and, in particular, no cash to pay the March quarter's rents and no assets to pledge apart from its stock. But it could not use stock as security without the consent of Arcadia and the terms of the ABL Facility were so onerous that the BHSGL chose to enter administration rather than take the risk of default.

(2) KD1: 17 April 2015

879. I have found that on 17 April 2015 Mr Chandler believed that the twelve Solvency Factors listed in the draft minutes had a real likelihood of materialising and that BHSGL was not trading insolvently. I have also found that there was no material difference between this formulation and the minutes as amended by Mr Turner. I find, therefore, that Mr Chandler did not believe or conclude that there was no reasonable prospect of avoiding insolvent liquidation or administration on 17 April 2015. Given this finding, I am not prepared to draw the inference that Mr Henningson knew this either.

880. It is the Joint Liquidators' case that both directors ought to have known that there was no reasonable prospect of avoiding insolvent liquidation or administration on 17 April 2015 because they ought to have known that four of the twelve Solvency Factors were unachievable and would not materialise: the sales of Oxford Street, Marylebone House and Carlisle and an overdraft and working capital facility from the Bank of China. It is also their case that both directors should have known that Oxford Street had already been charged to HSBC to secure Noah II. Finally, it is their case that both directors ought to have taken into account the pensions deficit and that liquidation or administration was unavoidable without a restructuring of the Schemes.

881. I am not satisfied that Mr Chandler or Mr Henningson ought to have known that the first three factors were not reasonably achievable or that Mr Chandler ought to have known that the fourth outcome was not reasonably achievable either. Given those conclusions, I am not satisfied either that the absence of an agreed solution to the pensions deficit ought by itself to have led Mr Chandler and Mr Henningson to conclude

that liquidation or administration was inevitable. I have reached these conclusions for the following reasons:

(1) *Oxford Street*: I consider it more probable than not that the second page of the minutes of the 17 April Board Meeting contained a typo and should have recorded that Mr Chappell told the meeting that the sale could not take place until after August 2015 (rather than September 2015). I have also held that Mr Chandler believed what he was told at that early meeting and I am satisfied that both he and Mr Henningson were entitled to do so (to the extent that the information was not within their own knowledge). But even if they had asked Mr Sherwood for a second opinion, I find that he would have told them what he told Mr Bourne, namely, that he was confident that Oxford Street would be sold in September 2015 for about £50 million (as he confirmed in cross-examination): see [715].

(2) *Marylebone House*: I have accepted the evidence of both Mr Chandler and Mr Henningson that they relied on the assurances of Sir Philip Green. Moreover, I am satisfied that they had a rational basis for doing so at the 17 April Board Meeting. It was in the interests of Sir Philip Green and Arcadia to support the BHS Group for the immediate future and Mr Topp had worked with Sir Philip Green for many years and believed that when he gave his word, he would keep it. I am not satisfied that at this early stage it was blind optimism to rely on those assurances even though Mr Chandler and Mr Henningson had no reason to believe that they were contractually binding.

(3) *Carlisle*: I have found that by 17 April 2015 both Mr Chandler and Mr Henningson were aware that Carlisle had not been sold for £4.92 million but also that this was presented as a timing issue: see [735] and [736]. I have also held that Mr Chandler relied on Mr Sherwood's assurance that the property had been sold and that it was a question of BHSGL waiting for the money. In my judgment, Mr Chandler and Mr Henningson were entitled to rely on that assurance and defer to Mr Sherwood's view as a property professional fulfilling the role of property director.

(4) *Bank of China*: I have held that Mr Chandler was not aware before 17 April 2015 that Mr Chappell had represented to Sir Philip Green that he had £7 million on deposit at the Bank of China and that he believed Mr Chappell when he said at the

17 April Board Meeting that he was in talks with the Bank of China for a working capital facility of £120 million: see [738]. I am not satisfied that it was reasonable to expect Mr Chandler to have lost all trust in Mr Chappell at this early stage. Mr Chappell was the owner of a majority of the shares in BHSGL's parent. Moreover, nobody challenged Mr Chappell at the meeting. I remind myself that commercial relationships are built on trust and that directors are not detectives. Indeed, I was reminded of the words of Millett J in *Macmillan Inc v Bishopsgate Investment Trust plc* (No. 3) [1995] 1 WLR 978 at 1014.

(5) *Noah II*: I am not satisfied that Mr Chandler and Mr Henningson should have appreciated that BHSGL would not be able to draw down the full £25 million facility: see [598] to [600]. I have also found that they both understood that the consequence of granting security over Oxford Street would be to erode the proceeds of sale. After all, this was a resigning issue for Mr Bourne. However, I have also accepted Mr Chandler's evidence that he disagreed with Mr Bourne and believed Mr Chappell's assurance that Sir Philip Green would ensure that the security was released when Oxford Street came to be sold. As with Marylebone House, I am not satisfied that it was irrational or blind optimism for Mr Chandler or Mr Henningson to rely on this assurance either.

(6) *Cost of borrowing*: This leaves the question whether they should have appreciated that the cost of borrowing between April and September would falsify the assumption in GT's cashflow forecast that Oxford Street would generate £40 million of cashflow. I am not satisfied that they should have appreciated this on 17 April 2015 either. Mr Chandler referred in evidence to a valuation report dated 6 May 2015 prepared by Jackson Criss, who valued the property at £61.5 million and Mr Curl and Mr Perkins did not take me to any documents which would have suggested to them that the cost of borrowing would exceed £21.5 million. Mr Sherwood accepted that this valuation was consistent with what he had told Mr Bourne and I am satisfied that if Mr Sherwood had been asked for his advice at the meeting, he would have expressed the same view.

(7) *The pensions deficit*: Mr Shaw accepted that it was rare for companies to enter insolvency proceedings as a result of reporting a net deficiency and that the directors would not have been advised to cease trading if they had a rational plan

for dealing with the pensions deficit. I accept that the BHSGL board had no rational plan at the 17 April Board Meeting. But in my judgment, it was reasonable for Mr Henningson and Mr Chandler to take the view that the BHSGL board had sufficient time to make one and to expect that BHSL would not be required to make increased Annual Contributions until the Triennial Valuation or that the PPF Levy would increase in the short term.

882. For these reasons I find that the Notional Director carrying out Mr Chandler's functions would not have reached the conclusion that there was no reasonable prospect of avoiding insolvent liquidation or administration at the 17 April Board Meeting. Mr Henningson is in a different position because I have found that he knew that Mr Chappell did not have £7 million on deposit at the Bank of China and that there were no talks with the Bank of China: see [608]. However, I am not satisfied that I should make a different finding against him for that reason alone. Mr Chappell referred only to talks with the Bank of China and GT's headroom forecast as at 11 April 2015 did not assume that such a facility would be granted. For this reason, therefore, I also find that the Notional Director carrying out Mr Henningson's functions would not have reached the conclusion that there was no reasonable prospect of avoiding insolvent liquidation or administration. I, therefore, dismiss the Wrongful Trading Claim in relation to the first Knowledge Date.

(3) KD2: 6 May 2015

883. I have dismissed the allegation that Mr Chandler and Mr Henningson knew that even £6.5 million was likely to cause the BHS Group to experience negative cashflow and I have held that the BHSGL board considered it to be in the interests of creditors to put the Second LOC Facility in place. However, I have also held that it was clear to both Mr Chandler and Mr Henningson that the solvency of the BHS Group was at serious risk unless trade credit insurance was restored and the group obtained a sustainable working capital facility. Despite those risks, I have accepted Mr Chandler's evidence that he did not believe there was no reasonable prospect of avoiding insolvent liquidation or administration at that date: see [744].

884. I am not persuaded that on 6 May 2015 the risks which I have identified were so great or that the BHS Group's financial position had got so much worse in three weeks that

insolvency could properly be described as inevitable or that it was wishful thinking to believe that the group could trade out of its difficulties. Accordingly, I am not satisfied that a Notional Director carrying out the functions of either Mr Chandler or Mr Henningson would have reached the conclusion that there was no reasonable prospect of avoiding insolvent liquidation or administration and I dismiss the Wrongful Trading Claim in relation to the second Knowledge Date. In fairness to Mr Curl and Mr Perkins, they did not put this Knowledge Date at the forefront of their submissions.

(4) KD3: 26 June 2015

885. I have found that by 26 June 2015 both Mr Chandler and Mr Henningson knew that there was no reasonable prospect of restoring trade credit insurance in the short term. I have also found that Mr Chandler knew that the GT weekly cashflow update dated 17 June 2015 was unduly optimistic in continuing to assume that BHS Group would receive £8.5 million of new money on the sale of Marylebone House and that both he and Mr Henningson ought to have known that it was unduly optimistic in continuing to assume that Oxford Street would be sold at the end of August 2015 for £60 million. Finally, I have found that both Mr Chandler and Mr Henningson understood that the consequences of ACE II were negative in that it was very expensive, it did not permit the BHS Group to implement the 2015 Turnaround Plan and that further finance would be required to pay the September quarter's rents.

886. Mr Chandler also accepted in evidence that on 26 June 2015 the BHS Group was cashflow insolvent unless it found further funding. He did not accept, however, that at that date there was no reasonable prospect of avoiding insolvent liquidation or administration:

> "Q. Now, before leaving 26 June 2015, I suggest that by 26 June 2015 you knew or ought to have concluded that the companies had no reasonable prospect of avoiding insolvent liquidation or administration. And do you accept that? A. No. Q. And, further to that, you knew or should have known, by 26 June 2015, that any continued trading by the companies would be adverse to the interests of the companies' creditors and would be only for the purposes of RAL or for your own purposes. Do you accept that? A. No."

887. I accept this evidence. Mr Chandler was in general an honest witness and the findings which I have set out above were very largely based on the admissions which he made

in the course of cross-examination. For this reason his refusal to accept the final step which Mr Curl put to him carried real conviction. I find, therefore, that on 26 June 2015 Mr Chandler did not know or conclude that there was no reasonable prospect that the Companies would avoid insolvent liquidation or administration.

888. Mr Henningson did not give evidence about ACE II or his state of mind on 26 June 2015. Although I am satisfied that he knew and understood the terms of ACE II and its financial consequences, he was not present at the meetings on 23 and 24 June 2015 or party to the resolution to proceed with ACE II. For this reason alone, I consider it highly unlikely that Mr Henningson consciously turned his mind to either of the issues which Mr Curl put to Mr Chandler and I am not prepared to draw the inference that he did so. I find that on 26 June 2015 Mr Henningson did not know or conclude that there was no reasonable prospect that the Companies would avoid insolvent liquidation or administration.

889. There was, however, no consideration of either of these issues by the BHSGL board on or before they resolved to enter into ACE II or the BHS Loan Agreement and the Framework Agreement. No formal board meeting was convened and no minutes were kept before that decision was taken. Moreover, Mr Chandler's notes of the meeting do not suggest that those present at the meeting considered either issue. His notes suggest that their concerns were directed at the cost of ACE II, whether it would enable them to pay the rents due on the June quarter day and, if so, what further finance would be required by September 2015.

890. Moreover, the BHSGL board took the decision to enter into ACE II before taking legal advice. Ms Hilliard and Mr Lightman placed very heavy reliance on the fact that the BHSGL had legal advice throughout the period with which this action is concerned. But Mr Roberts was not present at the meeting on 23 June 2015 and he did not give advice to the board until the following day. Mr Chandler referred to Olswang's email dated 24 June 2015 in Chandler 1 and stated that it "precisely reflected his view at the time". I do not accept this evidence. The problem with it is that Mr Roberts raised questions which needed to be addressed by the BHSGL board urgently. But Mr Chandler did not call a board meeting to consider Mr Roberts' advice before the documents were signed. In my judgment, a reasonably diligent person who had the general knowledge, skills and experience of the General Counsel of a major presence on the High Street with a

turnover of £660 million and 11,000 employees would have done so and this is one of the occasions on which Mr Chandler's inexperience let him down.

891. In my judgment, therefore, the critical question is whether Notional Directors carrying out the functions of Mr Chandler and Mr Henningson would have concluded that there was no reasonable prospect that the Companies would avoid insolvent liquidation or administration if they had carefully considered this issue together on 26 June 2015. The Joint Liquidators submitted that they would have done so because BHSGL was "shut out from the ordinary commercial lending market" (as Mr Curl put it in his oral opening submissions). Mr Lightman submitted that they would not have reached this conclusion because ACE II only became necessary when the negotiations with Farallon fell through and it was a short-term measure intended to enable BHSGL to put the July 2015 Turnaround Plan in place and to obtain a sustainable working capital facility to meet the upcoming funding gap in September and October 2015.

892. Mr Perkins put a series of points to Mr Pilgrem in support of the Joint Liquidators' case that it was irrational for either Mr Chandler or Mr Henningson to believe that the BHS Group would obtain a sustainable working capital facility on the commercial lending market which I now summarise:

(1) BHS had conducted an extensive market testing exercise from investment funds who specialised in turnaround funding. In their opening submissions Mr Curl and Mr Perkins identified 14 lenders from whom the BHS Group was unable to secure funding and Mr Perkins put this list to Mr Pilgrem, who accepted that he was not an expert in this kind of lending. Mr Lightman and Ms Hilliard did not challenge the factual basis of this run of questions and I accept that it was accurate.

(2) Mr Chappell owned 90% of RAL and had total control over the composition of the boards of directors of the Companies. Mr Perkins put it to Mr Pilgrem that because he had been made bankrupt in 1999, 2005 and 2009 no bank or investment fund would have lent to the Companies.

(3) Lenders would carry out due diligence and their credit committees could be expected to see the adverse publicity in newspapers such as that article written by Mr Oliver Shah in the Sunday Times on 17 May 2015. Mr Pilgrem accepted that a credit committee would have carried out this kind of due diligence.

(4) Mr Pilgrem also accepted that it was a standard term in LMA loan agreements that no borrower would be permitted to use the loan facility to make loans to connected parties and that any lender would have reacted negatively to the information that RAL owed £15.8 million to BHSL.

(5) Mr Perkins also put it to Mr Pilgrem that Mr Chandler had accepted that he knew by May 2015 that Mr Chappell had misappropriated £521,976 dishonestly, that this sum formed part of the inter-company balance between BHS and RAL and that as General Counsel he would have been bound to disclose it to potential lenders.

(6) Mr Perkins suggested that a lender would have been highly sceptical that the 23 initiatives in the July 2015 Turnaround Plan were achievable. In particular, a lender would have been sceptical that unidentified costs savings of £7.5 million were necessary to achieve the turnaround of the group.

(7) He also suggested that a lender would have been prudent and would have relied upon the Base Case (which was described as the group's three year forecast) rather than the Target Business Plan (which was described in terms as a "stretch").

(8) Euler Hermes and Atradius had withdrawn credit insurance to customers of the BHS Group and even after Sir Philip Green's intervention, there was no prospect of restoring it by the end of May 2015. Mr Pilgrem accepted that the withdrawal of credit insurance would have been of serious concern.

(9) Mr Pilgrem accepted that a lender would have been deeply concerned that the BHS Group had an unfunded pensions deficit which was certain to increase at the next triennial valuation and that a greater deficit would require higher contributions to service over the lifetime of a recovery plan.

(10) He also accepted that a lender would have been concerned that there was no timeframe for Sir Philip Green to fix the pension problem or agreement with him over the amount payable and by the fact that there was a real risk of a regulatory investigation once the Pensions Regulator had issued the S.72 Notice.

893. These were powerful points and Mr Curl reinforced them persuasively in his oral closing submissions. For the reasons which they gave, I am satisfied that on 26 June 2015 both

Mr Chandler and Mr Henningson ought to have known that it was more probable than not that the Companies would eventually go into insolvent liquidation or administration (a finding to which I will have to return). But I am equally satisfied that this is not the test and that the Joint Liquidators had to satisfy me that they ought to have appreciated that there was "no light at the end of the tunnel" and that liquidation or administration was inevitable.

894. I do not accept that Notional Directors carrying out the functions of Mr Chandler and Mr Henningson would have concluded that there was no reasonable prospect that the Companies would avoid insolvent liquidation or administration on 26 June 2015 and I dismiss the Wrongful Trading Claim in relation to that Knowledge Date for the following reasons:

(1) ACE II was arranged at the very last minute and to enable BHSL to pay the June quarter's rents. On 16 June 2015 the negotiations with Farallon fell through and on 17 June 2015 Mr Morris and Mr Henningson approached ACE. Indeed, Mr Chandler was only told about ACE II on 23 June 2015. Mr Lightman submitted (and I accept) that ACE II served the specific purpose of giving the BHS some breathing space whilst it attempted to negotiate a sustainable working capital facility.

(2) Although a draft of the July 2015 Turnaround Plan was in circulation, the final draft was not circulated to Mr Chandler or Mr Henningson until three weeks later. They were, therefore, dependent upon Mr Topp's assessment of whether a turnaround was possible. Mr Topp's evidence (which I accept) was that in July 2015 he believed that the BHS Group had sufficient assets to execute the plan:

> "MR JUSTICE LEECH: How long did you think you had before, looking back, alarm bells started ringing? A. Well, when we first did the business plan I thought we would have a year to two years in order to execute it. You know, I came to the conclusion by -- towards the autumn that we probably needed to do something more radical, hence the CVA. And then, finally, in April, that, actually, we just -- you know, this just wasn't going to be fundable or we weren't going to execute it quick enough. MR CURL: I have to suggest to you, Mr Topp -- A. Sorry, I do apologise. Q. -- that by the time of the turnaround plan it was -- it was clear to anybody who actually looked at the -- at the granularity of the business plan that there weren't enough assets to get you to a position of sustained improvement when other funding might

> have become available. And that's -- you understand now that that's right, don't you? A. No. That's not what I believed. Q. No, but you understand now that that's right? A. No, even today I think if we'd -- as of July, when it was, 13, if we'd executed all the component parts of the turnaround plan in accordance with the turnaround plan, I believe we had sufficient assets or cash to allow us to execute it. I fully accept that in the intervening period it didn't materialise in that way, but that's not -- that certainly wasn't my thinking at the time; and it has borne out that -- clearly, that, you know, it didn't happen, unfortunately."

(3) In my judgment, Mr Chandler and Mr Henningson were entitled to rely on this assessment. I accept that at the meeting on 23 June 2015 Mr Topp candidly expressed the view that ACE II would not enable the BHS Group to implement the July 2015 Turnaround Plan. But that was not its purpose. Its purpose was to buy time to enable BHSGL to negotiate a sustainable working capital facility.

(4) I have found that it was not unreasonable for Mr Chandler and Mr Henningson to assume that rent reductions of £7.2 million might be achieved. Moreover, on 9 July 2015 Mr Hitchcock was appointed and I have set out Mr Sherwood's evidence about his appointment. Although he was not in post on 26 June 2015 it was reasonable for Mr Chandler and Mr Henningson to assume that the appointment of a new CFO with turnaround experience was imminent and that he would have some impact both in negotiating a reduction in rents and a sustainable working capital facility.

(5) The BHS Group had substantial property assets including Oxford Street which meant that the Companies would avoid insolvency in the next three to six months and at the meeting on 23 June 2015 Mr Sherwood pointed out that the sale of Atherstone and Oxford Street would produce about £50 million alone. In my judgment, it was not irrational on 26 June 2015 to assume that if the group could survive until Black Friday and Christmas there was a real prospect that cashflow would improve and that the group would return to profitability.

(6) Finally, I take into account the fact that the Companies did not enter insolvent administration until ten months later in April 2016. Although I accept that there is a danger of hindsight here, in my judgment, it would be to hold Mr Chandler and Mr Henningson to too high a standard to find that on 26 June 2015 they should have concluded or predicted that this was inevitable.

(5) KD4: 13 July 2015

895. I have found that Mr Chandler did not consider the July 2015 Turnaround Plan to be a document of fantasy or unrealistic and that he trusted that it could be implemented successfully: see [795]. I have also dismissed the allegation that Mr Henningson knew that no reliance could be placed on it: see [800]. However, I have also found that both Mr Chandler and Mr Henningson knew that it was not an Adequate Plan (in the sense pleaded by the Joint Liquidators): see [827]. But, as I have also found, the plan was primarily a marketing tool to obtain a sustainable working capital facility and was presented to lenders on the basis that adequate funding was available (e.g. to restore trade credit insurance).

896. I am satisfied, therefore, that in July 2015 when they digested the plan Mr Chandler and Mr Henningson did not conclude that there was no reasonable prospect that the Companies would avoid insolvent liquidation or administration. I am not persuaded that Notional Directors carrying out their functions would have done so either. The plan was not presented to them on the basis that they should use it to assess whether the Companies could continue trading and they were not asked to approve the plan at that stage. Further, I am not satisfied that the plan should have raised so many points of concern that they should have forced the issue and insisted that the BHSGL board should have convened to resolve that insolvency was now inevitable.

897. I have considered whether it is open to me to make findings in relation to 14 October 2015 as an alternative Knowledge Date. In my judgment, it would not be appropriate to do so given that it was not expressly pleaded as an additional date. Edwin Johnson J accepted that the Court had a degree of flexibility in in terms of individual Knowledge Dates: see *Chandler v Wright* (above) at [101]. But I do not consider that he had in mind a four month time lapse when the factual circumstances had changed significantly. Moreover, in the light of my findings in relation to the last Knowledge Date, the point is academic.

(6) KD5: 26 August 2015

898. I have found that on 26 August 2015 both Mr Chandler and Mr Henningson knew that there was no prospect that RAL would be able to repay £6,177,000 to BHSGL. But, as Mr Lightman submitted, the damage was done on 11 March 2015 when BHSPL agreed

to charge Atherstone to ACE to secure the loan to RAL and compounded on 1 May 2015 by the Deed of Amendment and Variation when the amount for which the property was secured was increased to £6,157,884. The issue is whether Mr Chandler and Mr Henningson knew (or should have known) that using £6.17 million of free cash to repay ACE I would drive the BHS Group into insolvency and that they should appoint an insolvency practitioner immediately. Mr Curl put that point to Mr Chandler and he did not accept it. His evidence was that there was no way that anybody would have told the BHSGL board to stop trading before Christmas.

899. I accept Mr Chandler's evidence that he did not believe or conclude that the Companies had no reasonable prospect of avoiding liquidation or administration on the sale of Atherstone. I am not prepared to draw the inference that Mr Henningson reached the opposite conclusion because there was no board meeting called to discuss the issue and it is highly unlikely that he consciously considered the issue. Finally, I am not satisfied that the use of £6.17 million of free cash to repay ACE I ought to have raised such a concern by itself that either Mr Chandler or Mr Henningson should have summoned a board meeting to consider the appointment of an insolvency practitioner and immediate administration. Mr Lightman submitted that as at 26 August 2015 the EBITDA figures as reported by management were broadly in line with the July 2015 Turnaround Plan and that the cashflow position looked positive. I accept that the headroom forecast showed that the BHS Group would have sufficient cash available to pay the September quarter's rents with the benefit of the Grovepoint Facility. I also accept that on that date the BHSGL board did not have the actual figures available which showed that the EBITDA figures had been overstated by £10 million. But I do not accept that the position looked positive or even healthy.

900. On the contrary, I am satisfied that by 26 August 2015 Mr Chandler and Mr Henningson should have known that the Companies were bordering on insolvency and that the BHS Group could barely afford to use £6 million of the proceeds of sale of Atherstone to repay RAL's debts. GT stated on the first slide of their weekly cashflow update dated 26 August 2015 that without the proceeds of sale the cashflow forecast for that week was negative and that management had actioned the "mitigating cashflow levers". The headroom forecast also showed that without the Grovepoint Facility the Companies would be insolvent and that even then the BHS Group would only maintain positive

cashflow of £4 million after paying the rents by using the "mitigating cashflow levers". I am just not persuaded that the Knowledge Condition was satisfied at this date.

(7) KD6: 8 September 2015

901. I have found that on 1 September 2015 Mr Chandler and Mr Henningson knew that the July 2015 Turnaround Plan was based on the assumption that the sale of Oxford Street would generate a surplus of £22.1 million in September 2015 and that the Operations Board and the wider management of the BHS Group were no longer making that assumption because Oxford Street was unlikely to be sold in the short term because it was charged to secure ACE II and would be charged to secure the Grovepoint Facility. I have also found that by 8 September 2015 both Mr Chandler and Mr Henningson knew or believed that it was highly unlikely that there would be any surplus available from the sale of Oxford Street once the Grovepoint Facility had been repaid and that there was no prospect of it producing a surplus of £22.1 million: see [841] to [843] and [849] to [850].

902. Despite these findings, I accept Mr Chandler's evidence that on 8 September 2015 he did not believe or conclude that the Companies had no reasonable prospect of avoiding insolvent liquidation or administration. I have reached this conclusion because I take the view that Mr Chandler would have responded very differently if he had known or appreciated that there was a risk that the BHSGL board might be personally liable for wrongful trading. In my judgment, he would have convened a board meeting and instructed Mr Roberts and Mr Turner to attend it and give advice before the decision was taken to approve the Grovepoint Facility. I also take the view that Mr Chandler did not consider Mr Turner's memo dated 25 August 2015 with care because it did not cross his mind that the Companies had no reasonable prospect of avoiding insolvent liquidation or administration.

903. By comparison, I strongly suspect that Mr Henningson well understood that the Companies had no reasonable prospect of avoiding insolvent liquidation or administration given his background in corporate finance and his knowledge as a turnaround specialist. I am also satisfied that he deliberately lied to the Court in stating that he was not involved in approving the Grovepoint Facility. However, after some hesitation, I am not satisfied that Mr Henningson's background and experience together

with his false evidence provides sufficient material upon which to draw the inference that Mr Henningson had the very specific state of mind required for wrongful trading.

904. It is necessary for me to consider, therefore, what Notional Directors carrying out the functions of Mr Chandler and Mr Henningson would have concluded at the BHSGL board meetings on 1 September 2015 and 8 September 2015. In my judgment, Notional Directors carrying out those functions would have believed and concluded that the Companies had no reasonable prospect of avoiding insolvent liquidation or administration. I say this for the following reasons:

The September Quarter's Rents

(1) On 1 September 2015 Mr Chandler and Mr Henningson knew or ought to have known that the BHS Group was cashflow insolvent even if it drew down the Grovepoint Facility. GT's final weekly cashflow update showed that once it had utilised the facility, the group would have headroom of no more than £4.3 million in the week beginning 4 October 2015 and once it had paid the September quarter's rents. However, to achieve this position, the headroom forecast assumed that the group would apply mitigating levers to generate £5.7 million of additional cash. These levers included failing to pay both tax and rent liabilities when they fell due. To get past the September quarter day BHSL had to default on its rent and tax liabilities.

Working Capital Facility

(2) By 1 September 2015 Mr Chandler and Mr Henningson both knew that the BHS Group had been unable to obtain a sustainable working capital facility since Day One. Mr Morris, Mr Hitchcock and Mr Henningson had spent the summer trying to raise new finance and the only finance available was the Grovepoint Facility which would provide finance for a term of one year only and on a fully secured basis. I am satisfied that they were unsuccessful in obtaining a sustainable working capital facility for the reasons which Mr Perkins put to Mr Pilgrem.

(3) They also knew that Barclays would not provide an overdraft to the BHS Group unless Arcadia guaranteed it. The minutes of the meeting on 1 September 2015 confirm that Sir Philip Green and Arcadia had been asked to provide additional

support and the terms of the Hudson Facility which was executed on 16 September 2015 confirm this to be the case. Notional Directors would have appreciated that there was no prospect of obtaining any sustainable finance if a primary lender like Barclays was unwilling to grant even a short-term overdraft without Arcadia's guarantee.

The Target Business Plan

(4) By 1 September 2015 Mr Chandler and Mr Henningson knew that the BHS Group had no prospect of achieving the Target Business Plan. The bridge to positive EBITDA in the July Turnaround Plan assumed an EBITDA of –£55.3 million for FY 2015 and property sales of £27.6 million: see slide 7. As I have found, Mr Chandler and Mr Henningson knew that the sale of Oxford Street would not produce a surplus of £22.1 million and was highly unlikely to produce any surplus at all.

(5) Moreover, at the BHSGL board meeting Ms Morgan reported that sales were down 11.8% against forecast and 13.8% against the previous year. She also reported that the cumulative EBITDA until week 51 was –£63 million. This was almost £8 million worse than the –£55.3 million figure shown in the July 2015 Turnaround Plan and, as Mr Perkins put to Mr Pilgrem, the figure was even worse by the year end.

(6) By June 2015 both Mr Chandler and Mr Henningson knew that there was no reasonable prospect of achieving the restoration of trade credit insurance and on 1 September 2015 the position remained the same. They also knew that Sir Philip Green had provided no assistance to restore trade credit insurance since June and that there was no prospect that it would be restored by FY18 or that £25.2 million of additional cash would be released.

A Degenerative Strategy

(7) If they had asked either GT or Mr Carver to perform some calculations, Mr Chandler and Mr Henningson would have known that it would cost £72.7 million to repay the Grovepoint Facility and that the sale of the entire property portfolio would generate an additional £15.5 million based on management's current

valuations. This sum was insufficient to pay the March 2016 quarter's rent or meet the funding requirement of £21.6 million in February or March 2016 shown on the headroom forecast for the Turnaround Business Plan.

(8) They would also have known that the Grovepoint Facility would generate only £31 million of new money because £30.4 million had to be used to repay ACE II which had itself generated only £17 million of new money. If they had done a very simple calculation, therefore, they would have known that the total cost of ACE II and the Grovepoint Facility would be £103 million for £48 million of new money. Notional Directors would have fully understood that this was a degenerative strategy (to use Mr Shaw's expression) which would only lead to the BHS Group running out of assets to fund its losses long before the turnaround of the business could be achieved. Mr Bourne appreciated this at Day One.

(9) Put another way, Notional Directors would have appreciated that Mr Chappell's strategy was to sell off the crown jewels to keep trading even though there was little or no hope of achieving the Target Business Plan. Mr Martin gave vivid evidence that on 12 January 2016 Mr Topp and Mr Hitchcock pointed out to Mr Chappell that there would be no "crown jewels" left to sell because everything had been charged or sold. In my judgment, Mr Chandler and Mr Henningson should have known by 1 September 2015 that if the BHS Group entered into the Grovepoint Facility, there would be no crown jewels left to pay the March 2016 quarter's rent.

The Pension Deficit

(10) Finally, I have found that both Mr Chandler and Mr Henningson knew that the BHSL board did not have a plan or strategy in place to deal with the Schemes and were relying on Sir Philip Green to negotiate a solution directly with the Trustees and the Pensions Regulator. In my judgment, Notional Directors would have understood on 8 September 2015 that the BHS Group could not afford to pay increased DRCs of £20 million to £25 million per annum or the increased PPF Levy once the Triennial Valuation had taken place.

(11) I accept that it was highly improbable that the Trustees would have issued a winding up petition against BHSL. But by 8 September 2015 the BHSGL board had had sufficient time to engage with the Trustees, Arcadia and the Pensions

Regulator and to develop a plan. Moreover, the date was fast approaching on which any increase in Annual Contributions would take effect. As Mr Topp told Mr Martin on 9 November 2015, unless the BHS Group was able to refinance successfully, it could not afford to pay the increased DRCs and would run out of money and become insolvent in March 2016. In my judgment, Notional Directors carrying out the functions of Mr Chandler and Mr Henningson would have arrived at the same conclusion by 8 September 2015.

(8) Professional Advice

(i) Olswang

905. Both Mr Lightman and Ms Hilliard relied on the fact that Olswang gave no advice that there was no reasonable prospect of avoiding insolvent administration or liquidation. In my judgment, it is no answer to the wrongful trading claim in relation to KD6 and the decision to enter into the Grovepoint Facility. As Mr Turner emphasised in the memo dated 25 August 2015 it was the duty of the directors themselves (and not for him) to decide whether there was a reasonable prospect of avoiding insolvent liquidation.

906. I accept that in many cases the legal advice which directors receive may provide an evidential basis for dismissing a wrongful trading claim where those directors carefully consider and follow the legal advice which they have received. But I am also satisfied that they did not do so in the present case. In my judgment, Mr Turner raised all the right questions in his memo dated 25 August 2015 but his advice was never tabled or discussed at a BHSGL board meeting before the decision was taken to enter into the Grovepoint Facility. I add that much the same thing had happened in June 2015 when the BHSGL board resolved to enter into ACE II. The decision was taken on 23 June 2015 and although there was a meeting with Mr Roberts, his email dated 24 June 2015 was never tabled or discussed at a board meeting.

907. Finally, if Mr Chandler had called a board meeting to consider each of the issues raised by Mr Turner in his memo dated 25 August 2015 before entering into the Grovepoint Facility, then I have no doubt that Notional Directors carrying out the functions of Mr Chandler and Mr Henningson would have concluded that there was no reasonable prospect of avoiding insolvent liquidation or administration and that the immediate course was to take advice from an experienced insolvency practitioner.

(ii) GT

908. Ms Hilliard and Ms Earle argued the same case in relation to GT. In their closing submissions, she and her team placed strong reliance on the detailed terms of the Second GT Engagement Letter. I have set out in section II all of the relevant terms. They placed particular reliance upon Appendix 2 in which GT stated that they would assist in the development of "robust business cases and plans" and review and test the reasonableness of the BHS Group's financial forecasts. They also relied on the fees which GT estimated or expected to charge: £1.5 million under the Second GT Engagement Letter and £281,000 under the Fourth GT Engagement Letter. In reliance upon these materials they submitted as follows:

> "In the circumstances, and particularly when one also considers the number of issues and the level of detail addressed by GT in the weekly cash flow reports up until September 2015, it cannot sensibly be said that GT amounted to an incredibly expensive data assistant. It is clear that the directors were reasonably relying on GT in the preparation of the July 2015 Turnaround Plan and the GT Cashflow Reports and that they expected GT would tell them if the plan was "crazy" and/or if it was inevitable that the Companies would enter into insolvent administration or liquidation in any event (see the written and oral evidence of Mr Chandler and Mr Topp set out below). It is presumably for this reason that at least one representative from GT was present at every board meeting where cash flow was considered between May and September 2015."

909. Ms Hilliard and her team made this submission in answer to the Joint Liquidators' case that Mr Henningson (and Mr Chandler) were liable for wrongful trading at each of the Knowledge Dates. But given my findings in relation to KD1 to KD5, it is only necessary for me to consider this submission in the context of KD6 and the decision to enter into the Grovepoint Facility. For the following reasons, I attach little or no weight to the fact that before the BHSGL board took that decision GT did not advise the members that the July 2015 Turnaround Plan was "crazy" and that it was inevitable that the Companies would enter into insolvent administration or liquidation in any event:

(1) At the BHSGL board meeting on 1 September 2015 Mr Crane was only present for item 5 (Trade Update) and reported specifically on cashflow. He left the meeting before Mr Morris updated the board on the new financing round and the decision was taken or the board concluded that there was a reasonable prospect that BHSGL would avoid insolvent liquidation. I am satisfied that if the members of the board

had been looking to GT for advice in relation to that issue, they would have invited Mr Crane to stay and would have asked him to give advice on that issue.

(2) On or about 1 September 2015 GT instructions to provide weekly cashflow updates was terminated and Mr Carver and the in-house treasury team produced them instead. Moreover, after that date GT no longer attended BHSGL board meetings. Indeed, Mr Lightman and Ms Hilliard did not rely on any documents or advice which GT produced after the meeting on 1 September 2015. Finally, Mr Curl put it to Mr Chandler that in the context of Project Vera he told the Pensions Regulator that the board did not want to spend any more money with GT and stood them down:

> "Q. Now, can I take you to bundle {G/1.1/11}, please. This is your interview with the Pensions Regulator from 20 July 2016, so the matters were very fresh in your mind at that time, I suggest. And you've said there, at line 5: "I've referred to the meeting in May or June -- April, May or June. I can't remember exactly when it was. Then we had, after that meeting, we were discussing whether or not we would instruct Grant Thornton to do the vast amount of actuarial work that would be required to try and model a new Thor. Thor became Vera eventually, and RAA that was called. Yeah? You might struggle to believe this, but we didn't want to spend any more money with Grant Thornton than we absolutely had to, so we got an idea as to the length of time it would take to get that information together and we held off. We didn't instruct them to do that immediately. "Then later, September/October I want to say – Michael Hitchcock came on board in July. Michael's very black and white, so Michael just wanted to get it sorted out. He just ['said' I think] 'let's get the pension thing sorted out.'" So instead of progressing Project Vera, and instead of working hard on a solution, and instead of having a plan in any meaningful sense, you actually stand down Grant Thornton for several months, don't you? A. I can't remember if we stood them down. I do say there that we got an idea as to the length of time it would take to get that information together. So we had that in our minds. Whether we stood them down and didn't -- didn't progress in terms of, you know, meetings and correspondence with them, I don't remember."

(3) I accept that the members of the BHSGL board stood GT down with effect from 1 September 2015 whether or not they had formally terminated GT's retainer by that date. I am also satisfied that after 1 September 2015 the board of directors did not rely on GT to provide cashflow updates or to provide advice or assistance in relation to the July 2015 Turnaround Plan.

(4) But in any event, I am not satisfied that the Second GT Engagement Letter was binding on the parties or governed the terms of GT's retainer. It was not signed by either party and I was not taken to any contemporaneous correspondence which showed that it was ever sent. Neither Mr Chandler nor Mr Henningson gave evidence that they had received or acted on the Second GT Engagement Letter and given the importance which Ms Hilliard attributed to it in closing submissions I would have expected either or both of them to do so.

(5) By contrast, the Third and Fourth GT Engagement Letters were signed and dated by both parties and it is clear from the Third GT Engagement Letter that it was intended to have retrospective effect from 12 March 2015. If the Second GT Engagement Letter was already binding on the parties, they would not have done so. Accordingly, I find that the Third and Fourth GT Engagement Letters governed GT's engagement in relation to the preparation of weekly cashflow updates and the assistance which they gave in relation to the July 2015 Turnaround Plan.

(6) This conclusion is consistent with the contemporaneous correspondence. In particular, it is consistent with: (a) Ms Dale's email dated 10 July 2015 setting out the assumptions which she had been required to adopt; (b) her email dated 12 July 2015 in which she recorded her instructions to present the Base Case and Target Business Plan as a single forecast; and (c) Mr Crane's email dated 22 July 2015 in which he asked Mr Topp to sign a letter confirming that BHSGL and BHSL took full responsibility for the forecasts and underlying assumptions in the July 2015 Turnaround Plan. This was a requirement of paragraph 2.9 of the Fourth GT Engagement Letter.

(7) Finally, it is consistent with Mr Chandler's evidence in cross-examination. He accepted that GT had not validated any of the assumptions in the Model and that they were not vouching for its accuracy (although he did not accept Mr Curl's characterisation of the case which he was running):

> "Q. And then could I have page {C/695.1/6} of that document, please. This is Appendix 2 of the Grant Thornton engagement letter. At paragraph 1.3 it says: "You will be responsible for the following in relation to the development of the Model: "Provide the detailed requirements of the Model through discussion with us; "Approve the detailed requirements prior to our commencing work on the

> construction of the Model; "Provide all input data and assumptions required to populate the Model". So this is being done solely with the companies' data, isn't it, and assumptions? A. Yes. Q. Then the final bullet point on that list: "Outputs and results of the Model, including any financial statement projections, in terms of the information that the Model creates and its factual accuracy." So you are -- the companies are solely responsible for the factual accuracy of anything Grant Thornton do here. Do you agree with that? A. Yes. Q. And paragraph 1.5 (sic) says: "We will not undertake an audit examination, carry out due diligence on any management information or any financial accounts provided to us. You may not make any representation to third parties..." A. I think you said 1.5. Q. Sorry. Still on 1.4. Thank you. "We will not make any representations to third parties that Grant Thornton has in any way validated the input data, assumptions or output from the Model." So that's pretty unequivocal, isn't it? A. Yes. Q. They don't want to be associated with it; and they aren't vouching for the accuracy of anything in it either. Do you agree with that? A. Yes. Q. So the case that you are running is, essentially, that the court should reverse the terms under which Grant Thornton contracted to do this work. So the court should take it that Grant Thornton has validated the input data, assumptions and output from the model, when that is the opposite of what they contracted to do. Do you agree with that? A. No, I don't."

910. But whatever the terms of GT's retainer, I am satisfied that Notional Directors carrying out the functions of Mr Chandler and Mr Henningson would have fully understood the assumptions upon which both the July 2015 Turnaround Plan and the weekly cashflow updates were based and whether those assumptions were reasonable. I have made a series of findings that Mr Chandler and Mr Henningson understood those assumptions and that they knew when those assumptions were unreasonable. For example, I have found that Mr Chandler and Mr Henningson knew that the assumptions upon which the weekly cashflow update dated 17 June 2015 were unrealistic. I have also found that it was irrational for the BHSGL board to approve the July 2015 Turnaround Plan on 14 October 2015 when it was clear that the EBITDA figures on which it was based were inaccurate.

911. I am also satisfied that it would have been obvious to Notional Directors from the GT weekly cashflow update dated 1 September 2015 that the BHS Group was cashflow insolvent because it stated in terms that BHS management had begun withholding payments the previous week and was dependent upon the group adopting mitigating cashflow levers to generate £5.7 million in cash. It was not necessary for GT to spell out the obvious, namely, that this was a euphemism for the group defaulting on its

payment obligations (including its obligations to HMRC). The update also stated in terms that the property sales were critical to the group's cashflow over the next two months and Mr Crane told the board that they needed to be comfortable with the timing and quantum of those assumptions. Mr Hitchcock clearly understood that these assumptions were false because he said that the board should assume that they were not taking place.

(iii) Conclusion

912. The question whether the Companies had a reasonable prospect of avoiding insolvent liquidation or administration was not one on which Olswang or GT could or should have been expected to express an opinion but it was a question of individual judgment for the directors of those Companies. In my judgment, Olswang and GT could not have been expected to do more than to identify the legal issues which the directors had to consider and the severity of the financial position on 1 September 2015 and in the intervening period before the formal decision was taken to approve the Grovepoint Facility.

(9) The CVA

913. Ms Hilliard and Mr Lightman also argued that the CVA was a complete answer to the Wrongful Trading Claim. They put this argument two ways in opening. First, they argued that the fact that the creditors voted in favour of the CVA demonstrated that insolvency was not inevitable. Secondly, they argued that neither KPMG nor Weil advised the BHSGL board that it had no reasonable prospect of avoiding insolvent liquidation or administration. Ms Hilliard and Ms Earle put these arguments clearly in their Skeleton Argument:

> "Moreover, it would appear that the JLs attach no significance whatever to the report to the Court on 3 March 2016 on the proposed CVA in accordance with IA 1986, section 2. That report, signed by Brian Green, Will Wright and Mike Pink of KPMG certified that in their professional opinion the CVA proposal had a reasonable prospect of being approved and implemented {C/1453/1-5}. The JLs also appear to attach no significance to the fact that the CVA was subsequently approved at the meeting of creditors on 23 March 2016 by a substantial margin {C/1497/1-4}. These factors are evidence that at least as late as 23 March 2016 (and therefore *after* the Alternative Dates, there were reasonable prospects of the BHS Group avoiding insolvent liquidation."

914. By the conclusion of the trial Ms Hilliard and Mr Lightman had also advanced a more nuanced argument, namely, that it was not irrational for Mr Chandler and Mr Henningson to conclude that the Companies would avoid insolvent administration because it was reasonable for them to believe that the group only had to bridge the short gap between the Grovepoint Facility and a successful CVA rather than the three year gap between the end of FY15 and the end of FY18 anticipated in the July 2015 Turnaround Plan. Ms Hilliard and Ms Earle also submitted that not only did Weil not advise the BHSGL board that there was no reasonable prospect of avoiding liquidation but also that Mr Plainer positively advised them that the BHS Group could continue to trade. To meet these arguments, the Joint Liquidators argued that a CVA was never on the cards in 2015 and that it was never capable of implementation. They also argued that no reliance should be placed on the advice which the BHSGL board received or on the outcome of the Creditors Meeting because the information given to both KPMG and Weil was misleading. I address each of these arguments in turn.

(i) Timing

915. In my judgment, it is no answer to the wrongful trading claim that the BHS Group later proposed a CVA and that its creditors voted to approve it for the simple reason that the BHSGL board did not consider a CVA as an alternative solution on 1 September 2015 and Mr Hitchcock only gave instructions to start planning for a CVA on 18 January 2016. Indeed, I consider that Mr Hilliard and Mr Lightman were inviting me to do exactly what they accused the Joint Liquidators of doing, namely, to apply hindsight to the decisions which the BHSGL board took on 1 September 2015 and then on 8 September 2015.

916. Moreover, it is clear why the BHSGL board did not consider a CVA to be an alternative solution on 1 September 2015. In his interview with Mr Christian Ramsay of the Insolvency Service on 10 April 2017, Mr Topp stated that in August 2015 Mr Chappell told him that he had promised Sir Philip Green that he would not enter into any insolvency process for a year. Mr Topp confirmed this in cross-examination:

> "Q. And then the insolvency examiner says: "For what reason?" And you say: "Well, Dominic felt in partic, so it was Dominic really so for Board read Dominic, so Dominic was anti it for two reasons: he said he'd promised Phillip that he wouldn't do an administration of any that year. I've no idea, I never asked Philip I meant ... but that's what he said but also

> that he felt that they were starting to make some traction and that you know, I had to appreciate that these things didn't happen overnight, which I sort of get as well, you know, they didn't get there til April in effect there's they bought it on the 15th of March but with the benefit of wanting to know 'cos it had all been working hard, I get that." Now, that's -- that's all an accurate summary of what happened, isn't it? A. That's right. That was the conversations around early autumn. Q. Yes. So a CVA or an administration is out of the question as far as Mr Chappell is concerned because he's promised Sir Philip Green that he's not going to do it? A. Well, that's what he said. Q. That's what he said, yes. And that would -- that would seem to be borne out by his behaviour as well, wouldn't it? A. Yes, I think that's -- that's -- I think that's right."

917. On 8 June 2016 Mr Hitchcock also gave evidence to the Select Committee that Mr Chappell ignored his advice to propose a CVA until early January 2016. In the following passage from his evidence he explained why:

> "It became very evident to me and this was the proposal I made to the board that the only way you would address the property issue in this business and reset the property portfolio and the rents was to do a property-led CVA. That proposal went in before Christmas. For lots of different reasons, and one in particular, RAL and Dominic Chappell chose to ignore that proposal until after Christmas and the trade that was softer than we wanted it to be. The main reason was there was an exercise being undertaken by RAL led by RAL and Dominic Chappell called Project Herald. Project Herald was to set about removing the assets within BHS primarily the international part of the business and the online business of BHS, which was profitable and taking them outside the group and having them flowing directly into RAL.
>
> Dominic and I only found out [Interruption.] Sorry, I beg your pardon. [Laughter.] Darren and I only found out about this when, basically, RAL had spent up to £350,000 on adviser fees putting this so-called initiative together. We found out about it and, in a scene not too dissimilar to this, quite frankly, the day before black Friday, down in Dorset at an off-site management meeting, in the space of three hours we killed their so-called initiative as being completely unworkable. How they ever thought they could take assets out of the group at a time when it was desperate for cash and needed the buy-in and the support of the suppliers is beyond me. That just goes to show you the credibility and the ability of the people who Dominic surrounded himself with were not fit for purpose."

918. Finally, on 27 March 2017 Mr Chappell was interviewed by Jones Day on behalf of the Joint Liquidators and he confirmed that Sir Philip Green used the QFC as a lever to prevent the BHSGL board from proposing a CVA:

> "Going on from that, it was when we realised as a board of directors that there was no way out of dealing with the landlords, or whatever, bar putting it through a CVA, which then would trigger theoretically the full debt of the pension regulator, that's when Philip was very difficult. He did not want us to go into CVA and he said, If you trigger CVA I'll pull the company over using my floating charge. And that's when we took advice from Olswangs and if you look at that sort of timing of the CVA, there's chapter and verse from Olswangs and legal counsel opinion about where that floating charge sat."

919. Mr Chandler gave a different explanation for the timing of the CVA Proposal. In Chandler 1 he gave evidence that once the poor trading figures for the Christmas period emerged, it became clear to him that there was a significant risk that the BHS Group would be unable to pay the March quarter's rents, the board acted quickly:

> "220. In January 2016, once the trading figures for the Christmas 2015 period emerged, we discovered that the trading performance for the business was well below expectations. This was obviously very disappointing. It was from this moment that it was clear to me that there was a significant risk that rents would not be capable of being paid in March 2016. Something more needed to be done. 221. Once we discovered that there was likely to be an issue with paying the next quarter's rents, we were very mindful of potential insolvent administration or liquidation and so we acted, and we acted quickly. Before this point, it did not appear to us necessary to do so. 222. We instructed KPMG, as insolvency practitioners, to advise on a potential creditors' voluntary arrangement ("CVA"). Although this idea had been floated by Mr Hitchcock in around late 2015, it was only in January 2016 that we pursued the idea fully. I understood that KPMG had particular expertise with CVAs and had successfully done many in the past."

920. I find as a fact that Mr Chappell refused to permit BHSGL to propose a CVA until January 2016 and that he gave those instructions to both Mr Topp and Mr Hitchcock. It is unnecessary for me to decide whether Mr Chappell gave those instructions because he had made a promise to Sir Philip Green or because Sir Philip Green had threatened to enforce the QFC or because Mr Henningson and he were engaged in Project Herald or, indeed, for a combination of all three reasons. But either way, I reject Mr Chandler's evidence that the sole or principal reason was the BHS Group's disappointing trading over Christmas. In my judgment, this was another occasion on which Mr Chandler was not trying to mislead the Court but with the benefit of hindsight put the most optimistic spin on the timing of the CVA. There is no doubt that the group's Christmas trading was poor but this does not explain why no CVA was proposed very much earlier.

(ii) Outcome

921. But even if the Court were to apply hindsight, I attach little weight to the CVA because it was unsuccessful in preventing the Companies from going into administration. Moreover, it was unsuccessful in preventing them from doing so for essentially the same reasons that it was irrational to believe in September 2015 that the BHS Group could trade out of difficulty, namely, that the BHS Group had no sustainable source of funding, had run out of assets to pledge and was unable to agree a pensions solution which would lead to a restructuring of the Schemes and free BHSL to trade. I say this for the following reasons:

(1) The CVA Proposal involved the compromise of BHSL's leasehold obligations and other property liabilities. It did not involve the release or restructuring of the pension deficit or the compromise of any liabilities with suppliers or other creditors with whom it needed to continue to trade. To avoid insolvent liquidation or administration, therefore, the BHS Group still needed to turnaround the business and the CVA Proposal identified two key components of the turnaround plan: (1) the compromise of pension liabilities and (2) funding from three sources: (i) £60 million to be funded by the ABL Facility, (ii) up to £30 million from property disposals and (iii) £10 million from the release of letters of credit or security deposits.

Pension Liabilities

(2) The CVA Proposal was a qualifying insolvency event and triggered the start of an assessment period during which the rights and powers of the Trustees as creditors were exercisable by the PPF. It was essential, therefore, that the BHSL reached agreement with the PPF. Moreover, as Ms Boorman recognised in her letter dated 29 February 2016 agreement with the PPF was linked to the separate and independent negotiations between the Pensions Regulator and Arcadia relating to the exercise of its "moral hazard" or anti-avoidance powers because Arcadia was not prepared to release or subordinate its QFC unless or until it had reached a settlement with the Pensions Regulator.

(3) The CVA Proposal stated that the BHSGL directors believed that there was a reasonable prospect of settlement discussions with the PPF, the Pensions Regulator

and the Trustees being successful. However, the minutes of the BHSGL board meeting record that by 10 March 2016 the PPF had rejected the Pensions Deficit Offer and there was no evidence before me that it was prepared even in principle to negotiate a restructuring of the deficit. Indeed, the only evidence of the PPF's position was contained in the agreement dated 23 March 2016 in which it agreed not to vote against the CVA but only on terms that BHSL continued to pay the DRCs and the PPF Levy.

(4) In any event, the negotiations between the Pensions Regulator and Arcadia had also reached an impasse even before the CVA Proposal was issued. The Pensions Regulator had rejected Arcadia's offer to release its security and pay the balance of £15 million and Mr Kahn had told Mr Martin that Arcadia saw the CVA as the next outcome. In her letter dated 29 February 2016 Ms Boorman stated that the Pensions Regulator remained open to further discussions but challenged the statement in the draft of the CVA Proposal that there was a reasonable prospect of the discussions being successful.

(5) Both Mr Martin and Mr Squires accepted in evidence that a moral hazard investigation would take a number of years to complete and the Pensions Regulator made it clear to Arcadia what was required in order to avoid such an investigation. Arcadia would not agree to those terms and the investigation took place. In the TPR Intervention Report, the authors stated that a key message was that the regulator was open to consider offers of settlement but would not be distracted or deterred from continuing its investigations. Their detailed narrative was as follows:

> "Arcadia proposed three offers in February and March 2016, as a way of supporting the aims of the CVA and to help BHS avoid a subsequent insolvency. We rejected the first two offers because we considered that the amounts offered were insufficient. We also made clear, and continued to make clear throughout the discussions, what we required in order to reach a settlement. We received a further offer in March 2016 which built on the work that had been undertaken during Project Thor and involved a new pension scheme being established to which the members of the schemes could transfer. However, we rejected this offer as we considered that it lacked sufficient detail and, more fundamentally, was insufficient to ensure that the new scheme could continue on an ongoing basis with little or no supporting covenant. Discussions continued about what an appropriate solution would be. We were clear that any settlement must provide a good outcome for

> members and protect the PPF. Therefore, we worked closely with the schemes trustees and the PPF throughout.
>
> While a further offer was made at the end of October 2016, and even though we recognised that efforts had previously been made by Sir Philip Green, Taveta and their advisers to reach a settlement, we concluded that we had not received a sufficiently comprehensive proposal in respect of the schemes. We had unresolved concerns about the ongoing risk that the structure of the proposed new scheme would represent to the PPF. Despite these concerns, we concluded that the proposal represented an opportunity to continue constructive dialogue with a view to reaching a settlement, and discussions continued.
>
> Throughout the discussions, we maintained a parallel track of pursuing our ongoing investigation into the use of our powers. While we may in appropriate circumstances be willing to enter into discussions to resolve the problem without the use of formal enforcement, we will not let these discussions deter us from establishing our case or allow them to erode time and resources to the detriment of our case. In this case we felt that it was appropriate to issue the Warning Notices even though settlement discussions were also taking place."

(6) On 28 February 2017 the Pensions Regulator reached agreement with Sir Philip Green and Taveta for £343 million to fund a new scheme. In the Intervention Report, the authors stated that clearance was granted because the settlement deed included details about the implementation and structure of the new scheme. They also stated:

> "The reason the structure was included was because it was a key part of applying the settlement monies in such a way as to ensure that members would receive the best possible outcome in terms of their benefits, while also being consistent with the overall settlement objectives that are set out in the following section. It was therefore key that the ongoing structure was understood and agreed to by all parties."

(7) Mr Martin gave evidence (which Mr Lightman did not challenge) that the meetings in February 2016 did not get anywhere. None of Mr Chandler, Mr Henningson or Mr Topp gave evidence about the settlement discussions between BHSGL and the PPF and none of them explained why they believed that there was a reasonable prospect that the negotiations with the PPF or between the Pensions Regulator and Arcadia would be successful. In particular, they failed to explain why they believed that Sir Philip Green was prepared to accept the Pensions Regulator's terms or why they believed that a lengthy moral hazard investigation could be avoided (if, indeed, they believed this at all). Indeed, Mr Chandler told the Creditors Meeting that the

ongoing discussions were "complex and sensitive" and that he was unable to comment further. This hardly reflected the confident statement which BHSGL made to creditors in the CVA Proposal.

(8) For these reasons, I am not satisfied that on 4 March 2016 or 23 March 2016 there was a reasonable prospect that the negotiations between BHSL and the PPF or between Arcadia and the Pensions Regulator would have been successful or resolved quickly enough to enable the CVA to be implemented and the Companies to avoid insolvent administration. It is fair to say that a settlement was ultimately achieved between the Pensions Regulator and Arcadia but only after BHSL had gone into liquidation and the Pensions Regulator had issued Warning Notices and at a level far above the amount which Arcadia was prepared to offer in March 2016.

The QFC

(9) But whether or not the directors genuinely believed that that there was a reasonable prospect that the negotiations over the pension liabilities would be successful, the term sheet for the ABL Facility required BHSGL to grant a "first secured interest" over all present and future assets of the BHS Group and this required Arcadia to agree to subordinate its QFC. It was obvious to the BHSGL board that it would be necessary to obtain Arcadia's consent if the CVA was to be implemented successfully. This point was also made by Mr Bloomberg in his draft letter to the PPF and by Ms Boorman in her letter dated 29 February 2016. It was also clear from Mr Budge's letter dated 27 January 2016 that Arcadia was only prepared to release Cribbs Causeway because it remained fully secured. It is inexplicable, therefore, that no request was made to Arcadia to agree to subordinate the QFC to rank behind the ABL Facility before either the CVA Proposal or the Creditors Meeting and until 7 April 2016. I asked Mr Topp about this and he did not suggest that the BHSGL board asked him to do so before the meeting on 18 April 2016. I set out the relevant passage from his evidence below.

(10) Mr Curl and Mr Perkins submitted that the Respondents did not ask the question before the Creditors Meeting because they turned a blind eye to the fact that Arcadia would give a negative answer. I would put it slightly differently. It was obvious to the BHSGL board that Arcadia would not consent to subordinate the

QFC until or unless it could reach agreement with the Pensions Regulator not to exercise its moral hazard powers and Mr Chandler's notes of the meeting on 18 April 2016 show that this remained Sir Philip Green's position. He recorded that Sir Philip Green said that Arcadia was being asked to give up £40 million which it would never see again whilst the pensions issue remained.

(11) The inference which I draw is that the members of the BHSGL board did not instruct Olswang to request Arcadia to subordinate the QFC until 7 April 2016 because they were waiting to see whether Arcadia could reach agreement with the Pensions Regulator before they gave those instructions and holding out hope that this might be achieved before the Creditors Meeting. In my judgment, this was the same kind of wishful thinking which they demonstrated on 1 and 8 September 2015.

The ABL Facility

(12) Moreover, when the BSGL board finally addressed the terms of the ABL Facility, those terms were unacceptable whether or not Arcadia was prepared to subordinate the QFC. No formal board meeting appears to have taken place to resolve whether to enter into the facility but Mr Topp's evidence (below) was that only Mr Chappell considered it adequate. Mr Curl put the relevant passage from his written evidence to Mr Chandler and he accepted that he would have known the terms of the ABL Facility if he had looked at them before the Creditors Meeting. Mr Curl then continued:

> "So you knew or could have known that tranche A is going to be 25 million, at best; and that's before we take into account the bridging loan? Do you agree with that? A. Well, except that the discussions with Gordon Brothers that I became aware of before the CVA were continuing and were -- and no doubt Mr Morris was -- and Mr Hitchcock were trying their best to improve those terms. Q. And the second point there, that the process for making requests for a drawdown was unsuitable because of the systems you had on stock monitoring, that was an issue that could have been known at any point, couldn't it? A. I think so, yes. Q. Yes. And stock monitoring is obviously, as a matter of commonsense, absolutely critical to any ABL facility, isn't it? A. Yes. Q. And the third point there, that the events of default were very strict, that's a feature that has been described as a hair-trigger loan to own. Do you recall that expression? A. I do not remember hair-trigger; I do remember loan to own. Q. Yes. All these features rendered the

> facility unsuitable from the outset, didn't it -- didn't they? A. They rendered them unsuitable when we came to consider them."

(13) Mr Topp did not agree with Mr Chandler that the BHS Group's stock monitoring facilities were inaccurate. However, he did agree that it was a "loan to own" device and that the funding was inadequate. Indeed, when I suggested to him that it was Arcadia's refusal to subordinate the QFC which triggered the administration, Mr Topp gave evidence that this was ultimately academic because the ABL Facility did not enable the BHS Group to survive:

> "MR JUSTICE LEECH: Well, it was, eventually, his refusal to do either which put the -- effectively put the companies into administration, wasn't it? A. Well, my Lord, the reality was that even with the ABL facility everyone other than Dominic Chappell thought it couldn't survive. So we didn't believe, even if he subordinated his floating charge, that the business was in a position where it could survive. So it became a sort of non-question in a way because the -- even with the facility it didn't work. We didn't have sufficient cash to ensure the business remained solvent. MR JUSTICE LEECH: Did you ever test the water with him earlier about the floating charge? Because, you know, the only instances I have are the -- where he refused to allow the -- of his attitude to the floating charge are the -- qualifying floating charge are in the summer - previous summer when he refused to allow the -- A. Release it. MR JUSTICE LEECH: Or allow the balance of the Noah II facility to be drawn down; and then, finally, in the days before the administration itself. So the impression I get, from those two events, is that he was -- he was not willing to subordinate his -- you know, subordinate the charge. Although he did release the fixed charge over Cribbs Causeway. A. He did, indeed. And I think the floating charge he would have released if we'd all said that with that release it would have ensured the longevity of BHS. But even with the release, as I said at the -- at the Board meeting, it wasn't sufficient because we'd underplayed on the -- sorry, we'd -- we'd got less than we had anticipated on the property. And also the way the ABL worked, even though the facility was available, it was, basically, a -- what they call a loan to own scheme. So -- MR JUSTICE LEECH: So it would trigger a default and they -- and they take the stock? A. Correct, my Lord. And they would get it immediately, for virtually nothing, relatively to value of the IP and the stock. MR JUSTICE LEECH: I mean, the terms were incredibly onerous. A. The terms were completely onerous. By the time we got the final term sheet, it was clear that -- and Gordon Brothers had a bit of a reputation for that in the market -- MR JUSTICE LEECH: Right. A. -- but they assured us that wasn't the case. But the opportunity to trigger was so low that we felt that it would trigger very quickly."

(14) It is unnecessary for me to decide whose recollection was correct because the striking thing about the evidence of both Mr Chandler and Mr Topp was that the members of the BHSGL board did not meet together to consider whether the terms of the ABL Facility were acceptable or whether it provided adequate funding at any time before the CVA Proposal or the Creditors Meeting. It is equally striking that they did not take legal advice in relation to the terms of the ABL Facility until 7 April 2016 and that Mr Turner's memo was so alarming that it prompted the BHSGL board to meet with GB Europe on 11 April 2016 to seek comfort that it would not use the facility as a "loan to own" the BHS Group's stock.

(15) It is also clear that the reason why Mr Chandler and the other members of the board did not address the terms or adequacy of the ABL Facility was the one which Mr Chandler gave in evidence when this was put to him directly, namely, that they continued to hope that Mr Hitchcock and Mr Morris would be able to improve on the terms until after the Creditors Meeting and right up until 11 April 2016. In my judgment, this was again the same kind of wishful thinking which they demonstrated on 1 and 8 September 2015. As Mr Turner pointed out, the terms of the ABL Facility reflected the fact that BHSL had approached more than ten ABL lenders who were not prepared to enter into the transaction.

Property Disposals

(16) Mr Curl and Mr Perkins submitted that the statement in the CVA Proposal that funding of up to £30 million would be available from property disposals was based on the Management Forecast in which the BHS management were forecasting that £23.8 million would be achieved by the sale of Oxford Street for £75 million and the sale of 13 remaining properties. I accept that submission. Mr Wright did not state in terms in his witness statement that this was the basis for the statement but he confirmed that this was correct in cross-examination in answer to a question from me.

(17) However, Oxford Street was not sold for £75 million but for £50 million (plus VAT) and completion took place on 31 March 2016. On 22 March 2016 Mr Chappell told the BHSGL board and Mr Plainer that Oxford Street would be sold for £52.5 million. Mr Curl and Mr Perkins carried out a detailed analysis of Mr

Bloomberg's note of the meeting on 22 March 2016 to show that if Mr Chappell turned out to be correct about the sales of the other 13 properties the total amount of cash which they would generate was £84.6 million (ignoring the incorrect price which Mr Chappell gave the meeting). They also calculated that after £72.1 million was used to discharge the Grovepoint Facility, this would produce £12.5 million of free cash on a best case analysis.

(18) I accept this analysis and the final calculation. Ms Hilliard and Mr Lightman did not challenge it and they are both consistent with the figures in the DTZ Valuation and the property collateral pool upon which the GT weekly cashflow update dated 1 September 2015 was based (after taking into account the upfront fees which BHSGL had to pay under the Grovepoint Facility). If the CVA had not been approved, the sum of £12 million would have been insufficient to pay the March quarter's rents even if BHSGL had been able to liquidate these properties immediately. Further, even if the full amount of £60 million had been available under the ABL Facility, the Management Forecast anticipated both that a funding gap of £7.8 million would arise and that all of the property disposals would be achieved in May 2016.

(19) In my judgment, it was fanciful for the BHSGL board to accept or believe that Caernavon, Manchester, Scunthorpe, Sunderland, Taunton, Darlington and Cribbs Causeway could all be sold either within a few days and the transactions completed within two months. If Mr Chappell had been correct, all of these transactions would have been on the point of exchange and Ms Hilliard and Mr Lightman did not take me to any documents to establish that Sports Direct had agreed to buy any of them and Mr Chandler did not even know whether lawyers had been instructed in relation to Caernavon. The property update to the BHSGL board dated 8 April 2016 referred only to the sale of Oxford Street and Sunderland (to which Mr Topp had objected). In the event, Darlington was not sold until 2 October 2017 and only for £975,000 rather than £2 million and Cribbs Causeway was not sold until 2019 and only for £500,000.

(20) Finally, it was Mr Shaw's evidence that the Management Forecast was overstated by £14 million and that if it had been accurate, it would have turned a positive EBITDA of +£7 million into a negative EBITDAE of –£7 million over the three

years of the plan. I accept that evidence for the reasons which I set out below. Accordingly, even if BHSGL had resolved to enter into the ABL Facility and Arcadia had agreed to subordinate its charge, I am satisfied on the basis of Mr Shaw's evidence that it is more probable than not that the Companies would have gone into insolvent administration in May 2016 when the next funding gap arose.

922. For these reasons I find that if the members of the BHSGL board had acted promptly and with reasonable care and to the Notional Director standard, they would not have proposed the CVA or would have withdrawn the CVA Proposal before the Creditors Meeting. They would have done so because they would have taken legal advice in relation to the ABL Facility and resolved to reject its terms. They would also have done so because they would have appreciated that there was no reasonable prospect of a successful outcome to the negotiations between themselves and the PPF and between Arcadia and the Pensions Regulator and that in the absence of such an agreement Arcadia would not consent to subordinate the QFC. But even if I am wrong and it was reasonable for the directors to put the CVA Proposal forward and put it to the Creditors Meeting, I find that it was only ever a temporary respite and that in all probability the Companies would have gone into insolvent administration in May 2016 when the next funding gap arose. The CVA was not a cure for the problems which the BHSGL board faced from Day One and which, as I have found, led to only one conclusion on 8 September 2015.

(iii) KPMG

923. The Joint Liquidators advanced a case that no weight could properly be attached to the advice of KPMG and Weil because they were not given complete or accurate information. Particulars of this allegation were set out in the RRAPOC, Appendix 4. In summary, the Joint Liquidators alleged that KPMG were informed that the improvement in EBITDAE over the 18 month period from 1 September 2015 to 28 February 2017 would result in a net cash inflow of £7 million when the true figure was a significant cash outflow of £16.9 million which would have depleted BHSGL's cash reserves and placed too much strain on working capital for the BHS Group to continue trading. Their case was that the Management Forecast was based on overly optimistic assumptions including the following:

(1) Oxford Street would be sold for £75 million.

(2) By May 2016 the Grovepoint Facility would be discharged in full and BHSGL would raise new finance of £23.7 million.

(3) In March 2016 the ABL Facility would complete and the BHS Group would receive the first tranche of £30 million, the second tranche of £10 million in July 2016 and third tranche in September 2016.

924. I deal first with the evidence on this issue before setting out my analysis and conclusions. I begin with Mr Wright's evidence of fact. I have set out Mr Wright's evidence in his witness statement about the Management Forecast in full and, as I have stated, I checked his evidence against the Management Forecast itself. Ms Hilliard did not challenge that evidence. Indeed, she took Mr Wright to the Management Forecast itself to show me where it stated that Oxford Street would be sold for £75 million and the Grovepoint Facility discharged. Ms Hilliard also cross-examined Mr Wright about the documents which KPMG saw but she was not able to demonstrate that he was provided with the management accounts to 28 February 2016 and she did not submit that he was provided with this information before the Creditors Meeting. She focussed instead on his role and obligations as an insolvency practitioner and one of the Nominees.

925. On 18 January 2016 RAL instructed KPMG to act in relation to Project Pipe. Between that date and his appointment as one of the Nominees he attended seven BHSGL board meetings and one immediately after appointment and I have set out the key points discussed at each of those meetings in section II: see [382]. He accepted that SIP 3.2 applied to CVAs at the time and that an insolvency practitioner was central to the process which should be open and involve full disclosure to the creditors. He also gave evidence about his responsibilities to directors:

> "Q. Can we go just down to paragraph 4 -- just -- which provides that: "An insolvency practitioner should ensure that information and explanations about all the options available [to the companies] are provided to the directors, so that they can make an informed judgment as to whether a CVA is an appropriate solution ..." And, at the time, you and KPMG, you were confident that you had complied with the requirements of paragraph 4? A. Yes. Q. Just to assist the course, explain how you consider you complied with those requirements, if you can. A. Well, we certainly would

> have discussed the options available with the directors when we met them. Q. In detail? In depth? A. I would hope so, yes. Q. What else? Anything else? A. Nothing particularly. I mean, we -- we obviously had a number of conversations with the directors around what route they should take; and there were broad discussions around -- around the routes forward. Q. And who would have been involved in those conversations? A. Most likely the senior team. So Richard Fleming, myself and maybe other members of the team. Q. And often outside Board meetings? So not always in Board meetings? A. Quite possibly, yes. Q. Yes. Is it -- is it usual, when you're advising on a restructuring, like a CVA or a scheme or a restructuring plan, that there are lots of conversations between the KPMG team -- senior team, and the main Board directors? A. Yes. Q. And not all -- not always in Board meetings? A. Not necessarily."

926. Mr Wright also accepted that KPMG had procedures in place to enable a proper assessment of the viability of the CVA to be made and that the Nominees' view was that there was a reasonable prospect of it being approved and implemented. He did not accept, however, that KPMG's investigations would necessarily have been very substantial and thorough although they would have been more intense for a company of the size of BHSL. Ms Hilliard then put to him the section in the CVA Proposal which set out the fees which KPMG expected to bill:

> "Q. Now, if we just go to the CVA now, at page{C/1452/1}. And page {C/1452/64}, please. Paragraph 3. There it has the "ESTIMATED FEES" of KPMG "prior to their acceptance of the role as nominees" was £1 million. And then at paragraph 3.2: "It is estimated that the total fees to be paid to the Nominees shall amount to £450,000". So total fees of around 1.5 million. Now, you agree that those are fairly substantial fees; yes? A. I do. Q. Yes. But those very substantial fees, I suggest to you, undoubtedly account for the high degree of due diligence and verification that KPMG and you and your colleagues, as nominees, would have carried out in order to test whether it was appropriate to convene a meeting of creditors to see whether the CVA could be approved? A. There was a huge amount of work involved in our work up to the end of our engagement. So it was a very intense piece of work. Q. No, I can appreciate that. It was a large assignment, wasn't it? A. It was. Q. Yes. Now, the responsibility of any firm or -- and any insolvency practitioner advising on a proposal for a CVA is an onerous one? A. It is. Q. Do you agree? A. Yes. Q. And you, personally, and, I suggest, KPMG at the time, took that responsibility very seriously? A. We did. Q. Because, as you know, failing to take that responsibility seriously or failing to adopt proper procedures for verification and testing whether there are reasonable prospects of a CVA being approved and implemented, can result in disciplinary proceedings against an insolvency practitioner; correct? A. I'm sure, yes."

927. Ms Hilliard put next to Mr Wright the advice which Mr Plainer had given between 27 January 2016 and 24 February 2016. She suggested to him that if the members of the BHSGL board had been guilty of wrongful trading, then he would have been aware of this:

> "Q. And it -- I mean, you can see wrongful trading when you -- when you see it, as it were. It would be odd if you couldn't. Because, for example, if you have a -- if you're appointed as an insolvency practitioner, you look at the company's affairs and you say: well, is there any evidence of wrongdoing here? And if you think there is, if you see evidence of wrongdoing, then you would go to a lawyer and ask their advice about whether your first impression is the right impression; correct? A. Yes. That's fair. Yes. Q. So I'm asking you, really, quite a sort of simple and, I suggest, straightforward question -- A. Sorry. Q. -- that, you know, if you had seen any wrongful trading at this time, if you thought that the companies -- you know, it just wasn't worth it, the CVA wasn't worth it because they were wrongfully trading, I mean, you might not have wanted to advise the directors directly, but you would surely have had a word with Adam Plainer, wouldn't you? And said: look, you know, I know you're advising the directors this? But wouldn't you have said that? A. Quite possibly. MR JUSTICE LEECH: Can you give me an idea of the kind of red flags that would put you, as an accountant, let's say, on notice? A. If it was very clear that sort of the range of options were, for whatever reason, never going to work then, absolutely, at that point, you'd have to be doing something about it. I think the point certainly in these minutes, our work had only just started; and we were trying to explore the options that were available. So ... I hope that's helpful. MS HILLIARD: But the -- as we've -- well, we haven't seen but you've accepted from me, this advice was consistent over the period -- over the following month. And -- and then you went -- and then you -- the proposal was put to creditors. A. Yes. Q. And all I'm saying to you is that if you'd seen any evidence of wrongful trading during that period, it – in circumstances where Mr Plainer was saying: it's fine, carry on trading, if it was fairly obvious, you would have been saying: hold on a minute, I'm not sure that this is the right thing to do. Because, ultimately, your reputation as a nominee is on the line, isn't it? A. I think what we would do there, if the range of options that were being considered weren't going to work then the directors obviously need to consider what to do about that. Q. Yes. A. And it's less about us assessing wrongful trading. It's looking at the options that are available and whether there's a reasonable prospect of those options being delivered. Q. Yes. A. If that makes sense. Q. Yes, I think it does. So if the CVA looked, at any -- at any stage as though there wasn't a reasonable prospect of it being approved -- A. Yes. Q. -- then, as you said earlier in your evidence, you would have -- and it was agreed, you would move on to the contingency plan, Project Pipe II; yes? A. That's right."

928. Ms Hilliard moved next to the terms of the CVA Proposal itself to Mr Wright and those representations which the Nominees made to creditors: see [387]. He confirmed that at the time he believed that the CVA Proposal had a reasonable prospect of being approved and implemented. He was also asked about the basis for this statement. On at least two occasions Mr Chappell told the BHSGL board with Mr Wright present that Oxford Street was to be sold imminently and that the BHS Group would receive £75 million. But Mr Wright accepted that he was told on the evening before the Creditors Meeting that the price for Oxford Street was to be much lower:

> "Q. It was envisaged, wasn't it, that the proceeds of sale of the Oxford Street property would be used to discharge the Grovepoint Facility? A. Yes. Q. Do you recall that? A. I do. Q. Yes. So do you -- do you think -- well, it would appear that nobody raised any concern or point about the fact that the sale of Oxford Street had produced only 60 million -- that would be -- in the end, it was 50 million with 10 million VAT -- rather than the 75 million that was included in the cash flow? As far as we can see, nobody at KPMG seemed to have any concern about that? A. Well, what happened on the -- I can just try and recall what actually happened. So on the evening of 22 March -- so that was the day prior to the creditors' meeting -- that was when we first became aware of the revised sale -- potential sale price for Oxford Street. And, as I recall, there was a number of discussions late in the evening, but, ultimately, I think, where the directors got to was that there was a package of properties potentially available for very short-term disposal and they would have been sufficient to discharge the Grovepoint Facility. Q. Well -- and, of course, the Grovepoint Facility wasn't repayable until 8 September 2016. We've just seen that. A. I can see that on the screen; but I think the assumption would have been that they could have repaid it at that time. That was what we were being told."

929. Mr Curl explored this issue again in re-examination and it was Mr Wright's evidence that he attended the meeting on 22 March 2016 which Mr Bloomberg recorded in his notebook: see [398]. His evidence was as follows:

> "Q. You said there was a discussion late in the evening; and where the directors got to was that there was a package of properties potentially available for very short-term disposal and they would have been sufficient to discharge Grovepoint? A. That was my understanding. Q. Yes. Could I, please, have bundle {J/35/152-3} side by side, please. This is some handwritten notes taken by Linton Bloomberg from Weil. And you will see up in the top right there is the date of 22 March 2016. And it appears to indicate, about a third of the way down the page, that the meeting started at 18.45. And then, about halfway down the page, it says: "DC1 update. "Oxford Street" underlined. It says "in legals", "under contract" crossed out, then "52 million" and it looks like "100,000 + VAT completion

> possible tonight/could be tomorrow". Do you see that? A. I do. Q. And then, below that, the sort of bottom quarter of the page, it says: "ALL NET", in block capitals underlined. And there's a list of properties, "Caernarfon, Manchester, Scunthorpe, Sunderland, Taunton", and then over the page "under offer", underlined "Darlington, Bristol". And next to the first lot of properties it says: "Trying to do all by Thursday. All to Sports Direct". And then over the page it says "SD". Now, can you comment on the properties that are there under the heading, "ALL NET"? A. I think this may have been the point I was referring to earlier on, because we were -- I think we were at that meeting. And I think this is where we found out about the latest position on Oxford Street. So this is the day before the creditors' meeting. And I think what we were told here was that Oxford Street was going to be potentially sold, as it says in that note there; and there was another property -- I think it's -- I think that "MK" might be Milton Keynes. Q. Oh yes "in legals 18 million plus VAT"? A. Yes. Yes. Q. Then what about the ones towards the bottom? A. This is difficult to remember, but I think what this is saying is you sell Oxford Street, you sell Milton Keynes, which are in legals, and that is very close, if not sufficient, to discharge Grovepoint. At which point you've got other properties at the bottom there that could be disposed of thereafter, I think. Q. I see. And why did you -- that short of chain of reasoning that you've just been through, why did you think that? A. Because that's what we were being told. Q. By whom? A. The directors. Q. So who? Those -- that being those present there in the top left so DC1, DC2, EP, DT? A. Yes."

930. Ms Hilliard took Mr Wright to the minutes of the BHSGL board meeting on 10 March 2016 at which Mr Plainer had advised that he saw no reason why the BHSGL board could not take a view that the CVA had a reasonable prospect of being approved and implemented in light of the recent communications between the pensions stakeholders, Arcadia and landlords. Mr Wright agreed that the Nominees had not expressed a different view. He also agreed that on 29 February 2015 he obtained independent confirmation from Mr Appelbaum that subject to final negotiation there was a desire to conclude the ABL Facility either prior to or immediately after the Creditors Meeting.

931. Ms Hilliard also put to Mr Wright paragraph 7(k) of the Nominees Report and the statement that they were not aware of any claims which might be capable of being pursued by a liquidator administrator and suggested that if he had been aware of a potential wrongful trading claim against the directors, it would have been incumbent on the Nominees to point it out:

> "Q. So, typically, if an insolvency practitioner or an accountant, during a review, for the purposes of putting together a CVA, was to identify wrongdoing by one or more of the directors of the Board, do you agree it would be incumbent on the insolvency practitioner that's doing this report

> to refer to that fact in his report to the court? A. Well, if they were aware of any potentially antecedent transactions at the point of signing the nominees' report then that's correct. Q. It would be very difficult when an insolvency practitioner identified, for example, wrongdoing -- wrongful trading to put their name to a report to the court without mentioning that fact, because clearly it's a matter that creditors might wish to know about? A. I just need to be very careful here with wrongful trading. Q. Well, sorry -- let me make it easy and more practical, rather than a more legal analysis. If an insolvency practitioner who becomes a nominee observes, during their review of the companies' financial affairs that the company has been trading for several months without any prospect of avoiding an insolvent liquidation, heading in that direction all the way, it would, I suggest, be something -- even though they might do a CVA, which sounds to me a bit odd, but even though they might do a CVA, it would be something that you would have to draw to the creditors' attention? A. In respect of wrongful trading, though, how would a nominee make that assessment? Q. Well, I think it would be -- it would be that the company -- the evidence would be there that the directors had been trading without -- not just after Christmas, but before Christmas, without any prospect of avoiding liquidation. A. I'm not sure I agree there. I think it's very difficult for a nominee to assess whether directors have been wrongful trading. I mean, otherwise in every single CVA there would have to be some analysis to understand how -- you know, what exactly the directors have been doing. And so I'm not sure I agree with that. Q. Let me put it to this way: I'm not suggesting that you have to reach a conclusion, because obviously, that would be much -- that would be a tall order, but as an insolvency practitioner -- and I said this to you before -- I mean, you know it when you see it. You know what wrongful trading looks like. That's why, you know, when you see it you then go to a lawyer to take advice. Do you agree with that? A. I think it's very difficult. I mean, we're obviously sat in these proceedings, after many years of work has been undertaken to assess whether or not wrongful trading is an action. I think it's very difficult for an insolvency practitioner at a point in time, on every case, to be able to form a view as to whether they think there's been wrongful trading or not. Q. All right. Let me put it this way: there was no -- I mean, you say in paragraph 7(k), I think it is, of your report, you're not aware of any claims that would be capable of being pursued by a liquidator or administrator of a company, if one were appointed; yes? A. Correct. Q. And one of those claims would be wrongful trading; yes? A. That is correct. Q. So if you had seen obvious evidence of wrongful trading, you wouldn't have been able to make that statement? A. But I -- I wouldn't know how to -- to form a view on wrongful trading. It's a deeply technical point which would involve a huge amount of work to try and understand and quantify. It's practically not possible to do that or very difficult to do that, I would suggest.

932. Finally, Ms Hilliard and Ms Earle relied on the extended minutes of the Creditors Meeting at which Mr Green confirmed that the Nominees had seen the most recent forecasts and that they showed that BHSL was viable. They submitted that Mr Green

made that statement in the knowledge that the sale price of Oxford Street was either £50 million or £60 million. They also submitted that he could not have made this statement if he had believed that there was no reasonable prospect of a solution to the pensions issue. Finally, they submitted that given that KPMG considered BHSL to be viable on 23 March 2016 "it is impossible to understand how the JLs can seriously allege wrongful trading against the directors".

933. I turn next to Mr Shaw's evidence. His evidence was that the BHS management had assumed an EBITDA loss of £63.8 million and that this assumption was incorrect when compared to the actual performance of the BHS Group as stated in the management accounts to 28 February 2016. It was also his evidence that the impact on the Management Forecast was that an EBITDAE profit of £7 million over three years would have been turned into a loss of £7 million and that this would have generated an additional funding requirement of £14 million. Ms Hilliard did not challenge this evidence and in the second joint statement dated 3 November 2023 Mr Pilgrem agreed the financial information which had been sent to KPMG and accepted that the actual figure was worse than the figures given to KPMG. Ms Hilliard put it to Mr Shaw that this information would not have been available to KPMG before March 2016:

> "Q. And what -- what they say, at {A/2/108}, 13 paragraph 1 -- I think it's paragraph 1. Yes. That: "Whilst the Liquidators' assessment of the likely CVA savings (predominantly in relation to its rent roll) is broadly similar to KPMG's analysis, KPMG were provided with a more optimistic set of management account figures when compared to the reality of the management accounting pack for March 2015 to February 2016, the financial information pro which would have been available to the Respondents (and by extension should have been provided to KPMG) in March 2016." Now, you've seen no evidence, have you, Mr Shaw, that -- to suggest that the management accounting pack for March 2016 was available in March? A. I wouldn't have thought that the March management accounts -- what date in March are we talking about here? Just to be clear. Q. I think it would have been -- yes, Mr Pilgrem is saying we don't know. A. Yes. I mean, it's self-evident that the performance for one month can't be available before the end of it. Q. Yes. A. There is one proviso to that: that in a retailer you would normally have what are called flash figures as you get close to the end of the month; so you'd know broadly where it was coming out. But if you say we're at the 10th March you probably wouldn't know; if you're at the 28th or 29th you probably would broadly know, but without exact."

934. I turn now to my analysis and conclusions. I find that the Management Forecast was based on three assumptions which I have set out in [923]. Mr Wright's evidence in relation to the forecast was not challenged and I accept it. I also find that the EBITDAE for the three years which it covered was overstated by £14 million and if the Management Forecast had been accurate, it would have been necessary for the BHS Group to raise an additional £14 million of funding. Mr Shaw's evidence that the forecast was overstated and of the impact of the actual figures in the management accounts to 28 February 2016 was not challenged either and, again, I accept it. Finally, I find that KPMG were not provided with the management accounts to 28 February 2016. There was no documentary evidence to suggest that those accounts were sent to KPMG during March 2016 and before the Creditors Meeting and Mr Shaw and Mr Pilgrem agreed the information which they were sent in the Second Joint Statement.

935. There was no evidence that the management accounts to 28 February 2016 were available before the CVA Proposal was announced and the Nominees were appointed and it is no more than common sense that they would not have been available until after the month end, as Mr Shaw readily accepted. Moreover, there was no evidence before me to show when they became available. Mr Curl suggested to Mr Chandler that they would have been available on 16 March 2016 but he was unable to confirm this one way or the other. This was no doubt because Mr Carver circulated the updated forecasts on that day. But there was no evidence that he had the management accounts to 28 February 2016 available to him as well and I was not invited to draw that inference.

936. I find, therefore, that the BHS management did not deliberately mislead KPMG in the Management Forecast or deliberately suppress or withhold the management accounts to 28 February 2016. However, it remains the case that KPMG were not provided with accurate financial information and, in my judgment, little weight should be attached to the view expressed by the Nominees in the CVA Proposal and by Mr Green at the Creditors Meeting that they believed that the CVA had a reasonable prospect of being implemented. I have reached this conclusion this for the following reasons:

(1) The Management Forecast was prepared by the BHS Management and not by KPMG and in the CVA Proposal the Nominees made it clear that they were unable to warrant or represent the accuracy of the information provided to creditors. They also drew management's attention to the importance of satisfying the creditors that

they had sufficient funding to implement their business plan and that there was a pension solution. Mr Chandler accepted this in cross-examination:

> "Q. Could I have, please, bundle {C/1392/1}. This is the Project Pipe report of 9 February 2016. Could I have page {C/1392/3}, please. Right at the outset of the report it says: "Notice: About this Report". And then in the fourth paragraph: "We have not verified the reliability or accuracy of any information obtained in the course of our work, other than in the limited circumstances set out in the Engagement Letter." So you agree there that KPMG are wholly relying on the information they got from the companies? A. Yes. Q. Could I have page {C/1392/9}, please. Under "Viability", at the bottom of that page, it says, in the second -- the second dash it says: "Funding for the business plan is an important consideration as CVA creditors will expect the Group to demonstrate that it has sufficient resources to carry out its business plan post-compromise. "In addition to the business plan, the Group must find a solution to the Group's underfunded defined benefit pension schemes if the business is to be viable in the long term. This will be a key corner-stone of messaging to landlords and other creditors to support any proposed CVA." Now, do you agree there that KPMG are essentially identifying some very significant known unknowns? A. Yes. Q. And paragraph -- sorry, page {C/1392/33}, please. At 14 there under "floating charge creditor" it says: "Following the release of its fixed charge security over crib cause ... Arcadia's loan of £35.8 million is now secured solely by its floating charge." Do you see that? A. Yes. Q. There's no hint of a suggestion there that there's any question mark over the enforceability of Arcadia's floating charge. Do you agree with that? A. I do."

(2) BHSGL had not entered into any binding agreements with the PPF, Arcadia or GB Europe and no agreement had been reached between Arcadia and the Pensions Regulator. KPMG were, therefore, reliant upon management's assurances about these negotiations. In their engagement letter dated 2 March 2016 KPMG also pointed out that it was a criminal offence for directors to make false representations for the purpose of obtaining the approval of creditors and Mr Wright affirmed this in evidence. In those circumstances, it was reasonable for KPMG to rely on the Management Forecast for the purpose of assessing the viability of the CVA Proposal.

(3) I accept that Mr Wright attended the meeting on the evening of the 22 March 2016 and that he was informed that Oxford Street was not going to be sold for £75 million. However, I accept his evidence that he was also told that the proceeds of sale of Oxford Street and Milton Keynes would be sufficient to discharge the

Grovepoint Facility. This is consistent with Mr Bloomberg's notes of the meeting in which he recorded that the proceeds of both properties were £70.5 million and that the meeting was told "Hoping GP accept that instead of £72m".

(4) Mr Wright was not given this information until the evening before the Creditors Meeting. The minutes of the BHSGL board meeting that day record that Mr Chappell told the board that the price had been agreed "following many months of protracted negotiations with the Landlord of the Property". Mr Lightman and Ms Hilliard did not explain why Mr Chappell made no attempt to keep KPMG informed about those negotiations, whether a price of £75 million had ever been agreed and when Mr Chappell had agreed to accept the lower figure.

(5) Moreover, Mr Wright was being told that the proceeds of sale of Oxford Street and Milton Keynes would be sufficient to discharge the Grovepoint Facility, that £16.185 million would be available from the sale of Caernavon, Manchester, Scunthorpe, Sunderland and Taunton within days and a further £2.5 million from the sale of Bristol after the discharge of the GB Bridging Facility. It is wholly unsurprising, therefore, that Mr Wright accepted what he was told and did not raise concerns about the Management Forecast at that very late stage. It is also unsurprising that neither he nor Mr Green challenged the statements which Mr Chandler made to the Creditors Meeting the following day, namely, that the BHSGL board was actively engaged in obtaining up to £30 million in property sales and that good progress was being made.

(6) Mr Wright and his colleagues had very little means of verifying what they were told about the negotiations with Arcadia and GB Europe. Mr Wright obtained confirmation from Mr Appelbaum that GB Europe intended to enter into the ABL Facility. But he had no means of knowing that the first tranche of the facility was really £25 million not £30 million and that the terms were commercially unacceptable. It was not suggested to him or me that he should have taken his own separate legal advice.

(7) Finally, BHSGL board did not produce a revised management forecast for KPMG at any time before the Creditors Meeting which reflected the management accounts to 28 February 2016 and the true sale price of Oxford Street. If they had done so,

even on the evening of 22 March 2016, I have no doubt it would have demonstrated that the CVA Proposal was unviable and could not be implemented. Mr Shaw's evidence (which I accept) was that because the CVA Proposal was prepared on an incorrect basis, there was insufficient funding available:

> "Q. Yes. Now, were it not for the poor Christmas results, I suggest to you, there would have still remained a reasonable prospect of avoiding an insolvency process, because what they did is that they put together a CVA which was approved. And the reason the CVA failed, I suggest, is because -- for reasons best known to himself -- Sir Philip Green wouldn't subordinate his floating charge. That's correct, isn't it? A. There were -- the reason -- the full funding wasn't able to be put in place. I think it was accepted that that funding wasn't sufficient by some of the directors at the time. The underlying EBITDA assumptions, I think Mr Pilgrem and I both agree, were 14 million or more out. So it was based on a false premise or an incorrect premise is a better way of putting it. And, lastly, the CVA of itself did not deal with the pensions deficit. It triggered a PPF assessment but didn't compromise the underlying liability. So I think it is just important to understand those things."

(8) In any event, KPMG were not lawyers and it is clear that the Nominees relied on Mr Plainer's assessment of the negotiations between the various parties. Ms Hilliard put the minutes of the BHSGL board meeting on 10 March 2016 to Mr Wright and he accepted that he relied on Mr Plainer's report about the negotiations in reaching the conclusion that neither the PPF nor the Pensions Regulator was shutting the door:

> "MS HILLIARD: It is {E/88/1}. Sorry. That's the Board meeting of 10 March 2016. And if we go to {E/88/3}. And just below paragraph 6 there's a "PENSION UPDATE". And if you would just like to have a look at -- from paragraph 6.1 to paragraph 6.3. Yes. And, in particular, bearing in mind what Mr Plainer says at paragraph 6.3 about -- that he was saying that both letters from the PPF and the TPR had suggested that they remained open to further discussions with the company. Did that lead you to conclude that they were not shutting the door -- A. Yes. Q. -- on further negotiations? A. Yes. Q. And is it fair to say that if you had concluded, at that time, that there was no reasonable prospect of a solution to the pensions issue, that you would have felt it necessary to inform creditors at the creditors' meeting? A. Yes."

(9) Finally, although the minutes of the BHSGL board meeting on 10 March 2016 state that Mr Pink was to attend a meeting with Mr Chandler and the PPF on the following day, it is clear that the purpose of that meeting was to reach agreement

with the PPF not to vote against the CVA. Mr Chandler did not give evidence about that meeting and although Ms Hilliard put the minutes to Mr Wright, she did not suggest that Mr Pink obtained any further insight into the PPF's position at that meeting.

(iv) Weil

937. Ms Hilliard and Ms Earle advanced a positive case that Mr Plainer advised the BHSGL board that the Companies could continue to trade and because they put their case so high, I should record precisely how they put it in their written closing submissions (references removed):

> "34. At board meetings on 27 January 2016, 10 February 2016, 24 February 2016 and 10 March 2016, Mr Adam Plainer (Partner and head of restructuring and insolvency at Weil) positively advised that the Companies could continue to trade. 35. Given that the JLs' own accountancy expert Mr Shaw accepts that Weil was provided with accurate information by the board, this should be the end of the wrongful trading claim against Mr Henningson. The board did take specialist insolvency advice from a leading law firm and a leading individual and they were not advised to cease trading even as late as March 2016."

938. Again, I begin with the evidence. In their engagement letter dated 22 January 2016 Weil agreed to advise the boards of RAL, BHSGL, BHSL and BHSPL on their duties and to assist them and KPMG in relation to the CVA and its implementation. Mr Shaw gave evidence that the financial information provided to Weil primarily related to the historical performance of the BHS Group or related to the property portfolio and potential categorisation for the purposes of the CVA. He stated that there were some discrepancies between the financial information provided to Weil and the relevant management accounts but these were immaterial. Ms Hilliard did not challenge this evidence or put it to Mr Shaw that Weil received the Management Forecast. She merely put it to Mr Shaw that the information which Weil did receive was accurate:

> "Q. No -- yes. And if you just read paragraph 16.27 and then over the page to 16.28. {B/19.2/170-1}. A. Yes. Q. So your -- your opinion is, then, that, on the whole, the information provided to Weil Gotshal was accurate and not materially inaccurate? A. Yes. I mean, we've moved on to Weil from KPMG now, but, just to be clear, yes. Q. Yes. A. Yes. Q. And so the advice that they gave on the basis of it could be relied upon; yes? A. On the basis of information that they're provided, I can't -- I think the words are clear on the page."

939. There was no issue that Mr Plainer was present at each of the board meetings upon which Ms Hilliard and Ms Earle relied or that he expressed the view that he was not aware of any reason why they could not continue to trade. Ms Hilliard put the form of words which Mr Plainer used at the meeting on 10 March 2016 to Mr Wright and he did not accept that he agreed with it and said that this was a matter for a lawyer. She did not, however, suggest to Mr Wright that Mr Plainer expressed the positive view that the BHS Group could continue to trade. Indeed, his evidence was that this was fairly typical advice:

> "Q. Yes. So that's what the minutes say. Do you confirm that at the point at which -- the point at which we're looking at, which is 27 January, that was your considered view, that the companies -- that you hadn't encountered any issues and when Mr Plainer says, at paragraph 6.6, that: "... the Directors, taking all matters into account, he saw no reason from a wrongful trading perspective why they should not continue to trade"; you agreed with that? A. I don't think I commented on 6.6. Q. No. A. Typically lawyers give wrongful trading advice in these situations. Q. But if you disagreed with him -- if you thought that, actually, they shouldn't be trading, you would have, presumably, said something? A. It's not for -- we don't give wrongful trading advice as a matter of principle in our work. So the lawyers always give wrongful trading advice. Q. Right. But -- well, we've seen the Weil Gotshal letter that actually referred to giving advice to the directors about their duties. Is this the kind of advice that you would expect a restructuring lawyer to give to directors? A. Yes. It's fairly typical. Q. Sorry. I didn't quite hear that -- it's typical? A. Sorry, typical, yes. Q. Of course if Mr Plainer had thought that they shouldn't be trading, he would have also advised that they shouldn't be trading, wouldn't he? A. Indeed."

940. Finally, Ms Hilliard and Ms Earle relied on a note of a meeting which Mr Plainer made at a meeting on 9 March 2016 at which Mr Hinds of GT gave advice about the pensions issue. Mr Plainer recorded in his notebook that Mr Hinds told the meeting that "TPR + PPF letters written in conjunction to close down both offers". He also recorded that Mr Hinds stated that "For a scheme to be put back will be nearly £200m" and that Mr Chappell said that he would like to have Mr Hinds and Mr Plainer have a rational discussion with Sir Philip Green. His notebook then records as follows (my emphasis):

> "KH ran through options: (i) Administration today – AP said no-one has said so so AP would find it very difficult to advise the Board to file as still a reasonable prospect; (ii) up the offer; DT said no need, will disentangle from Arcadia by the Summer; Economic value is all DT can give."

941. Again, I turn next to my analysis and conclusions. I accept that Weil were engaged to advise the boards of the four Companies on their duties and that the information which was provided to Weil was accurate in all material respects. I also accept that Mr Plainer stated at the board meetings on each of the four dates that he knew of no reason why they could not continue to trade. However, I also attach little or no weight to those statements for the following reasons:

(1) Weil were instructed by RAL and the BHS Group to advise the board of each company on their duties. They were not instructed to give independent advice to the directors and they did not advise the directors to take their own advice. In any event, there was a clear conflict between the interests of RAL and the BHS Group from Day One to the administration of the Companies.

(2) Mr Shaw accepted that Weil were not provided with misleading financial information. But he was slightly bemused by the question when it was put to him (as, indeed, was I) because his evidence was that they were never given any of the relevant financial information at all. Weil were not provided with the Management Forecast let alone an accurate forecast based on the updated management accounts and there is no evidence that they were ever asked to give any advice about it.

(3) It was not for Mr Plainer to advise Mr Henningson and Mr Chandler whether those forecasts were achievable and it was not reasonable to expect him to do so. If they had asked for advice whether there was a risk that the directors of each company would be personally liable for wrongful trading in the light of those forecasts, I have no doubt that he would have advised them that they should either obtain comfort from KPMG or, better, an independent firm of accountants that the Management Forecast was achievable.

(4) Mr Plainer was not instructed to act for BHSGL in relation to the ABL Facility or the subordination of the Arcadia charge. The BHSGL board instructed Mr Roberts and Olswang to act for them in relation to those matters and there is no evidence that board members were looking to Mr Plainer for advice in relation to either of them. Again, if Mr Henningson or Mr Chandler had asked for his advice, he would no doubt have advised them that they ought to instruct Olswang to give them that advice (as, indeed, they did but only when it was far too late).

(5) In any event, I do not accept that Mr Plainer gave positive advice that the Companies could continue to trade at any of those meetings. All that he said on each occasion was that he had no reason to believe that the Companies could not continue to trade but that this was a decision for the directors themselves. Mr Wright's evidence was that this was fairly typical advice and its obvious purpose was to invite the individual directors to consider this issue carefully. This is obvious when the paragraph which Ms Hilliard put to Mr Wright is read as a whole:

> "AP advised the Directors that, taking all matters into account, he saw no reason from a wrongful trading perspective why they should not continue to trade but this was a decision for the Directors and AP requested that should any Director have any different view that he should make this known to the meeting. No Director expressed a different view."

(6) But in any event, even if (contrary to the view which I have expressed) Mr Plainer was positively advising the BHSGL board that they could continue to trade on each of these four dates, I am satisfied that Mr Plainer had no reason to believe otherwise. Mr Chappell was continuing to represent to the BHSGL board that Oxford Street would be sold for £75 million and Mr Plainer had no reason to believe that the terms of the ABL Facility were unacceptable.

(7) Indeed, it is of some significance that Ms Hilliard and Ms Earle did not rely on the BHSGL board meeting on 22 March 2016 in their closing submissions. Mr Plainer joined that meeting by telephone. He was told that the sale price of Oxford Street was £52.5 million (which was not itself accurate). He was also told about the earlier valuations and that Grovepoint was keen for the transaction to proceed. He then advised the board to consider whether this would be a transaction at an undervalue and also whether it was in the best interests of creditors.

(8) But Mr Plainer was not asked to advise what (if any) effect the sale to Oxford Street would have on the implementation of the CVA. More importantly, Mr Chappell told him that the collateral pool of properties would be released upon the sale of Oxford Street and available to raise finance for the CVA:

> "As a result of the transaction, £50 million would be repaid to Grovepoint which would enable other properties to be released from the

> Grovepoint security which would, in turn, provide the Company with an opportunity to raise finance as envisaged in the CVA,"

(9) Ms Hilliard and Ms Earle did not seek to defend this statement or suggest that it was true and I am satisfied that Mr Chappell misled Mr Plainer at the meeting on 22 March 2016. In those circumstances, it is entirely understandable that Mr Plainer did not advise the board that the CVA could not be implemented and that they should cease trading immediately.

(10) Finally, I am not satisfied that the BHSGL board placed any real reliance on Mr Plainer's statements at the relevant board meetings. Although Mr Henningson and Mr Chandler both gave evidence that they relied heavily on Mr Plainer's advice in their witness statements, I do not accept it. In my judgment, the members of the BHSGL board were simply going through the motions. At each meeting Mr Plainer invited the board members to consider whether there was reasonable prospect of avoiding insolvency and their duties to creditors. But the minutes are formulaic and none of them record that there was any genuine discussion between board members about the risk of insolvency or the risks to individual creditors.

(11) I also rely on my findings in relation to the Individual Misfeasance Claims. It is clear from those findings that Mr Henningson generally favoured the interests of Mr Chappell and RAL over the interests of the Companies and that Mr Chandler did not follow Mr Plainer's advice when Mr Parladorio did not want him to do so. When Mr Plainer gave specific advice to Mr Chandler, Mr Topp and Mr Parladorio that RAL should repay the £600,000 paid by Lowland on 1 April 2016, Mr Chandler did not follow that advice but took steps to ratify the payment.

942. Subject to one point, therefore, I am satisfied that Ms Hilliard and Ms Earle significantly overstated both the advice which Mr Plainer gave and its significance. The one point which gave me cause for concern related to the note which Mr Plainer recorded in his notebook for 9 March 2016. There is no doubt in mind that on that occasion he gave positive advice that he would find it very difficult to advise the BHSGL board to put the company into administration because there was a still a reasonable prospect of avoiding insolvent liquidation or administration. Mr Bloomberg made a very similar note in his notebook and although both of them used the phrase "reasonable prospect" this was obvious shorthand for the wrongful trading test.

943. It is not possible to assess the significance of this advice and it may have been no more than a throwaway remark since none of Mr Henningson, Mr Chandler or Mr Topp mentioned this meeting in their evidence let alone this statement and it was not put to any witness. Nevertheless, I have considered whether Mr Plainer's positive advice that there was a reasonable prospect of avoiding liquidation provides an indication that the findings which I have reached are infected by hindsight and, in particular, by the knowledge that the Companies went into liquidation shortly after the CVA and that the Pensions Regulator did not reach agreement with Sir Philip Green and Taveta until 28 February 2017.

944. After reconsidering my findings I am not satisfied that Mr Plainer's advice makes a difference to them. It is clear from both sets of notes that the purpose of the meeting was to consider the pension contributions and whether BHSL should refuse to continue to make them. Moreover, Mr Plainer was not a pensions specialist and he was responding to the individual options which Mr Hinds (who was a pensions specialist) had put forward. When Mr Hinds identified administration as the first option, he gave advice that he would find it difficult to advise the board to put BHSL into administration when no one had suggested they should do so. If that is the true context, then it is unsurprising that Mr Chandler and Mr Topp did not consider this advice or the meeting to be memorable or place any particular reliance on it.

945. Moreover, Mr Plainer did not have the advantage of the evidence which I heard from Mr Martin and the pensions experts. He accurately recorded that both the Pensions Regulator and the PPF had written "to close down both offers". But he was not told that Mr Chappell and Mr Parladorio had first met the Trustees and the Pensions Regulator over a year before and that they had failed to come up with any sort of plan for dealing with the pensions deficit apart from Project Vera which was vague and lacked detail. If he had been aware of the full history, I am very doubtful whether he would have taken the view that there was a reasonable prospect of the parties reaching a settlement and avoiding a moral hazard investigation in the near future.

(v) The Creditors Meeting

946. Mr Curl and Mr Perkins also submitted that Mr Chandler deliberately misled the Creditors Meeting by stating that the directors were actively engaged in obtaining up to

£30 million of funding from property disposals. For reasons which I have already explained, I am not prepared to decide this issue or the related question whether the creditors would have been entitled to apply to set aside the CVA for unfair prejudice because there was no pleaded allegation that Mr Chandler deliberately misled the Creditors Meeting. Although the Joint Liquidators were responding to an anticipated line of defence, they pleaded a case that both KPMG and Weil were given incomplete and inaccurate information and then gave particulars of that case in the Points of Claim, Appendix 4. In my judgment, they should have taken the same approach to Mr Chandler's representations to the Creditors Meeting if they intended to advance a such a case at trial.

947. Nevertheless, it was entirely legitimate for the Joint Liquidators to rely on Mr Chandler's representations to the Creditors Meeting in support of their case that KMPG and Weil were not given complete or adequate information. I place little weight on the disclosure to Mr Wright and Mr Plainer on 22 March 2016 that Oxford Street was about to be sold for £50 million because Mr Chandler continued to tell the Creditors Meeting that up to £60 million would be available from the ABL Facility and up to £30 million from property sales. Indeed, it is clear that the Nominees continued to believe that the forecasts were achievable and that property sales would produce £30 million from the questions and answers at [403].

(10) The Section 214(3) Defence

948. It is common ground that the IND between 8 September 2015 and 25 April 2016 was £45.5 million. The burden was on Mr Henningson and Mr Chandler to demonstrate that during that period they took every step to minimise the potential loss to the Companies' creditors. Mr Lightman and his team submitted that the decision to continue trading before Christmas was such a step and they relied on the evidence of Mr Topp in re-examination that this was the best chance of realising the value of the group's stock:

> "Q. Okay. Can we now go to the transcript of today, please, {DAY12/96:1}. I invite you to read lines 3 to 12, please. A. Okay. Q. And in particular, from line 9: "It was getting difficult that time, as well, because we were heading towards peak. So we really needed to make the decision on September 1 probably or wait til January 1." What did you mean by your reference there to "heading towards peak"? A. So, for BHS, as I said earlier, October half term is the critical date for gifts and gift purchases. So November and December are a significant proportion of that

> year's sales. And you really want to avoid doing any activity from around October half term. And if we didn't -- my view was if we didn't appoint -- if we didn't do a CVA on 1 September, we would just run out of runway and we'd end up trying to doing a CVA in the middle of peak trading. Because one of the problems with a CVA is that -- there's lots of upsides, but one of the problems is it does spook the customers a bit, you know, because suddenly people are nervous about buying giftcards, you know, as we were talking about earlier; they're worried that they might not get refunds back if they buy. So that's why, if you look at all the retail CVAs that have happened since, in the last decade, none of them happened in November. You know, they all happen in January, February, March, April."

949. Ms Hilliard and Mr Lightman both urged on me the good sense of continuing to trade over Black Friday and the Christmas period rather than taking insolvency proceedings (whether they took the form of a CVA or administration). Although this initially struck me as a strong point, I was unable to accept it after a careful analysis of the evidence. For the following reasons, I am not satisfied that Mr Chandler and Mr Henningson took every step to minimise the potential loss to creditors by continuing to trade until 25 April 2016:

(1) The July 2015 Turnaround Plan assumed that the BHS Group would make a loss for FY 2016. Management was forecasting a negative EBITDA of –£19.9 million and a negative operating cashflow of –£45.1 million for FY16 even if it was able to achieve the Target Business Plan. This was to be offset by receipts from property disposals of £101 million: see slide 12.

(2) I have found that by 1 September 2015 Mr Chandler and Mr Henningson knew that the BHS Group had no prospect of achieving the Target Business Plan. Moreover, the minutes of the BHSGL board meeting on 14 October 2015 (when the plan was approved) record that Mr Topp told the meeting that the results for September 2015 did not meet the turnaround plan (although the plan had been left unaltered because he wanted staff to continue to work towards the original goal).

(3) The minutes of the BHSGL board meeting on 22 January 2016 record that Ms Morgan told the meeting that EBITDA for the first three months of trading was a negative –£30.8 million (excluding any management fee payable to RAL). Although the minutes record that Christmas sales were disappointing, the board pack contains a "P&L Summary" which shows that the EBITDA in the previous

forecast, the plan and the previous year were all negative. It shows that the BHS Group's operating profit or EBIT was –£53.9 million as against a forecast of –£45.7 million, a plan of –£45.8 million and a previous year of –93.8 million.

(4) I accept Mr Topp's evidence that he believed that it would damage trading to propose a CVA before Christmas and that he could continue to improve the business if the BHS Group was permitted to continue trading over the peak period of Black Friday and Christmas. But I do not accept that either he or the BHSGL board believed that the BHS Group would trade profitably over that period or that by doing so, it would minimise the potential losses to the Companies' creditors. He was not asked this in re-examination and this is not what he said. The figures show that the BHS management always expected the business to be loss-making.

(5) But even if there was a reasonable prospect of reducing the net deficiency of the Companies as regards its general body of creditors by continuing to trade over Christmas, I am not satisfied that the BHSGL board ever considered the risks to unsecured creditors or individual creditors such as the Trustees, employees or suppliers: see *Ralls Builders* at [245]. This issue was raised by Mr Turner in his memo dated 25 August 2015 and I have found that Mr Chandler did not read or consider that memo carefully or table the issue for consideration by the BHSGL board.

(6) Indeed, if the members of the BHSGL board had considered this issue, they would have appreciated that Grovepoint, ACE and RAL would all be paid at the expense of the unsecured creditors: see *Ralls Builders* at [246]. Mr Curl and Mr Perkins produced a series of charts showing the key drivers in the increase of the IND at each of the Knowledge Dates. The chart for the IND between 8 September 2015 and 25 April 2016 shows that the principal driver was the reduction in property assets by £64 million and that the net IND was only £45 million because of a reduction in the pension deficit of £31 million. This illustrates well the effect of the degenerative strategy.

(7) The principal beneficiary of that strategy was Grovepoint which was repaid £49,926,456.20 of the proceeds of sale of Oxford Street none of which was applied for the benefit of the Companies' unsecured creditors. Further, by continuing to

trade after 8 September 2015 BHSGL was able to repay the sums due under the ACE Loan Note III in full. Mr Shaw exhibited to Appendix 15 of his first report a BHS loan schedule showing that BHSGL paid three instalments of £122,668.51 and the final payment of £3,000,000 to ACE between 14 September 2015 and 24 December 2015.

(8) After 8 September 2015 Lowland also paid £749,363 (inclusive of VAT) to RAL and BHSL paid £600,000 (inclusive of VAT) to RAL out of the proceeds of sale of Oxford Street. Whether or not Mr Henningson or Mr Chandler committed breaches of their duties as directors in relation to these payments, they should not have authorised or ratified (or attempted to ratify) these payments after the time at which they ought to have concluded that there was no reasonable prospect of avoiding insolvent liquidation.

(9) Finally, after 8 September 2015 BHSGL authorised the purchase of Darlington by DSHBL for £2.45 million (plus interest and costs) on the basis that it would be resold immediately for a profit. Again, whether or not this amounted to a breach of duty, Mr Chandler and Mr Henningson ought not to have been using the assets of the BHS Group for property speculation after the time at which they ought to have concluded that there was no reasonable prospect of avoiding insolvent liquidation.

950. Mr Lightman also submitted that on the Joint Liquidators' own case the S.214(3) defence was made out because the BHSGL board took insolvency advice from Weil on 22 January 2016 and Mr Chandler and Mr Henningson could not be liable for the IND between that date and 25 April 2016. Like Ms Hilliard, he also relied on heavily on Mr Shaw's acceptance in cross-examination that Weil were not provided with any inaccurate information.

951. I reject Mr Lightman's submission. The information given to Mr Plainer was not inaccurate but incomplete. He was never given any forecasts (accurate or otherwise) and at each board meeting it was for the BHSGL board members to consider whether those forecasts were achievable. On each occasion Mr Plainer raised the question of wrongful trading and reminded the directors of their duty to creditors. I have found that by 8 September 2015 Mr Henningson and Mr Chandler should have concluded that there was no reasonable prospect of avoiding insolvent liquidation or administration

and, in my judgment, they should have said so to Mr Plainer at the meetings in January and February 2016. It is no answer, therefore, to say that he told them that he personally had no reason to believe that they could not continue trading.

952. Moreover, I have no doubt that if Mr Chandler and Mr Henningson had told Mr Plainer that they had concluded that that there was no reasonable prospect of avoiding insolvent liquidation or administration, he would have advised them that they should take every step with a view to minimising the potential losses to creditors and then explored with them whether they should appoint an insolvency practitioner and to take immediate insolvency proceedings. There is no evidence that Mr Chandler or Mr Henningson went through this process at all. All of the minutes contain the same formula and record no more than: "No Director expressed a different view."

VII. Misfeasance

Z. The Trading Misfeasance Claim

(1) The Pleaded Case

953. As Mr Curl and Mr Perkins accepted in their opening submissions, there is a considerable overlap between the Wrongful Trading Claim and the Trading Misfeasance Claim. However, the Joint Liquidators advanced a separate case in the Points of Claim that both Mr Henningson and Mr Chandler committed breaches of a number of their statutory duties in continuing to trade. I begin my analysis of the Trading Claim by setting out their pleaded case:

> "307. In addition to the breaches of duty by the Respondents in relation to particular transactions set out at Paragraphs 127, 128, 139, 167, 189, 222, 228, 254, 265, 279 and 297 above, further and as to the whole of their conduct from the dates of each of their appointments as directors of each of the Companies, the Respondents committed the following ongoing breaches of duty:
>
> a. they failed to act in the interests of the Companies in that they failed to have sufficient regard for the interests of the Companies' creditors at any material time;
>
> b. in particular, they failed to put in place an Adequate Plan or consider on a rational or informed basis whether or not the Schemes could be dealt with and/or, if they could, how that should be done;

> c. they failed to act for proper purposes, in that instead of acting for the purposes of the Companies, they acted throughout for the purposes of RAL and/or for their own purposes;
>
> d. they failed to take reasonable care in their stewardship of the Companies and, in particular: i. they failed to keep themselves informed of the true financial position of the Companies; ii. they failed to take adequate advice and/or instruct advisers properly and/or heed such advice as they received; and iii. they failed to hold regular board meetings or reach properly documented decisions.
>
> 308. Had the Respondents discharged their duties properly, then they would have concluded that the Companies should not continue trading after, at the latest, 17 April 2015 or alternatively after 6 May 2015 or alternatively after 26 June 2015 or alternatively after 13 July 2015 or alternatively after 26 August 2015 or alternatively after 8 September 2015 (the foregoing six dates in the alternative "Cessation Date") and the losses occasioned by that continued trading would not have been incurred."

954. Although the Joint Liquidators' case on liability was pleaded in the most general terms and by reference to the ongoing duties throughout the relevant period, it is clear from their case on causation that it has to be tested at each of the Knowledge Dates and this is consistent with the way in which Mr Curl and Mr Perkins put their case in their opening submissions and Mr Curl put his case throughout orally. Moreover, Mr Curl cross-examined Mr Chandler by reference to each of the Knowledge Dates. I therefore address the question whether Mr Henningson and Mr Chandler committed any breaches of duty by reference only to the Knowledge Dates and not to any other dates.

(2) KD1: 17 April 2015

(i) S.171

955. The Joint Liquidators allege that Mr Henningson and Mr Chandler failed to act for proper purposes and preferred the interests of RAL and Mr Curl put this directly to Mr Chandler when dealing with each of the Knowledge Dates. I set out the relevant passage from Mr Curl's cross-examination on the 17 April Board Meeting but I will not repeat it for the following Knowledge Dates:

> "Q. Further to that, you knew or should have known that any continued trading after that point would be adverse to the companies' creditors and solely for the purposes of RAL or for your own purposes. Do you agree with that? A. No, not at all. Q. And do you agree that on 17 April 2015 you should immediately have instructed an insolvency practitioner or other restructuring expert and taken steps to cease trading? A. No."

956. I accept Mr Chandler's evidence and I find that on 17 April 2015 he honestly believed that he was acting in the interests of the BHS Group when the BHSGL board reached the conclusion that the Solvency Factors were likely to materialise and chose to continue trading. Mr Curl and Mr Perkins did not suggest that the decision to continue trading fell outside the scope of the BHSGL board's powers if the board of directors genuinely believed that they were acting in the interests of the company. But in case there is any doubt, I hold that this was a proper purpose. This is an abuse of power case not an excess of power case to use Lord Sumption's distinction in *Eclairs Group* (above).

957. As I have indicated above, it is more difficult to assess whether Mr Henningson genuinely held the belief that it was in the interests of creditors to continue trading on 17 April 2015. Moreover, given the other findings which I make in relation to his conduct, it seems to me that the Court would be justified in drawing the inference that he exercised his powers as a director to enable the BHS Group to continue to trade for the sole or dominant purpose of enabling RAL to extract as much money as possible from it until it went into administration or liquidation. However, I am prepared to give Mr Henningson the benefit of the doubt in the light of Mr Chandler's evidence both in relation to this and other Knowledge Dates. I therefore dismiss this claim.

(ii) S.172

958. I have held that Mr Chandler genuinely believed that he was acting in the interests of the BHS Group, that he took the question of solvency seriously and that the BHSGL board considered the interests of creditors on 17 April 2015. Although the original minutes of the 17 April Board Meeting did not expressly state that the BHSGL board had considered the interests of creditors and Mr Turner added this wording later, I am satisfied that the BHSGL board considered the interests of creditors even if they did not use the precise words which Mr Turner inserted into the draft minutes. Again, I am not prepared to draw the inference that although he participated in the discussion, Mr Henningson did not believe that it was in the interests of creditors to continue trading. I therefore dismiss this claim.

(iii) S. 174

959. There is no allegation that Mr Henningson and Mr Chandler failed to exercise independent judgment on each of the Knowledge Dates and I, therefore, move to

consider S.174. The first allegation against them is that they failed to keep themselves informed about the true financial position of the Companies. In section V I have made detailed findings about the knowledge of Mr Chandler and Mr Henningson by the 17 April Board Meeting and I have dismissed the allegations that Mr Chandler and Mr Henningson ought to have known that the first four Solvency Factors were not achievable and that there was no reasonable prospect of avoiding insolvent liquidation or administration. I am also satisfied that they informed themselves adequately about those matters before the meeting and that they did not act in breach of S.174 by failing to put in place an Adequate Plan to deal with them.

960. Where I consider that Mr Henningson and Mr Chandler did not know but ought to have known any of the specific facts alleged by the Joint Liquidators, I have also made that clear in section V. In particular, I have found that by 17 April 2015 Mr Henningson and Mr Chandler ought to have known the following additional information about the pensions deficit: (i) the post-transaction secured debt would lead to a weakening of the employer pension covenant and that this was relevant to the regulatory regime, (ii) the annual PPF Levy was £2.9 million and (iii) additional annual contributions of a further £20 million to £30 million would be required and that the BHS Group could not support the Schemes in their current state. To this extent, therefore, I am satisfied that their failure to inform themselves fully about the pensions deficit was a breach of S.174 applying the Notional Director standard.

961. I have also held that there was no consideration of the Schemes or the pensions deficit at the 17 April Board Meeting. I must, therefore, consider whether in breach of S.174 Mr Henningson and Mr Chandler ought reasonably to have considered at the meeting whether it was possible to achieve a pensions solution and, if so, how it should be implemented. Finally, I also have to consider whether Mr Henningson and Mr Chandler ought to have considered whether to appoint an insolvency practitioner to advise them what they should do in those circumstances.

962. Having considered the detailed findings which I have made and the additional information which they ought to have known, I am not satisfied that Mr Henningson and Mr Chandler ought to have raised these issues at the 17 April Board Meeting or, in the absence of a solution, decided to appoint an insolvency practitioner. I have reached this conclusion for the simple reason that the pensions deficit was not an immediate

problem. Mr Shaw accepted that it was rare for companies to be treated as insolvent for reporting a net deficiency and that directors would not be advised to cease trading if they had a rational plan for dealing with the pensions deficit. Mr Shaw is an experienced insolvency practitioner and I am satisfied that this is the advice which the BHSGL board would have received if it had instructed an insolvency practitioner to advise the directors personally.

963. I accept that the Pensions Regulator had served the S.72 Notice before the 17 April Board Meeting and that Mr Chappell had made a poor impression both on the Trustees and the Pensions Regulator. I also accept that I have found that the BHSGL did not have a rational plan for dealing with the deficit either then or ever. But in my judgment it was reasonable for both Mr Henningson and Mr Chandler to believe that the Trustees and the Pensions Regulator would give them sufficient breathing space to put such a plan in place with the benefit of advice from Olswang and GT. Indeed, they did give BHSL that breathing space for almost a year (although the BHSGL made little or no use of it to produce a rational plan). I therefore dismiss the claim under S.174 and the Misfeasance Trading Claim as a whole in relation to the first Knowledge Date.

(3) KD2: 6 May 2015

964. The Joint Liquidators' case was that the increase in the amount required to secure the Second Letter of Credit Facility made the position of the BHS Group materially worse. But they did not allege that Mr Henningson or Mr Chandler ought to have appreciated that the position had worsened for any other reason. Given my detailed findings in sections V and VI and, in particular, my finding at [744] that the directors believed it was in the interests of creditors to enter into the Second LOC Facility, I dismiss the Misfeasance Trading Claim in relation to the second Knowledge Date.

(4) KD3: 26 June 2015

(i) S.171

965. I have accepted Mr Chandler's evidence that he was not acting for an improper purpose when he agreed to ACE II at the meeting on 23 June 2015 and I therefore dismiss this claim against him. Mr Henningson was not present at that meeting and I must therefore consider the claim against him separately. He did not address ACE II in either

Henningson 1 or Henningson 2 although he gave evidence that he was not present at a meeting at which the arrangement fee of £2 million paid to RAL was approved. I must, therefore, determine the extent of Mr Henningson's involvement in ACE II and whether he was acting in breach of S.171 by reference to the documents alone.

966. A cache of text, iMessage and chat messages were disclosed to the Joint Liquidators by ACE and were downloaded onto an Excel spreadsheet. It contained those messages passing between Mr Dellal and Mr Henningson and passing between Mr Alex Dellal and Mr Chappell to which Mr Henningson was copied (by either or both of them). The spreadsheet records that Mr Henningson either sent or received 20 text and iMessages on 11 March 2015. I set them out below. The last message which I set out is an iMessage which Mr Dellal sent to Mr Chappell and copied to Mr Henningson on 17 March 2015:

> "Are you still up"
>
> (Chappell to Dellal, 01.27)
>
> "Yes"
>
> (Dellal to Chappell, 01.29)
>
> "Morning Alex Few over night points Pls give me a call when you have your feet on the deck Don't worry just house keeping points nothing serious. DC"
>
> (Chappell to Dellal, 07.13)
>
> "Give me 20 and let's go through. Think I have found a solution re rent language."
>
> (Dellal to Chappell, 08.11)
>
> "Bernie calling you now re rent situation. Please answer. Just to clarify our solution works for you."
>
> (Dellal to Chappell, 09.13)
>
> "On my way"
>
> (Dellal to Chappell, 09.23)
>
> "Can't be Mike. Needs to be Independent"
>
> (Dellal to Chappell, 11.47)
>
> "Doesn't work"
>
> (Dellal to Chappell, 12.02)
>
> "Why can't it be Olswang"
>
> (Dellal to Chappell, 12.03)
>
> "Sending 5 but waiting for Olswang undertaking"
>
> (Dellal to Chappell, 12.18)

"Alex ! Pls call. Best Lennart"

(Henningson to Dellal, 12.34)

"Are you guys close?"

(Dellal to Henningson, 13.10)

"I think Dom is on his way to see you"

(Henningson to Dellal, 13.10)

"Great"

(Dellal to Henningson, 13.11)

"Get David to call us"

(Dellal to Chappell, 15.14)

"Got him"

(Dellal to Chappell, 15.15)

"Done"

(Dellal to Chappell, 16.42)

"Great! How long till David calls to complete?"

(Dellal to Chappell, 16.51)

"Any more news?"

(Dellal to Chappell, 17.22)

"Light weight Speak in the morning"

(Chappell to Dellal, 23.08)

"Thanks and we'll done"

(Chappell to Dellal, 23.08)

967. It is clear from the contemporaneous documents which I have set out in section II that Sir Philip Green decided to change the deal and not to include Marylebone House in the Dowry on or shortly after 7 March 2015. It is also clear that Mr Chappell was negotiating with both Mr Dellal and Mr Ismailjee for the sale of North West House and a loan of £5 million to make the first instalment of the Capital Injection throughout 10 March 2015. Finally, it is clear that Mr Ismailjee transferred funds to Olswang during 10 March 2015 and that Olswang only terminated the negotiations and agreed to transfer the funds back to Irwin Mitchell in the small hours of 11 March 2015. The run of text messages which I have set out above must be understood against that background.

968. From that run of text messages I find that Mr Chappell did not finally agree to sell North West House to Mr Dellal until 16.42 pm in the afternoon of 11 March 2015 and that Mr

Dellal sent the text "Done" to signify their agreement. I also find that during the earlier part of the day Mr Chappell and Mr Dellal negotiated the terms of the lease and ACE Loan Note I and that this was the solution to which Mr Dellal was referring in his messages that morning "re rent language". Finally, I find that Mr Henningson was fully aware of that agreement because he received all of the relevant texts and spoke to Mr Dellal that day. He was also aware of the terms of the sale because Mr Roberts had sent him the draft contract and transfer at 18.59 the previous day.

969. The Joint Liquidators also relied upon an exchange of text and iMessages between Mr Dellal, Mr Chappell and Mr Henningson beginning on 7 May 2015 and ending with a message which Mr Dellal sent both by text and iMessage on 26 May 2015. These messages are principally relevant to the Carlwood Payment but I set them out as part of the sequence here:

> "Hi Dominic. Need to speak to you. I have sold northwest house. Had an approach we couldn't turn down. Give me a call when you can speak."
>
> (Dellal to Chappell, 7 May 2015 14.24)
>
> "Just in case you forget Rolex yacht master 2 stainless steel with white face blue bezel See you Tuesday Dom"
>
> (Chappell to Dellal, 14 May 2015 12.21)
>
> "I haven't made any money yet! All my profits with you. Ha."
>
> (Dellal to Chappell, 14 May 2015 13.21)
>
> "That why you should be nice to me"
>
> (Chappell to Dellal, 14 May 2015 13.48)
>
> "That's a scary thought."
>
> (Dellal to Chappell, 14 May 2015 14.34)
>
> "Steady or I might start loving the solid gold one"
>
> (Chappell to Dellal, 14 May 2015 13.48)
>
> "Begins with Ro and finishes with ex"
>
> (Chappell to Dellal, 19 May 2015 13.48)
>
> "Ha. Not yet. You're ruining the pleasure of giving you a gift! It was on my list either way only now I know what you want. I want a gift too! Good meeting today. Will bring Jonathan, our editorial director to the pitch as he is British, 40ish and I think he will bring a bit of 'grey' perspective and understanding. He did all the editorial work for all saints and some other brands as was as edited a bunch of magazines before working with us."
>
> (Dellal to Chappell, 19 May 2015 17.50)

> "In London from tonight. See you tomorrow? Best. L"
>
> (Henningson to Dellal, 26 May 2015 16.08)
>
> "Can't get the trust up. But as I said I can make up the 50k for sale of relationship. Let me know how you would like to proceed. I have 2 projects being handed to me by construction company this week so it's been kind of manic. Have a nice evening. Alex"
>
> (Dellal to Henningson, 26 May 2015 19.22)
>
> "Ok let's go for the 300k and I give you the details tomorrow. Next time I don't want to be in between when we do the deal! Dom hasn't been totally honest to me in this deal so therefore I hope you talk to me before you decide the decision! I have now the total picture of what's happening in BHS. Call you tomorrow. Still think that's Mark S doing a bad job but will take that in the board within a few weeks !Have a nice evening. Ok with your illness? Best L"
>
> (Henningson to Dellal, 26 May 2015 19.38)

970. On 16 June 2015 the negotiations with Farallon collapsed and on 17 June 2015 Mr Morris approached Mr Berman and then met with him that day. On 17 June 2015 at 10.37 Mr Henningson sent a text asking to meet Mr Dellal that day: "Hi Alex! Can we have a meeting at 2pm today with Dom? Best. L" After further text exchanges, Mr Dellal agreed to meet them both at his office at 6 pm. Later that night at 22.19 Mr Dellal wrote to Mr Chappell stating as follows:

> "In principle I have it agreed. Slight different wording but same effect. 45million loan at 25% irr + 1m show fee. Then first 8.5m of profit goes to me. + 30% of any overage above 80m sale price. Spoke to Richard. If all is as you describe, we may be able to do before Wednesday. Let me know if that works."

971. Mr Henningson's messages shows that negotiations continued over the next few days and that Mr Dellal, Mr Chappell and Mr Henningson were frequently in contact with each other. I set out below the principal messages extracted from Mr Henningson's phone (but excluding messages setting up calls or checking availability):

> "I'll call you back. Just on the train. Looks like things are moving forward, so long as Dominic can maintain the scenario presented yesterday. There was an issue on the securities this morning. Dominic mentioned Manchester and Milton K and this morning on term sheet they weren't included. Let's see. Re Ralph Lauren, it's not for me but I know someone who would by it. Want to split agents fee? Up to you. Also, for clarity, what is your position in the Oxford St deal, for sake of not repeating the past?"
>
> (Dellal to Henningson, 18 June 2015 09.24)

"Hi Alex ! Still no money at the account from you. When did you sent them ? Best. L"

(Henningson to Dellal, 19 June 2015 12.36)

"Will check now"

(Dellal to Henningson, 19 June 2015 13.47)

"Sorry. That was a long 5. Was just having a tiff with the wife. Just checking in. Any surprises or all on track?"

(Dellal to Chappell, 19 June 2015 18.44)

"Call you back. The deal has changed quite dramatically. Will update you once I'm out of here."

(Dellal to Henningson, 19 June 2015 15.31)

"All sorted with SPG Let's get this done ASAP And thanks again I know you have put your neck on the block in this one DC"

(Chappell to Dellal, 24 June 2015 20.19)

"That's good news. Getting lots of questions from trustees about various scenarios. Mostly to do with legal points on default scenarios, Oxford St lease with freeholder and 18 month term. I have a meeting at 8.30 to go through all. This evening has left all involved lots of time to think of every possible case outcome so we have to move fast tomorrow. Just giving you a heads up"

(Dellal to Chappell, 24 June 2015 23.49)

"Bernie had a long chat with sherwood. I've been with one of the trustees all morning. We are very nearly there!"

(Dellal to Chappell, 25 June 2015 10.00)

"Almost there. 1 point: our legal fees have doubled. I'm happy to meet you at 120 and I'll pay the 30. Ok?"

(Dellal to Chappell, 25 June 2015 13.22)

"Still on with trustees. We're steps away...hold tight."

(Dellal to Chappell, 25 June 2015 14.21)

"Pls we must do this by 3:30 The 800k is a given but must come from BHS tomorrow Monday"

(Chappell to Dellal, 25 June 2015 14.22)

"I'll call u back in 30. Sorry. Had a crazy day. We got there. Deal changed massively. But let's discuss."

(Dellal to Henningson, 25 June 2015 20.16)

"Hope you had a relaxing weekend. Re the £960,000 for the rent, is it being processed?"

(Dellal to Chappell, 30 June 2015 11.16)

972. By letter dated 5 April 2018 Jones Day wrote to Mishcon as part of their investigation into the relationship between RAL and ACE. In section 17.2 of that letter they asked a number of detailed questions about the calls between Mr Dellal, Mr Chappell and Mr Henningson and, in particular, the period between 16 June 2015 and 23 June 2015. In their reply dated 4 July 2015 Mishcon stated that there were meetings on 16, 17, 18 and 23 June 2015 to discuss the ACE II Facility Agreement and the ACE II Mezzanine Agreement.

973. In reliance on the messages and this letter, I find that Mr Henningson initiated the negotiations between Mr Chappell and Mr Dellal. I also find that Mr Chappell and Mr Henningson agreed the principal terms of ACE II with Mr Dellal in person at his office on 17 June 2015. I also find that both Mr Chappell and Mr Dellal kept Mr Henningson informed about the progress of their subsequent discussions and that on 25 June 2015 Mr Dellal told Mr Henningson the final terms of ACE II. Finally, I find that Mr Henningson accepted and agreed to those terms. If he had disagreed or objected to the terms of ACE II he still had time to raise his concerns with the BHSGL board.

974. I also have to consider whether Mr Chappell informed Mr Henningson that he was intending to instruct Olswang to pay an arrangement fee of £2 million to RAL out of the funds drawn down under ACE II. After careful consideration I find on a balance of probabilities that Mr Chappell informed Mr Henningson of his intention to give these instructions and that Mr Henningson agreed to him doing so or turned a blind eye to the payment. I make this finding for the following reasons:

(1) Mr Chappell had been trying to raise the funds necessary to pay off the mortgage on his father's property since March 2015. Mr Sutton was asked about this in his interview with the Insolvency Service and he confirmed that Wheatleys was incorporated on 28 March 2015 and JDM Island on 9 April 2015 and that Mr Chappell's father told him at the time that Mr Chappell could raise the finance to purchase his property (which was called Longbridge):

> "SIMPSON: So, again let's be clear about the dates, we've got the incorporation of JDM and Wheatleys, just either side of the March/April changeover, so at that point where did you believe the finance was going to come from to allow JDM and Wheatleys to acquire Longbridge? SUTTON: My understanding was it would probably come through Dominic. Where it was coming from I don't know but I think

> Joe advised me yes Dominic can raise the finance er didn't say how or who at the time, but Dominic had undertaken to raise the finance. SIMPSON: How does that firm up, you've got that indication that Dominic is going to sort out the finance, as things progress, when do you become certain and know where that money Is going to come from? SUTTON: Er I think I only became certain I seem to remember being at, being at home on the day, dashing off to Lawrence Stevens when the money became available, it was never certain until literally the last minute."

(2) By June 2015, therefore, it was necessary for Mr Chappell to raise sufficient finance not only to enable the BHS Group to pay the June quarter's rents but also an additional £1.5 million to acquire Longbridge. Mr Henningson was closely involved in the negotiations for ACE II and Mr Chappell texted him numerous times between 19 June and 26 June 2015. In my judgment, it is more probable than not that Mr Chappell told Mr Henningson about the need to raise an additional £1.5 million and his purpose in doing so.

(3) On 1 July 2015 a BHSGL board meeting took place at which Mr Crane explained that "a net inward amount of £17m received following re-financing for £25m, of which £8m had been paid to RAL and [to] pay down the HSBC facility". The minutes of the meeting do not record any reaction from Mr Henningson when he learnt that BHSGL had only received £17 million of new money from ACE II. If Mr Henningson had been unaware of the arrangement fee or objected to it, he would have asked Mr Crane to explain where the balance of £2 million had gone.

(4) On 2 July 2015 Mr Henningson also attended the board meeting of RAL and approved the loans to Wheatleys Bridge and JDM Island. Again, the minutes do not record any reaction from Mr Henningson. There is no suggestion that he asked how RAL had raised the funds to make these loans or, indeed, about the source of those funds. The obvious inference which I draw is that Mr Henningson was fully aware both that ACE II was the source of those funds and their intended purpose before that meeting. Again, if he had objected to RAL using £2 million of the ACE II facility for that purpose, he would have said so. I note that Mr Parladorio voted against the loans.

(5) Mr Chandler's evidence was that both he and Mr Topp were very angry and challenged Mr Chappell when they discovered that only £17 million of new money

was available from ACE II. However, he did not suggest that Mr Henningson reacted in the same way and Ms Hilliard did not put this to Mr Chandler. Indeed, she did not cross-examine Mr Chandler at all about Mr Henningson. If Mr Henningson had been an honest man and unaware of the arrangement fee before the BHSGL board meeting on 1 July 2015, he could have been expected to react in the same way as Mr Topp and Mr Chandler.

(6) I attribute little or no weight to Mr Henningson's witness statements both because he lied about the secret commission of £300,000 (which I address below) but also because he gave very selective evidence on a number of key issues. This is one of those issues. The only evidence which Mr Henningson chose to give about the arrangement fee of £2 million was that he did not recall attending a board meeting to approve the payment to RAL or seeing the minutes of such a meeting. This was literally correct. He did not attend a meeting to approve the payment to RAL because no such meeting took place. But if he had been ignorant about the arrangement fee, I would have expected to him say so and to protest his innocence. It is telling that he did not do so.

975. I am also satisfied that in his text dated 19 June 2015 and timed at 12.36 Mr Henningson was referring to the secret commission of £300,000 which Mr Dellal agreed to pay him for introducing ACE to the purchase of North West House because this payment was made the same day and I make detailed findings in relation to this issue below. Although this payment gives rise to an Individual Misfeasance claim, it is also relevant to my assessment of the purpose for which Mr Henningson was acting between 17 June 2015 and 26 June 2015 and I turn now to consider that issue.

976. I have found that on 17 June 2015 Mr Chappell and Mr Henningson agreed terms in principle for ACE II with Mr Dellal and that on 25 June 2015 Mr Dellal communicated the final terms to Mr Henningson and he accepted them. I find that one of their purposes in doing so was to obtain the arrangement fee of £2 million to enable Mr Chappell to discharge the mortgage over Longbridge and acquire the property. I also find that one of Mr Henningson's own purposes was to keep Mr Dellal's goodwill and to induce or persuade him to make the payment of £300,000. Although Mr Dellal had agreed to pay Mr Henningson £300,000 on 26 May 2015, he had still not made the payment by mid-June. In my judgment, it was not accident of timing that Mr Henningson raised the issue

immediately after the meeting on 17 June 2015 or that Mr Dellal gave instructions to make the payment on 19 June 2015.

977. However, it is important not to lose sight of the fact that ACE II was arranged at the last minute and urgently required to pay the June quarter's rents. I am satisfied, therefore, that it was also one of the purposes of both Mr Henningson and Mr Chappell in agreeing to ACE II to arrange short term finance for the BHS Group to pay the June quarter's rents and generate some breathing space to enable BHSGL to arrange a sustainable working capital facility. Accordingly, I hold that Mr Henningson agreed the terms of ACE II for both proper and improper purposes.

978. If it is necessary for me to do so, I go further and I find that the dominant purposes which induced Mr Henningson to agree the terms of ACE II were to obtain an arrangement fee of up to £2 million for RAL and to secure the payment of £300,000 for himself. I accept that Mr Henningson did not give evidence before me and that this gave rise to the practical difficulty which Lord Sumption identified in *Eclairs* at [20] and Adam Johnson J had to face in *Re Cardiff City Football Club (Holdings) Ltd*: see [121] to [124]. However, I am fully satisfied that they were the dominant purposes because the terms of ACE II were so disadvantageous to the BHS Group that I consider it highly improbable that either Mr Chappell or Mr Henningson had any real regard to the interests of the BHS Group in agreeing to those terms.

979. I have set out the terms of ACE II: see [215]. I have also set out Mr Pilgrem's analysis of them: see [767] to [769]. Moreover, Mr Hitchcock and Mr Topp were scathing in their criticism of ACE II and Mr Henningson's involvement in the negotiations. On 10 April 2017 Mr Topp gave an interview to the Insolvency Service in which he was asked about the role which Mr Henningson played:

> "RAMSEY: Uhm the questions. our next question is regarding Mr Henningson's role, uhm I understand that Mr Henningson's role initially was regarding sourcing of finance and introductions regarding finance and that changed to becoming involved in the International department. Uhm what I'd like to know is is when and why did this role change and who made the call?
>
> TOPP: So Lennart was, came in as part of the team, the original you know take over team. Uhm what became clear within a few months of me being a director is that I didn't think that Lennart added any value to the business but he's an old family friend, apparently he was excellent in the world of

> finance. He did the infamous ACE loan yeah the, I think. I think they had 2 ACE loans but I think he knew the Dellal family uhm so he facilitated the ACE loans. So my comment to Dominic was well you know my 14 year old could have negotiated that deal 'cos that interest rate frankly, you know we're paying this guy 150 grand a year, we're paying his expenses to travel from Sweden, he stays at the Landmark, it's not acceptable, it's completely not acceptable."

980. On 27 April 2017 Mr Hitchcock also gave an interview to the Insolvency Service in which he described ACE II as a "Wonga loan" because of the very expensive cost of the loan:

> "HITCHCOCK: 'Cos the APR on it was just stupid. I mean it was just crazy. How in God's name can can a good corporate finance professional come in and get that. That is just nonsense. That ACE loan. the big ACE loan at the beginning, was farcical. RAMSEY: Was that the 5 million, one with one million .... HITCHCOCK: I know there was a bigger one after that. RAMSEY: Err I'm trying to think which one that would be but err HITCHCOCK: There was ... RAMSEY: Yeah, I've seen the the expressions of the Wonga loan HITCHCOCK: The Wonga loan."

981. Accordingly, I find that Mr Chappell and Mr Henningson agreed to the terms of ACE II and that Mr Chappell signed both the ACE II Facility Agreement and ACE II Mezzanine Agreement in breach of S.171(1)(b) and for improper purposes, namely, to secure funds of £2 million to fund the purchase of Longbridge and to secure Mr Henningson's commission of £300,000 for ACE II.

(ii) S.172

982. I have found that on 23 June 2015 both Mr Chandler and Mr Henningson knew that BHSGL was cashflow insolvent and that if it did not enter into ACE II it would be unable to pay the June quarter's rents of £27.5 million or cover rent cheques for £12 million that day. I have also found that they knew that in return for a short term loan which produced £17 million of new money, ACE II increased the net asset deficiency by £5.9 million, that it did not enable the BHS Group to implement the July 2015 Turnaround Plan and that they had no reason to think that the position would be any better by the next quarter day. Despite these findings, I have held that insolvent administration was not inevitable on 26 June 2015 because there was some light at the end of tunnel. In particular, I have held that Mr Henningson and Mr Chandler were entitled to rely on Mr Topp's assessment that the July 2015 Turnaround Plan could be

achieved and that there was a real and more than fanciful chance that BHSGL might obtain a sustainable working capital facility.

983. Although I have dismissed the Wrongful Trading Claim in relation to the third Knowledge Date, I am satisfied that the modified duty to consider the interests of creditors arose by 17 June 2015. Whether or not it is necessary for the Joint Liquidators to demonstrate that Mr Chandler and Mr Henningson knew or ought to have known that insolvency was probable (and Lord Reed and Lady Arden both left this open in *Sequana* for future decision), I am satisfied that they either knew or ought to have known this on 26 June 2015. They knew that the group could not pay the June quarter's rents unless BHSGL entered into ACE II and that there was no reason to think that the position would be any better by the next quarter day even if they did so.

984. If it is necessary for me to do so, I also find that Mr Henningson and Mr Chandler ought to have known that it was more probable than not that the BHS Group would go into insolvent administration because BHSGL had been unable to obtain a sustainable working capital facility to give it sufficient time to implement the July 2015 Turnaround Plan. I accept that they were hopeful that Mr Hitchcock and Mr Morris would obtain such a facility in the new funding round. But in my judgment they ought to have appreciated that it was more likely than not that the new funding round would be unsuccessful for the reasons which Mr Perkins put to Mr Pilgrem.

985. If I had been satisfied that before entering into ACE II the BHSGL board considered the interests of creditors and decided in good faith that it was in their interests, I would have dismissed the claim under S.172. However, I am not satisfied that they did so. The decision to enter into ACE II was taken on 23 June 2015 and before the meeting with Olswang. Moreover, Mr Chandler's evidence about the meeting on 24 June 2015 at Olswang was as follows: "We did not consider whether to put the Companies into administration or liquidation. That did not, at the time, seem like a realistic thing to be contemplating." Finally, no minutes of the meeting were taken and Mr Chandler's handwritten notes of both meetings do not record any such discussion on either 23 June or 24 June 2015.

986. Mr Henningson is not recorded as being present at either meeting and the evidence that the BHSGL board considered the interests of creditors and decided in good faith to enter

into ACE II rests entirely on Mr Chandler's evidence that Mr Roberts' email dated 24 June 2015 reflected his own views. But I have found that if he had read it carefully and considered the issues which it raised, he would have called a board meeting to consider it before the ACE II documents were signed two days later: see [889] and [890]. Mr Roberts raised the right questions in his email but they were not addressed or answered. Accordingly, I find on a balance of probabilities that the BHSGL board did not consider the interests of creditors before entering into the ACE II Loan Agreement and the ACE Mezzanine Agreement or, indeed, the Loan Agreement and the Framework Agreement.

987. It is necessary, therefore, for me to go on and consider whether reasonable directors who had properly considered the interests of creditors and given them appropriate weight, would have decided that the interests of the creditors were paramount and, if so, whether it was in their interests to enter into ACE II: see *Charterbridge* and *Re HLC Environmental Projects Ltd* (above). For the avoidance of doubt, I apply the Notional Director standard in deciding this issue both by analogy with S.174 and because Pennycuick J applied the same standard in *Charterbridge* and his decision was followed by Jonathan Crow in *Extrasure* and by John Randall QC in *Re HLC Environmental Projects Ltd*.

988. If the members of the BHSGL board had considered their duty to creditors from 17 June 2015 onwards, then in my judgment they ought to have concluded that the interests of the BHS Group's existing creditors were paramount or, at the very least, that those interests should carry more weight than the interests of RAL, its sole shareholder. I reach this conclusion for the simple reason that RAL had no "skin in the game" to use Lord Briggs's expression. It is fair to say that it had paid the first £5 million of the Capital Injection (although the ACE I loan was secured on BHS Group assets and ultimately repaid out of the proceeds of sale of Atherstone). But in the very short period of its ownership, it had also extracted over £7.5 million in cash from the BHS Group to which it was not entitled and both Mr Henningson and Mr Chandler knew this to be the case.

989. Further, the price which Arcadia extracted from BHSGL for agreeing to ACE II was given effect in the Loan Agreement and the Framework Agreement and the effect of these agreements was that BHSGL was required to use the BHS Loan of £3.5 million and £6.5 million in respect of Marylebone House to repay Noah II and discharge

Arcadia from its liability to HSBC as guarantor. Instead of receiving £8.5 million of new money, BHSGL had to agree that these sums were used to discharge Noah II and to deprive the BHS Group of its only working capital facility.

990. If the directors had considered the interests of the BHS Group's existing creditors to be paramount or had put them before the interests of RAL, then I have no doubt that they ought to have concluded that it was in the interests of creditors to put BHSGL and the other Companies into administration immediately. They should have appreciated that ACE II was damaging to the interests of creditors such as the Trustees, employees and suppliers because of its onerous terms and because of its degenerative effect on the BHS Group's assets. They should also have appreciated that the Loan Agreement and the Framework Agreement would leave the BHS Group exposed and without a sustainable working capital facility. But even if they had not understood this, an experienced insolvency practitioner such as Mr Shaw would have given them this advice.

991. In my judgment, this case provides a good example of "insolvency-deepening activity" which Lord Hodge and Lady Arden debated in *Sequana*: see [544] to [546]. To use their language, ACE II and the Grovepoint Facility involved two last desperate throws of the dice. If Mr Topp and Mr Hitchcock had been able to implement the July 2015 Turnaround Plan, RAL would have taken the benefit of the enterprise value which the plan was intended to create. But the unsecured creditors not RAL were taking all the risk because the cost of onerous and expensive finance would erode and then exhaust the group's property assets if the plan failed (as it did). It is also my judgment that this outcome was only too obvious by 17 June 2015 at the latest even though BHSGL was able to obtain finance on equally onerous terms to get past the September quarter day and to pay most of the September quarter's rents.

992. Finally, I have considered whether Mr Henningson should also be held liable for any breach of S.172 because he was not present at either of the meetings on 23 June 2015 and 24 June 2015. In my judgment, he is equally liable because he negotiated the principal terms of ACE II on 17 June 2015 and accepted or agreed to the final terms on 25 June 2015. He chose not to give any evidence about ACE II and there is no documentary evidence to suggest that he ever considered the interests of creditors or agreed those terms because he honestly believed in good faith that they were. I have

already held that he agreed those terms in breach of S.171 but I also hold that in breach of S.172 he failed to consider the interests of the Companies' creditors.

(iii) S.174

993. I have found that Mr Henningson and Mr Chandler knew and understood the information which the Joint Liquidators allege was relevant on 26 June 2015. I have also found that Mr Chandler failed to take or act on the advice which Mr Roberts gave in his email dated 24 June 2015. Mr Henningson also received that email and there is no evidence to suggest that he even read it let alone that he took any action to raise it with his fellow directors. I find, therefore, that in breach of S.174 both Mr Henningson and Mr Chandler failed to heed or act on the advice of Mr Roberts.

994. Further, no minutes were taken of the decision on 23 June 2015 and no BHSGL board meeting was convened and recorded to consider the advice of Mr Roberts. In my judgment, Mr Chandler should have appreciated that it was necessary to call a meeting of the BHSGL board to discuss Mr Roberts' advice before Mr Chappell was authorised to execute the ACE II Loan Agreement and the ACE II Mezzanine Agreement and to record the reasons why they considered it to be in the interests of each of the Companies and its creditors. This was an important discipline which would have required the directors to focus on the issue carefully. I find, therefore, that in breach of S.174 Mr Chandler failed to call a BHSGL board meeting between 24 and 26 June 2015 to consider and record why it was in the interests of each of the Companies and their creditors to enter into ACE II.

995. Finally, Mr Henningson did not attend the meetings on either 23 June 2015 or 24 June 2015 whether in person or by telephone and I was given no explanation for his failure to do so. These were week days and his service contract provided that his normal working hours were 9 am to 5 pm. He did not give evidence that he was travelling on either of those days and I was not taken to any documents to suggest that he was. I have rejected his evidence that his functions as a director were limited and I have found that he was directly involved in agreeing the terms of ACE II. In my judgment, he should have attended both meetings and also acted on Mr Roberts' email by contacting his fellow directors to arrange a meeting to consider his advice. I find that in breach of S.174 he failed to do so.

(5) KD4: 13 July 2015

996. I dismiss the Trading Misfeasance Claim in relation to the July 2015 Turnaround Plan. I do so because Mr Chandler and Mr Henningson were not required to consider the plan until 16 September 2015 or to approve it until 14 October 2015. Moreover, I am not satisfied that the position of the BHS Group had materially worsened since 26 June 2015 to impose a duty to consider again the interests of creditors.

(6) KD5: Atherstone

997. I also dismiss the Misfeasance Trading Claim in relation to the sale of Atherstone. I accept that the use of £6,157,588.24 of the proceeds of sale to repay ACE I ought to have raised a serious question in the minds of the members of the BHSGL board whether this was in the interests of creditors. But even if they had considered it against the interests of creditors to repay ACE II, there was very little they could have done about it because Atherstone was secured to repay ACE I and, as I have found, the BHSGL board knew almost from Day One that RAL would be unable to repay it. In any event, I was not taken to the contract of sale or any of the conveyancing documents and the payment was not made until 1 September 2015 when the BHSGL board was considering further funding. In my judgment, therefore, it is better to treat the payment of £6,157,588.24 as part of the background to that decision.

(7) KD6: The Grovepoint Facility

(i) S.171

998. I dismiss the claim under S.171. Mr Curl suggested to Mr Chandler that Mr Chappell might have been motivated to enter into Grovepoint Facility by the prospect of generating more fees for RAL. There is some evidence to support this conclusion because Mr Chappell clearly instructed Mr Roberts that he intended to charge a fee of 4% or £2.7 million for entering into the Grovepoint Facility. However, Mr Chandler countermanded these instructions and the BHSGL board did not consider the brokerage fees (as I have called them) until much later. I cannot be satisfied, therefore, that any of the directors of BHSGL or BHSL exercised their powers for improper purposes in entering into the Grovepoint Facility.

(ii) S.172

999. I have accepted Mr Chandler's evidence that he did not believe or conclude that the Companies had no reasonable prospect of avoiding insolvent liquidation or administration when the BHSGL board resolved to enter into the Grovepoint Facility and I was not prepared to draw the inference that Mr Henningson knew that this was the case. However, I have found that Notional Directors carrying out their functions would have reached that conclusion for the reasons which I have given at [904]. But if that conclusion is wrong and there was a chink of light at the end of the tunnel, I am entirely satisfied that by 1 September 2015 both Mr Chandler and Mr Henningson ought to have known that it was more probable than not that the Companies would go into insolvent liquidation for those very same reasons.

1000. If I had been satisfied that before entering into the Grovepoint Facility the BHSGL board considered the interests of creditors and decided in good faith that it was in their interests, I would have dismissed the claim under S.172. But as with ACE II, I have considered the relevant evidence and found that they did not do so: see [844] to [847] and [851]. I must therefore approach their conduct objectively and consider whether applying the Notional Director standard reasonable directors would have decided that the interests of creditors were paramount and, if so, whether it was in their interests to enter into the Grovepoint Facility.

1001. I find that if they had considered the interests of creditors and balanced their interests against the interests of RAL, Mr Henningson and Mr Chandler would have treated the interests of RAL as subordinate to the interests of creditors for the reasons which I have given in relation to ACE II. Further, by 8 September 2015 £6,157,588.24 of the proceeds of sale of Atherstone had been used to repay ACE I and I have found that this gave rise to an immediate debt even though RAL did not acknowledge it until 3 March 2016 in the AOI.

1002. On any view, therefore, BHSGL was a very substantial creditor of RAL. On 27 August 2015 Mr Hitchcock calculated that RAL owed the BHS Group £15.8 million and on 26 November 2015 Mr Carver sent a schedule to Mr Treacy showing that RAL owed the BHS Group £8,466,564. Mr Carver had struck this balance after setting off a total sum of £5 million which BHSGL was treated as owing to RAL. In particular, he treated the

BHS Loan of £3.5 million as a loan by RAL to BHSGL and £1.5 million of the £6.5 million paid under the Framework Agreement as a debt due from BHSGL to RAL because it had only been able to subscribe for £5 million in unpaid shares in BHSGL. Finally, he also included the £500,000 received back from RAL out of the arrangement fee of £2 million.

1003. I am not satisfied that any of these debts were properly due from BHSGL to RAL whether on 8 September 2015 or at all. Arcadia made the BHS Loan directly to BHSGL pursuant to the terms of the SPA even though this was not reflected in the terms of the Loan Agreement and the Deed of Rectification was not executed until 12 February 2016. The balance of £6.5 million reflected Sir Philip Green's promise to pay £8.5 million out of the proceeds of sale of Marylebone House and it was intended to form part of the Capital Injection and not a loan. Finally, the sum of £500,000 was the amount which Mr Topp and Mr Chandler had been able to recover from RAL out of the unauthorised and improper arrangement fee of £2 million. Indeed, the inter-company balance did not reflect this payment at all and it was the subject of further debate between Mr Carver and Mr Treacy.

1004. But in any event, the total sum of £5 million did not reflect any actual cash or liquid funds which RAL had lent to BHSGL and were no more than a series of book entries designed to reduce the total amount of the inter-company loan. If the members of the BHSGL board had properly reflected on the way in which RAL had used its ownership of the BHS Group to extract as much cash as possible over the short period of its ownership, I have no doubt that they would have come to the conclusion that the interests of the creditors of the group were paramount and far outweighed the interests of the shareholder. I also have no doubt that they would have concluded that it was in the interests of creditors to put BHSGL and the other Companies into administration immediately and that they ought to have instructed an insolvency practitioner before the September quarter day.

(iii) S.174

1005. Even if I am wrong and Mr Chandler and Mr Henningson did consider the interests of creditors and decide in good faith that it was in their interests to enter into the Grovepoint Facility (or that their interests did not outweigh the interests of RAL), I find

that they failed to exercise reasonable care, skill and diligence in doing so. In particular, they failed to consider or act on Mr Turner's advice dated 25 August 2015. If they had considered the questions raised in paragraph 4.2 of that memo and done the simple arithmetical exercise which I have set out in [904](7) to (8) they would have appreciated that there was substantial value for unsecured creditors in Oxford Street and the collateral property pool which would be used up and would not be available if BHSGL entered into the Grovepoint Facility.

AA. The Individual Misfeasance Claims

(1) The Carlwood Payment

1006. The Joint Liquidators alleged in the Points of Claim that on or about 26 May 2015 Mr Henningson negotiated and accepted a commission of £300,000 from ACE for which he failed to account to any of the Companies. They plead the text which Mr Dellal sent to Mr Henningson that day and which I have set out at [969]. The Points of Claim then continue:

> "201. ACE paid Mr Henningson the agreed commission of £300,000 soon afterwards. The Applicants understand that the commission was paid to a company called Carlwood Capital SA ("Carlwood"), which issued an invoice to ACE on or about 28 May 2015 for the sum of £300,000, and ACE issued a payment instruction form on 19 June 2015 to its bank for the purpose of authorising a remittance of the same sum to a bank account held by Carlwood with a Swedish bank (SEB Stockholm). On the relevant invoice, Carlwood identified its address as 173 Sutherland Avenue, which was an address used by Mr Henningson on or about the date when the commission was paid. In the premises, it is to be inferred that Carlwood is ultimately beneficially owned and/or controlled by Mr Henningson. The commission was accordingly paid to (or to the order of) Mr Henningson and was paid for his ultimate benefit.
>
> 202. In providing services to ACE and/or in negotiating and/or accepting and/or retaining a commission from ACE while a director of the Companies, Mr Henningson breached his fiduciary duty to the Companies or any one or more of them in that:
>
> a. Mr Henningson was required to show single-minded loyalty to the Companies as his principals and not to act on both sides (as he admitted he had done in the text identified at Paragraph 200 above) and/or convey commercially sensitive confidential information concerning to the Companies to ACE;
>
> b. Mr Henningson was required not to derive any benefit from a third party from his directorship of the Companies and, if he did, to account

> immediately to the Companies as principal for any such benefit that that accrued to him as a consequence of his directorship of the Companies; and
>
> c. Mr Henningson has failed to account to the Companies for the commission, which he has held on constructive trust since he received it."

1007. In written evidence which he provided to the Pensions Regulator in answer to a request dated 30 July 2015 Mr Dellal stated that in around October 2014 Mr Henningson introduced him to Mr Chappell. He also stated that ACE agreed to pay a fee to Mr Henningson in the event that a transaction completed:

> "1. Details of the involvement of Allied Commercial Exporters Limited ("ACE") with RAL (formerly known as Swiss Rock Ventures Limited ("Swiss Rock")) including details of who made the original introduction between ACE and RAL/Swiss Rock, the basis on which the initial approach was made and the nature/purpose of ACE's involvement with RAL/Swiss Rock and/or any of its directors.
>
> 1.1 Allied Commercial Exporters Limited ("ACE") was introduced to Retail Acquisitions Limited (formerly Swiss Rock Ventures Limited) ("RAL") by Lennart Henningson ("Mr Henningson"), an individual known to ACE, in around October 2014. As is typical for ACE and the property industry more generally, ACE agreed to pay (and did pay) a fee in the event that the transaction completed.
>
> 1.2 ACE was introduced to RAL in order that ACE would provide financing to assist RAL's acquisition of the BHS group of companies and its subsequent working capital requirements. After the introduction, other than for this purpose, ACE had no dealing with RAL or any of its directors.
>
> 1.3 No other fees were paid by ACE to Mr Henningson, RAL, any BHS entity or any other individual in relation to the transactions."

1008. In their letter dated 5 April 2018 Jones Day also asked Mishcon to confirm whether any referral or introductory fee or commission was paid by ACE to any individual or company, whether or not directly associated with RAL or any BHS entity. In their letter dated 4 July 2018 Mishcon answered that question as follows:

> "The only such fee paid by ACE, J9 or any of its associated entities or individuals to any individual or company, whether or not directly associated with RAL or any BHS entity, or vice versa, in connection with any of the transactions entered into between ACE, J9 or any associated entities or individuals on the one side and RAL or any BHS entity on the other, was an agreed introducer's fee paid to Mr Henningson."

1009. By contrast, Mr Henningson's evidence in Henningson 1 was that his text dated 26 May 2015 did not relate to any property transaction involving the BHS Group and he denied

that he received the sum of £300,000 in any event. He also denied any connection with Carlwood:

> "100. As I have mentioned above, I have known the Dellal family for many years and prior to my involvement with BHS. Mr Dellal and I had been involved in numerous business deals together. 101. There is a text message dated 26 May 2015 and timed at 19:38 from me to Mr Dellal in which I typed the words: 'ok let's go for the 300k and I give you the details tomorrow ... '. 102. The '300k' referred to in that text message was not related to any property transaction involving the BHS Group. The deal that was being discussed in that sentence related to a central London property (I am not at liberty to divulge further details in relation to this as I signed a non-disclosure agreement). 103. The remainder of the text message relates to a different subject matter. I went on to discuss with Mr Dellal the fact that Mr Chappell had decided that all real estate transactions were to be executed by him and Mr Sherwood. In any event, however, I did not receive the £300,000 from ACE or Mr Dellal - whether for the deal that he and I were discussing or otherwise."
>
> (Henningson 1)

> "6. On 27 January 2023, coincidentally only two days after service of my first witness statement, two documents were disclosed by the Applicants. The first of the two documents appears to be an invoice dated 28 May 2015 in the amount of £300,000 addressed to Allied Commercial Exports Ltd from 'Carlwood Capital SA' with the description 'consultancy fee concerning advice with the purchase of North West House at Marylebone Road London NWJ 5QD' (the 'Carlwood Invoice'). The Carlwood Invoice references an account at SEB Stockholm Sweden with IBAN SE24 5000 0000 0522 8100 8231 with reference 'CARLWOOD CAPITAL SA Depot 762484'. 8. The second of the two documents appears to be a payment instruction dated 19 June 2015 from Mr Dellal on behalf of Allied Commercial Exporters Ltd to HSBC Private Bank (UK) Ltd to transfer the amount of £300,000 to the account referenced in the Carlwood Invoice. 9. I can confirm that I have no connection whatsoever to Carlwood Capital SA or indeed the bank account referenced at SEB Stockholm on the Carlwood Invoice. I therefore instructed my solicitors to make my position clear to the Applicants by way of letter dated 13 February 2023. A copy of this letter is attached at [LH2/2]."
>
> (Henningson 2)

1010. Mr Henningson also gave evidence that 173 Sutherland Avenue was an address which was provided to him by Mr Chappell for the sole purpose of opening a UK bank account into which his salary would be paid and that was his only connection with it. He continued as follows:

> "12. I understand from my legal team that 'Carlwood Capital SA' appears to be an entity incorporated in the British Virgin Islands. From my own experience in the finance and banking sector, it strikes me as highly unusual that a Swedish bank would permit a company registered in the British Virgin Islands to open a bank account at their bank (due to the applicable AML regulations which banks are subject to in Sweden). 13. Furthermore, I instructed my legal team to write to the bank named on the Carlwood Invoice, SEB Stockholm, to ask the bank to confirm that I have no connection to the bank account. A copy of correspondence between my solicitors and SEB Stockholm is attached at [LH2/3-5]. I will provide any further updates to the Applicants if and when received from the bank."
>
> (Henningson 2)

(i) The pleaded case

1011. Ms Hilliard and Ms Earle submitted that this claim was not adequately pleaded because it was not "a proper pleading in fraud or dishonesty". They also submitted that the Joint Liquidators had failed to give adequate particulars of the allegation:

> "(1) What the services were that Mr Henningson is alleged to have provided to ACE in return for which Mr Henningson is alleged to have received the secret commission from ACE while a director of the Companies. (2) When the services were provided by Mr Henningson. (3) The particular company or companies of which Mr Henningson was a director in respect of which he is alleged to have provided the services to ACE. (4) The manner or way Mr Henningson is alleged to have acted on "both sides" as alleged. (5) When Mr Henningson is alleged to have acted on "both sides". (6) What commercially sensitive information Mr Henningson is alleged to have conveyed to ACE."

1012. I reject those submissions. S.176 required the Joint Liquidators to plead and prove that Mr Henningson accepted a benefit from a third party conferred by reason of either (a) his being a director or (b) his doing (or not doing) anything as director: see [562]. The Joint Liquidators have done so. They have pleaded the Carlwood Payment, that Mr Henningson was a director at the time and that this benefit accrued to him as a consequence of being a director. But in any event, I am satisfied that the Joint Liquidators gave adequate particulars of the factual case which Mr Henningson had to meet:

(1) The services for which Mr Henningson is alleged to have been paid the fee are set out on the Carlwood Invoice itself, namely, consultancy services for advice given

in relation to the purchase of North West House. The Joint Liquidators expressly pleaded the invoice: see the Points of Claim, ¶201.

(2) They also alleged that before the completion of the SPA Mr Chappell and/or Mr Henningson negotiated an arrangement with ACE that they would procure the sale of North West House and ACE would lend £5 million. They also alleged that at 7.18 pm on Day One Lowland sold North West House to ACE: see the Points of Claim, ¶113 to ¶115.

(3) They also alleged that Mr Chappell and/or Mr Henningson were acting in their capacity as directors of Lowland: see the Points of Claim, ¶119.

(4) Finally, they alleged that Mr Henningson accepted in the text dated 26 May 2015 that he had acted for both sides of the transaction, i.e. both Lowland and ACE. In the text, he did not use the words "both sides" but this was the sense which the Joint Liquidators invited the Court to make of the words: "Next time I don't want to be in between when we do the deal!": see the Points of Claim, ¶202a.

(5) They pleaded in terms that Mr Henningson had provided services to ACE and/or negotiated on its behalf and accepted a commission from ACE whilst a director of the Companies: see the Points of Claim, ¶202.

(6) They did not plead that Mr Henningson conveyed commercially sensitive information to ACE but only that it was part of his duty: see the Points of Claim, ¶202a. Indeed, the Joint Liquidators did not ask the Court to find that Mr Henningson had conveyed confidential information to ACE other than the business opportunity itself.

(ii) The Evidence

1013. Mr Henningson accepted the authenticity of the Carlwood Invoice. However, Ms Hilliard and Ms Earle submitted that I should accept Mr Henningson's evidence because there was no evidence that he was the author of the Carlwood Invoice and the similarities between this invoice and other invoices which he accepted that he had submitted to BHSGL for payment was not compelling. They also submitted that 173 Sutherland Avenue was not an address at which he had ever resided and the fact that Mr

Robb used that address was not compelling either. They also dismissed a letter dated 5 May 2015 in which Mr Chappell stated that Mr Henningson's address was 173 Sutherland Avenue because it was written for the purpose of opening a bank account but was never used for that purpose.

1014. I reject Mr Henningson's evidence and I find on a balance of probabilities that on 26 May 2015 Mr Dellal orally agreed with Mr Henningson to pay a commission of £300,000 for introducing him to Mr Chappell and to the opportunities to provide finance to RAL and to acquire North West House. I also find that on 19 June 2015 ACE paid £300,000 to Carlwood at Mr Henningson's request and for his benefit pursuant to this agreement. I reject Mr Henningson's evidence and make this finding of fact for the following reasons:

(1) Mr Henningson's explanation for his message dated 26 May 2015 is highly improbable and I reject it. It is clear and obvious that he was referring to a payment of £300,000 for the introduction to Mr Chappell and to the transactions with the BHS Group. In particular, he contrasted "this deal" with future deals and he justified the amount of the payment on the basis that it had been difficult and that Mr Chappell had not been honest with him. Indeed, it is clear that he had asked for more than £300,000 but ACE was unwilling to pay it.

(2) In his message Mr Henningson also told Mr Dellal that he would give him "the details" the following day. The details which Mr Dellal needed to have were the identity of the payee and its bank details. It is no coincidence, in my judgment, that on 28 May 2015 Mr Dellal received the Carlwood Invoice which contained those details and only two days after Mr Henningson agreed to provide them.

(3) It might just have been possible to explain the timing of the Carlwood Invoice as a coincidence if the narrative had not referred to advice in relation to the purchase of North West House. But even if Carlwood had been an unconnected third party or the offshore vehicle for a third party, then Mr Henningson ought to have been able to explain who that third party was. If Mr Dellal had used an introducer or agent, then Mr Henningson would have known who this third party was. He was a director of the company selling the property and even on his own evidence he knew about the sale before it took place on 11 March 2015.

(4) By the same token, such a third party would have left a documentary footprint. But there was none. Ms Hilliard and Ms Earle did not refer to any contemporaneous documents from which they could identify a third party who was involved in the transaction and who might have been entitled to a commission. Indeed, Mr Henningson accepted that he introduced Mr Chappell to Mr Dellal and his own text and iMessages from 11 March 2015 prove beyond any doubt that Mr Dellal negotiated directly with either Mr Henningson or Mr Chappell.

(5) It is also an unlikely coincidence that Carlwood, a BVI company, would provide the bank details of a Swedish bank. But if I had had any real doubt that Mr Henningson was responsible for submitting the Carlwood Invoice, the similarities between the Carlwood Invoice and two other invoices issued by Mr Henningson dated 23 March 2015 and 22 February 2016 were compelling. I accept that since they were paid to a European bank, it is unsurprising that they were in a continental style and that it was not unique. I also accept that the sequence of numbers in the date of the Carlwood Invoice did not correspond with the other invoices: "Stockholm 2015-03-23", "London 28-05-2015" and "Stockholm 2016-02-22". But what I found compelling was the use of the location before the date and the way in which the requests for payment were expressed: "Amount to be paid "£ 15.000:-", "The amount is £ 300.000:-" and "Amount to be paid is £ 350.000:-"

(6) Mr Chappell's letter dated 5 May 2015 also provides independent evidence of a connection between Mr Henningson and the Carlwood Invoice. In that letter Mr Chappell stated that the address given on the invoice, 173 Sutherland Avenue, was Mr Henningson's current address. The purpose of the letter was to enable Mr Henningson to open a UK bank account and he had obviously been asked to provide a current local address.

(7) The Joint Liquidators were also able to establish another connection between Mr Henningson, Carlwood and 173 Sutherland Avenue. In early March 2015 Mr Henningson had approached Mr Robb for a loan to pay the costs of the acquisition. On 19 December 2016 Mr Robb was appointed to be a director of Carlwood. Moreover, they were both directors and shareholders of a company

called Anglo-Scandinavian Investments plc (which went into liquidation). 173 Sutherland Avenue was also owned by Mr Robb's partner, Ms Victoria Law, and Mr Robb used it as his own address for credit purposes.

(8) In the light of this material I found Mr Henningson's explanation for the letter dated 5 May 2015 wholly implausible, namely, that Mr Chappell had given him this address to use to apply for a bank account. He did not explain why Mr Chappell would have asked him to use this address and, if so, why he would have agreed to do so if it was not in fact his current address. In my judgment, this was another lie to explain an inconvenient document.

(9) Finally, it was another unlikely and implausible coincidence that on 18 June 2015 Mr Henningson chased Mr Dellal for payment and a day later ACE paid £300,000 into Carlwood's account at SEB Stockholm Sweden. Mr Henningson did not attempt to explain his message on 18 June 2015 but simply asserted that he had never been paid. I reject this evidence and I draw the obvious inference that the account to which Mr Henningson was referring in his message was Carlwood's account in Stockholm and that Mr Henningson's message prompted Mr Dellal to give instructions for the payment.

1015. Ms Hilliard and Ms Earle also submitted that the Joint Liquidators should have done far more to prove their case and, in particular, they should have obtained a court order in the BVI to obtain details of Carlwood's beneficial owner since incorporation. Mr Curl submitted that this would have been impossible. There was no evidence before me apart from the certificate of incorporation, the list of directors filed with the BVI Financial Services Commission and a company search report. None of those documents disclosed the beneficial owner of Carlwood and the only information available was that Mr Robb had been a director from 19 December 2016.

1016. Ms Hilliard did not call evidence from an expert on BVI law to satisfy the Court that either the companies registrar or the company itself could have been compelled to disclose the beneficial owner of Carlwood since its date of incorporation on 6 November 2012. I am not satisfied, therefore, that the Joint Liquidators could have obtained such an order. But in any event it was always open to Mr Henningson to call Mr Robb to identify the beneficial owner of Carlwood. Given his long association with Mr

Henningson, I see no reason why he could not have done so and Mr Henningson did not provide one.

1017. Finally, Ms Hilliard submitted that the Court should have in mind that the more serious the allegation and the less likely it is that the event occurred, the stronger should be the evidence before the Court concludes that the allegation is established on the balance of probabilities: see *Re H (Minors)* [1996] AC 563 at 586E (Lord Nicholls) and *Secretary of State for the Home Department v Rehman* [2001] UKHL 470 at [55] (Lord Slynn). She also submitted that it was remarkable that the Joint Liquidators had not called Mr Dellal (or another witness from ACE) to confirm that the Carlwood Invoice was submitted by Mr Henningson and that ACE paid £300,000 to Mr Henningson.

1018. I accept that the Joint Liquidators made a serious allegation against Mr Henningson and that if I rejected his evidence, then I was bound to reach the conclusion that he had deliberately misled the Court. But they were not asking the Court to make an unlikely or improbable finding of fact. Mr Henningson had to accept that he was discussing the payment of a commission of £300,000 with Mr Dellal for a property transaction. The dispute was whether they were discussing the purchase of North West House and whether the commission was ever paid. In the event, I find Mr Henningson's explanation far less convincing than the one given by the Joint Liquidators. He invited me to believe that he agreed a fee of £300,000 in relation to a property transaction which he was unable to disclose, that he chased for payment but that payment was never made despite his frequent contact and longstanding relationship with Mr Dellal.

1019. Finally, it was a weakness in their case that the Joint Liquidators did not call Mr Dellal to give evidence or provide a witness statement to confirm precisely when he reached agreement with Mr Henningson and what event generated the commission. However, he answered a request to the Pensions Regulator within months of making the payment and there is no obvious reason why he would give false information. Moreover, Ms Hilliard and Ms Earle did not give me an explanation why Mr Henningson could not have called Mr Dellal himself or, at least, release Mr Henningson from any duty of confidentiality to enable him to defend the claim.

1020. In the absence of any oral evidence from either Mr Henningson, Mr Dellal or Mr Robb, I had decide whether the documentary evidence adduced by the Joint Liquidators was

sufficiently compelling that I could properly draw the inference that Mr Henningson received or took the benefit of the Carlwood Payment. For the reasons which I have given, I draw that inference and I find that he received or took the benefit of the Carlwood Payment.

1021. Ms Hilliard advanced an alternative argument that even if ACE agreed to pay (and did pay) a commission of £300,000 to Mr Henningson in relation to the sale of North West House, then it was not a secret commission and Mr Henningson did not commit a breach of S.176 because he was not a director of Lowland at the time when the introduction was made and had no further involvement in the sale of North West House or ACE I. I reject that argument for the following reasons:

(1) S.176(1) provides that a director must not "accept" a benefit from a third party conferred by reason of being a director or doing (or not doing) anything as director. The section does not impose a temporal limitation. Instead, it requires a causal connection between the office and the benefit. Further, the use of the word "accept" reflects the continuing duty of a director or other fiduciary to disclose a secret commission to their principal at any time before they receive it. Even if Mr Dellal agreed to pay Mr Henningson a commission before his appointment as a director of Lowland on 11 March 2015, he did not in fact accept it until 19 June 2015 when he had been a director for three months.

(2) But I also find that ACE did not agree to pay Mr Henningson the commission of £300,000 until 26 May 2015. Whether or not Mr Dellal had agreed in principle to pay Mr Henningson a commission at an earlier stage, it is clear from their text messages that Mr Dellal and Mr Henningson did not agree the amount of the commission until that day.

(3) I accept that it is not enough for the Joint Liquidators just to prove that the fee was agreed and Mr Henningson accepted it whilst he was a director. They also had to prove that there was a causal connection between his role as a director and the fee. But I reject the submission that Mr Henningson had no involvement in the decision-making process and I find that he authorised the sale of North West House in his capacity as a director of Lowland: see [1022] to [1029].

(4) I am also satisfied that Mr Dellal would not have agreed to pay Mr Henningson a commission of £300,000 or, indeed, paid him the money unless or until the introduction had resulted in ACE entering into a profitable transaction with RAL. He stated as much in his response to the Pensions Regulator dated 30 July 2015: see paragraph 1.1. Accordingly, I find that Mr Henningson accepted a benefit from ACE by reason of his doing something as a director of Lowland, namely, authorising the sale of North West House.

(5) Furthermore, Mr Dellal did not authorise the payment until 19 June 2015 when Mr Chappell and Mr Henningson had agreed in principle to ACE II on behalf of BHSGL. The inference which I draw is that Mr Dellal waited until after ACE had resold North West House at a profit before confirming that he would pay a fee or, indeed, agreeing the amount. I have also found that one of Mr Henningson's purposes in agreeing to those terms was to ensure that he received the commission. Even if, therefore, he did not authorise the sale of North West House in his capacity as a director of Lowland, I find that Mr Henningson accepted a benefit from ACE by reason of his doing something as a director of BHSGL, namely, agreeing to ACE II.

(2) North West House I: the sale

1022. The Joint Liquidators alleged that Mr Chappell and Mr Henningson caused or permitted North West House to be sold at an undervalue for £32 million. They alleged that this conduct amounted to breaches of S.171 to S.175 and also the duty to consider the interests of creditors. I have, therefore, to decide whether Mr Henningson knew on or before 11 March 2015 that North West House was being sold for £32 million to ACE and, if so, that this was a sale at an undervalue. I also have to explain my reasons for deciding that Mr Henningson approved the sale in his capacity as a director of Lowland. His evidence in relation to these issues is as follows:

> "66. By 11 March 2015, when I became a director of the BHS Group and RAL, it was my very clear understanding that the sale of North West House was already a done deal between RAL, ACE and Sir Philip Green. The mechanics of the transaction for the acquisition of the BHS Group by RAL were presented to me as a fait accompli and it was not something I was ever asked to consider and give my opinion on (nor would I have felt capable of doing so given that this issue fell outside of my agreed role). 67. I do not recall attending a board meeting, nor have I seen a minute of

> a board meeting, where the sale of North West House was voted upon. Rather, I recall Mr Chappell telling me informally that the transaction had been negotiated and agreed between RAL, ACE and Sir Philip Green and that the professional advisors (which I understood to mean the BHS Group's accountants and lawyers) were satisfied with the deal."

1023. Mr Henningson accepted in this passage that he was aware by 11 March 2015 that North West House was to be sold to ACE. Indeed, he had little choice but to accept this because the minutes of the RAL board meeting held at 2 pm that day record that he was told that North West House was to be sold for £32 million on completion. His evidence that he had not seen minutes of a board meeting of Lowland (where the sale was voted upon) was also correct because no minutes of such a meeting were taken. However, I reject his evidence that the transaction had been negotiated between RAL, ACE and Sir Philip Green, that it was presented to him as a fait accompli or that any professional advisers had given advice that they were satisfied with the deal. I do so for the following reasons.

1024. I have found that ACE paid Mr Henningson a secret commission of £300,000 for introducing Mr Dellal to Mr Chappell. Moreover, by 30 January 2016 Mr Dellal and Mr Chappell had agreed a put option under which Swiss Rock could require ACE to purchase North West House. There is no suggestion that Sir Philip Green was ever involved in these negotiations and there was a very important reason why both Mr Dellal and Mr Chappell did not want him involved. This is because ACE had agreed to advance £35 million to Swiss Rock to pretend to Sir Philip Green and Arcadia that it had substantial funds available to invest in the BHS Group.

1025. I have also found that Mr Dellal and Mr Chappell agreed the sale of North West House at 16.42 on 11 March 2015 and that Mr Henningson was fully aware of the negotiations based on his text and iMessages. I was not taken to any documents by Ms Hilliard to establish that Sir Philip Green had any involvement in those negotiations between 7 and 11 March 2015 and she did not put this to Mr Chandler, Mr Topp or Mr Bourne.

1026. Finally, there is no evidence that Mr Chappell and Mr Henningson asked Olswang or GT for advice whether they should proceed with the sale of North West House or that Olswang and GT gave that advice. Ms Hilliard did not draw my attention to any instructions to GT or Olswang or any advice which they gave. Nor did she put these documents to any of the witnesses. Moreover, I am satisfied that Mr Chappell and Mr

Henningson did not give proper instructions to GT in relation to the sale because they were not told about the payment to RAL or its purpose.

1027. On 10 March 2015 Mr Roberts sent Mr Chappell and Mr Henningson drafts of the contract for sale and transfer of North West House and Mr Henningson forwarded them on to his gmail account. I can see no reason why Mr Roberts would have sent these documents to Mr Henningson unless he expected him to approve them in his capacity as a director of Lowland. I also draw the inference that he did approve them because the sale took place the following day.

1028. I am driven to the conclusion, therefore, that this is another occasion on which Mr Henningson deliberately lied to the Court in order to distance himself from a transaction in which he was fully involved. Contrary to Mr Henningson's evidence, I find as a fact that Mr Henningson participated in the negotiations between Mr Dellal and Mr Chappell and that he was fully aware that Mr Chappell intended to sell North West House to ACE immediately upon completion of the sale of the shares in BHSGL. Further, in order to authorise or give effect to that sale RAL had to appoint at least one other director of Lowland and I find that Mr Chappell appointed Mr Henningson for that purpose and that between 2 pm and 7 pm on 11 March 2015 Mr Chappell and Mr Henningson approved the sale of North West House to ACE.

1029. In making these findings of fact I place significant reliance on the text messages between Mr Dellal, Mr Chappell and Mr Henningson on 11 March 2015. It is clear from those messages that Mr Chappell met Mr Dellal during the day and that Mr Henningson spoke to him by phone. It is also clear from those messages that the three of them contemplated a second phase of their deal. On 17 March 2015 at 23.08 Mr Dellal wrote to Mr Chappell with a copy to Mr Henningson stating as follows:

> "How's it all going? I imagine you haven't had too much time to rest. Once the dust has settled for a minute or 2, let's have a catch up and go over the next phase. Well done again. I've been hearing stories at how many people tried to be in your shoes."

1030. I also find that Mr Henningson received Vail Williams' letter dated 11 March 2015 and knew that they had valued North West House for £40 million with a 16 month leaseback to the BHS Group at a nil rent because the minutes of the RAL board meeting stated that it had been obtained "for circulation". Mr Henningson did not deny that he had

received and seen this letter in either of his witness statements. Indeed, he did not refer to it at all even though the Joint Liquidators specifically alleged that he was aware of it. In the light of these findings of fact I now consider the individual claims against Mr Henningson.

(i) S.171

1031. Mr Curl and Mr Perkins submitted that the reason why Mr Chappell and Mr Henningson were willing to sell North West House at a significant undervalue was because they were desperate to secure ACE I and enable RAL to make the first £5 million of the Capital Injection and to complete the SPA. They also submitted that Mr Chappell and Mr Henningson had been unable to obtain any other source of funding and were willing to accept whatever price Mr Dellal was prepared to accept. Moreover, RAL needed cash to pay its professional fees and the only available source of funds was the proceeds of sale of North West House.

1032. I accept that submission and I find that the primary or dominant purpose of Mr Chappell and Mr Henningson in approving the sale of North West House for £32 million on 11 March 2015 was to obtain £5 million which RAL could use to make the first instalment of the Capital Injection and to release funds to pay its costs of the acquisition for the following reasons:

(1) Mr Henningson gave evidence that his role was to advise Mr Chappell on "potential finance options" but he had only been able to raise £5 million from ACE. This was only half of the Capital Injection which RAL was required to make under the SPA and the inference which I draw is that Sir Philip Green would have refused to complete if RAL had been unable to fund a minimum of £5 million of hurt money which was required to finance the existing facility provided by the BOS.

(2) Moreover, the terms of ACE I itself demonstrate how desperate Mr Chappell and Mr Henningson must have been on Day One. They agreed that RAL would repay £2 million within 5 days working days even though they had no funds available and RAL was bound to default unless RAL could use the proceeds of sale of North West House to repay it.

(3) RAL had no funds available to pay any of the costs of the acquisition on completion. Again, the attempts to raise funds from Mr Robb and Mr Davis confirm how desperate Mr Chappell, Mr Henningson and Mr Parladorio had both become.

(4) Finally, this desperation is evident from an email dated 20 August 2018 which Mr Robb sent to Mr Louis Bailey of FRP Advisory on behalf of the Joint Liquidators explaining the background to his exchange of emails with Mr Henningson on 5 March 2015:

> "I have known Mr Henningson socially for more than 10 years. Now and then he presents opportunities to me, nothing has ever materialised. Same situation regarding the Swiss rock proposal. Mr Henningson called me and asked if I could meet with him and his colleague Mr Chappel [sic] regarding a bridge financing. I agreed to meet and asked my lawyer to join in a private capacity to listen to the proposal. It was a very short meeting where they presented their situation and went on to offer a ridiculous amount for a short term loan. I politely asked for a bit further documentation which I received and previously forwarded to yourselves. We had a few follow up phone calls, but from my point and the knowledge I have about Mr Henningson and Mr Chappel [sic] it was nothing I wanted to get involved in despite the substantial offer being made for the loan. Both myself and my lawyer felt they were completely out of their depth."

1033. I also find that this purpose was not a proper purpose and that Mr Chappell and Mr Henningson authorised the sale of North West House for £32 million in breach of S.171(1)(b). It was contrary to Lowland's interests to sell North West House for £8 million less than the value placed on it by Vail Williams and in RAL's interests for Lowland to sell North West House at that price to obtain the ACE I loan and the primary or dominant purpose of Mr Chappell and Mr Henningson in approving the sale was to further RAL's interest and to obtain that loan.

(ii) S.172

1034. I also find that Mr Chappell and Mr Henningson authorised the sale of North West House in breach of S.172 and their duty to act in the way in which they considered in good faith would be most likely to promote the success of Lowland. For the following reasons I am satisfied that both Mr Chappell and Mr Henningson did not act in good faith and knew that it was not in the interests of Lowland to sell the property at an undervalue:

(1) Mr Chappell and Mr Henningson attended a number of board meetings on 11 March 2015 all of which were recorded in minutes taken by Olswang. But no minutes were taken of their decision to authorise the sale of North West House and they did not ask Olswang to produce minutes of the Lowland board meeting. It is also clear from Mr Sherwood's email dated 7 May 2015 that Mr Chappell and Mr Henningson led Mr Sherwood to believe that Sir Philip Green had sold North West House directly to ACE.

(2) Lowland did not take independent valuation advice before the sale even though Mr Chappell and Mr Chandler knew that Mr Sherwood had advised RAL that it was worth £40 million. In my judgment, honest and reasonable directors would have obtained an independent valuation on behalf of Lowland to confirm that the price of £32 million was the open market value before authorising the sale.

(3) The minutes of the BHSGL board meeting on 8 May 2015 contained an explanation for the price increase which was untrue and which Mr Chappell and Mr Henningson both knew to be untrue. The terms of ACE I did not permit the BHS Group to occupy North West House rent free for a period which would justify a rent of £3 million. In fact, the true position was quite the reverse. BHSGL had agreed to pay ACE I £3,320,000 for two years and to provide a deposit of £750,000. However, this arrangement was not reflected in the lease which Lowland had granted immediately before completion but in the ACE I Loan Note and the Escrow Agreement.

(4) I am also satisfied that the statement in the minutes that Mr Dellal had instructed a team of experts and had spent considerable time and effort in increasing the value of the property was a complete fabrication by Mr Chappell and one with which Mr Henningson was prepared to go along. I was taken to no documents to suggest that this was the basis of the negotiations between Mr Chappell and Mr Dellal or to suggest that he ever gave any instructions or carried out any work to improve the value of the property during the 55 days of ACE's ownership. Indeed, both Mr Chappell and Mr Henningson knew well that Vail Williams had valued North West House at £40 million for RAL and on the basis that the BHS Group would occupy the premises rent free for 16 months.

(5) This conclusion is supported by the expert evidence. The property experts were agreed that on 11 March 2015 the market value of North West House was £40.5 million. Moreover, Ms Seal set out the planning history of the property and there is no suggestion that any application was made in the 55 days during which ACE owned the property. She also gave evidence that the property was resold for £58.5 million in July 2018 after a £14 million refurbishment.

(6) The inference which I draw is that Mr Chappell and Mr Henningson did not wish their advisers or third parties to know that they were authorising the sale of North West House at an undervalue of £8 million both to disguise the use to which they proposed to put the proceeds of sale but also because they were concerned about the reaction of the Pensions Regulator. I also draw the inference that when journalists began to question the transaction they decided to lay a false paper trail to justify their decision.

(7) Finally, this inference is supported by the curious form of the documents which were used to give effect to ACE I. Nobody attempted to explain to me why the parties should have agreed that Lowland would grant a two year lease at a peppercorn to BHSL immediately before the sale and that BHSGL should then enter into an entirely separate document (i.e. the ACE Loan Note I) agreeing to pay £3.32 million in rent for the same period and also to provide security for the rent of £750,000. On analysis, the obvious explanation is that Mr Chappell and Mr Henningson did not wish third parties (and, in particular, the Trustees and the Pensions Regulator) to know that they had really sold the property for less than £30 million.

(iii) S.173

1035. Mr Curl submitted that even if I accepted Mr Henningson's evidence at face value, it establishes that he failed to exercise independent judgment in breach of S.173. I accept that submission. Mr Henningson's only reasons for his failure to bring any independent judgment to bear on the decision to sell North West House is that the terms had been agreed and that it did not fall within his role. I reject both of those reasons. I have found that his role as an executive director was not limited in any way and his duty on appointment as a director of Lowland was to familiarise himself with the terms of the

proposed sale and to exercise his judgment in deciding whether it was in the interests of the company. Even on his own evidence, he failed to do so.

(iv) S.174

1036. I am also satisfied that Mr Henningson failed to exercise reasonable care to the Notional Director standard in breach of S.174. Any Notional Director who had seen Vail Williams' letter dated 11 March 2015 would have refused to authorise the sale of North West House until Lowland had obtained its own independent valuation to confirm whether £32 million was the true market value of the property on the full terms proposed by ACE. Mr Henningson failed to do so.

(v) S.175

1037. I find that in breach of S.175 Mr Henningson failed to avoid a situation in which he had a direct conflict with the interests of Lowland in relation to the exploitation of one of Lowland's major property assets. On 6 March 2015 he was appointed a director of RAL and on 11 March 2015 he accepted appointment as a director of Lowland in circumstances where there was an actual conflict between the interests of both companies. In my judgment, he should not have accepted appointment as a director of Lowland.

1038. Finally, I have considered whether it could be said that the situation could not reasonably be regarded as likely to give rise to a conflict because RAL owned the entire issued share capital of BHSGL and Lowland was a wholly owned subsidiary of BHSGL. After consideration I reject that argument. By the afternoon of 11 March 2015 Lowland had two directors only and both had a conflict of interest. Their decision to sell North West House could not be ratified under S.175(4) to (6). Moreover, the existence of an actual conflict of interest inhibited both Mr Chappell and Mr Henningson from exercising their duty to have regard to the matters set out in S.172(1)(a) to (e).

(3) North West House II: the proceeds

1039. Mr Henningson' evidence was that he was unaware of the payments which Olswang made to RAL, to Mishcon and to Mrs Ismailjee out of the proceeds of sale of North West House:

> "70. I did not cause or allow or approve any of payments out from the sale proceeds of North West House. I do not recall attending a board meeting, nor have I seen a minute of a board meeting, where I was asked to vote upon the payments out from the sale proceeds. 71. I did not even know that the payments referred to at paragraphs 130 of the Amended Particulars of Claim had been made until after the event, when I was served with this claim. 72. In any case, payments out of this nature did not fall within my agreed role."

1040. I reject Mr Henningson's evidence that he was unaware of the payments by Olswang to RAL until he was served with the Application Notice or the Points of Claim. In his written answers to the Insolvency Service which Mr Ring sent to Mr Ramsey on 24 October 2016 he admitted that he knew that BHS funds had been used to pay the costs of acquisition:

> "There was only one loan made by BHS to RAL. This was in respect of the fees and costs for acquisition. RAL had agreed not to load BHS with debt immediately, but the promised payments were not made by Arcadia/ SPG/Taveta to cover it requisition [sic] costs, so the fees and costs had to be met, originally on a temporary basis, by a loan from BHS to RAL. I had no involvement with this but am aware that some of the loan payments were to be set against certain MSA fees of RAL. It is my understanding that the loan reduced from £7m to 5m in approximately 12 months. I was aware of and approved the normal corporate structure whereby the acquisition costs and expenses of acquiring a large company (i.e. BHS) would be reconciled within group structure accounting and the loan would be set against income/profits or the target trading company. The BHS companies never reached the stage or finalising and filing accounts for the period and this has not yet been undertaken."

1041. In an interview with the Insolvency Service on 18 January 2017 Mr Parladorio gave a very similar account. He was asked how the RAL board expected to pay the fees of the acquisition. His evidence was that the original intention was to pay them out of the proceeds of Marylebone House but when that ceased to part of the acquisition, it was agreed that the fees be paid out of the proceeds of sale of North West House.

> "SIMPSON: Can you explain to us what the thoughts were and what's the Ral directors of, about how those costs would be met and how that perhaps changed up to and after completion? PARLADORIO: (pause) I, I believe my understanding was that those costs were going to be met um through the, the monies that Dominic Chappell had agreed with Sir Philip as to the Marylebone House arrangements. SIMPSON: Yes. So you get to the position of when you know that Marylebone House is not going) to be part of the deal. What do the RAL directors think of next and as. as a possible source of funds to meet the fees? PARLADORIO: Well then we're told by

> Dominic that, that although Marylebone House is not being purchased that, instead, that, that, the, if you like, the profit that was going to be made on it and some more .... SIMPSON: Hmm. PARLADORIO: ... is going to be, is going to be paid instead. So in that sense that it was neutral or, or better for RAL. SIMPSON: Those monies don't come in though. The fees still have to be paid PARLADORIO: Yes. SIMPSON: What arrangement is there put in place to meet them? PARLADORJO: To meet the fees? SIMPSON: Yes. PARLADORIO: Um, as I recall it er Olswang's plus GT had put their invoices in and were, and were expecting payment. The same applied to the, to the non-exec directors at RAL which included me and the others. Um, and I think, Bell Pottinger were also by this stage put their invoice in because most of these invoices were due on, on, on completion. Um, I recall, I recalled some back and forth with David Roberts at Olswang. Um, and I recall that they, they had, there had been a transaction er for the sale of North West House for, I think it was only 2 million. Um, then I recall that David Roberts had, had returned all of that money except for around 7 million, had returned it to, to the selling company. Um, and then he was, and then he proposed that the payments be made with, with the balance, the balance of that money to, to Olswang and also the other payments were then made at the same time. SIMPSON: Okay. So the movement of that E7 million from the sale of North West House which was er a BHS Group asset. .. PARLADORIO: Yes. SIMPSON: ... that £7 million moves into RAL, that creates the intercompany debt between RAL and BHS? PARLADORIO: Yes. SIMPSON: But again, at that time what's your expectation about how that would be repaid? PARLADORIO: That, that was to be repaid from the money due from Sir Philip or Arcadia on, on the Marylebone House deal. SIMPSON: So, so from your point of view a fairly short-term arrangement? PARLADORIO: Yes."

1042. I do not accept that Mr Parladorio's account was wholly accurate. In particular, I am not prepared to accept that Mr Roberts made the suggestion that RAL use the proceeds of sale to pay the acquisition costs rather than Mr Chappell or Mr Parladorio himself. However, I do accept Mr Parladorio's evidence that when Mr Chappell told the RAL board that Marylebone House was no longer part of the deal, they held discussions with Mr Roberts and agreed to use the proceeds of sale of North West House to pay the acquisition costs on the basis that this was a short term loan which would be repaid out of the anticipated profit from Marylebone House. In the light of that evidence, I consider it highly improbable that Mr Chappell Mr Parladorio and Mr Roberts did not involve Mr Henningson in those discussions or that he did not agree to the proposal.

1043. I find that on and immediately after 11 March 2015 Mr Henningson knew that Mr Chappell intended to use £5 million of the proceeds of sale of North West House to fund the acquisition costs out of the proceeds of sale. I make this finding in reliance on Mr

Parladorio's evidence to the Insolvency Service and his own written answers. Moreover, Mr Henningson knew that RAL had only been able to raise £5 million which it was required to pay to Linklaters as the first instalment of the Capital Injection and that RAL had no other source of funds to pay any of those costs.

1044. I also find that on and immediately after 11 March 2015 Mr Henningson knew that Mr Chappell intended to use the proceeds of sale of North West House to repay ACE. He knew that Mr Chappell had agreed to repay £2 million of the ACE I loan within five working days and that the only source of funds available to RAL was the proceeds of sale of North West House. Moreover, on 14 April 2015 ACE gave notice of default and Mr Henningson personally negotiated the Deed of Amendment and Variation and the ACE Loan Note II with Mr Dellal. I find it wholly improbable that Mr Chappell would have involved Mr Henningson in those negotiations if he had not been fully aware of the payments by Olswang to Mishcon on 26 and 27 March 2015.

1045. Finally, I have found that Mr Henningson knew and understood the terms of the SPA. I find, therefore, that Mr Henningson knew that the payments to RAL and to Olswang were a breach of the terms of the SPA. Clause 6.2 imposed a covenant on the buyer to use the proceeds of sale of North West House for the sole purpose of the day to day running of the business and I am satisfied that Mr Henningson knew this. This was a standard covenant and from his experience as a corporate finance adviser Mr Henningson would have known that any experienced lender would not have permitted substantial transfers of funds by a trading company to its parent or an associated company.

1046. However, although I have found that Mr Henningson knew Mr Chappell's intentions and that the way in which he proposed to use £7 million of the proceeds of sale of North West House involved a breach of the SPA I am not satisfied that he caused any of the payments to be made. There is no evidence that Olswang asked for Mr Henningson's instructions or authority to make any of the payments and I am satisfied that they acted on the sole instructions of Mr Chappell. The inference which I draw is that Mr Henningson turned a blind eye to those payments and made no enquiries of Olswang to establish how they intended to dispose of the proceeds of sale.

1047. Furthermore, I am not persuaded that Mr Henningson knew about all of the individual payments which RAL made out of the £5.2 million. The Joint Liquidators did not allege that he received any of those funds himself and there is nothing to suggest that he knew that Mr Chappell had misappropriated £1.25 million for his own benefit. Indeed, the inference which I draw is that Mr Henningson was referring to these payments in his text message dated 26 May 2015 when he told Mr Dellal that: "Dom hasn't been totally honest to me in this deal".

(i) S.171

1048. I find that Mr Henningson permitted Mr Chappell to instruct or authorise Olswang to pay £5.2 million to RAL for the purpose of paying RAL's costs of the acquisition. I also find that this was an improper purpose and that Mr Henningson permitted this payment in breach of S.171(1)(b). It was contrary to Lowland's interests to make this payment in breach of clause 6.2 of the SPA.

(ii) S.172

1049. I find that Mr Henningson permitted Mr Chappell to instruct or authorise Olswang to pay £5.2 million to RAL and the payments of £1.8 million to ACE in breach of S.172 and his duty to act in the way in which he considered in good faith would be most likely to promote the success of Lowland. No honest or reasonable director would have believed in good faith that it was in Lowland's interests to pay RAL's costs of the acquisition or to discharge ACE I in the absence of a contractual obligation to do so. Mr Henningson did not give evidence that he believed that Lowland owed a contractual obligation to pay RAL's debts or its costs of the acquisition and I do not accept that he did. Lowland was not a party to the MSA and none of RAL's costs of acquisition or any debt which it incurred to finance the Capital Injection were recoverable under that agreement. Moreover, Mr Henningson accepted that he saw and approved the MSA.

(iii) S.174

1050. I am also satisfied that Mr Henningson failed to exercise reasonable care to the Notional Director standard in breach of S.174. Any Notional Director would have insisted on taking legal advice to satisfy themselves that Lowland was liable to pay £5.2 million to RAL before agreeing to the payment. Moreover, as part of the basic stewardship of the

assets of the company, any Notional Director would have taken active steps to ensure that Lowland's solicitors did not act solely on the instructions of Mr Chappell but insisted that they obtained the authority of both directors before releasing any of the proceeds of sale from their client account.

(iv) S.175

1051. Finally, I find that in breach of S.175 Mr Henningson failed to avoid a situation in which he had a direct conflict with the interests of Lowland in relation to the exploitation of the proceeds of sale of North West House. Again, there was an actual conflict between Lowland's interests and RAL's interests and he should not have accepted appointment as a director on 11 March 2015.

(4) The Swiss Rock payment: £521,976

1052. The Joint Liquidators alleged that on 16 April 2015 Mr Chappell, Mr Henningson and Mr Chandler caused or permitted BHSL to pay £521,976 to Swiss Rock in breach of their duties as directors. They alleged that this conduct amounted to breaches of S.171 to S.175 and also the duty to consider the interests of creditors. There is no dispute that on 16 April 2016 Mr Chappell and Mr Henningson made a request to BHSL to pay £521,976 to Swiss Rock by immediate transfer. There is no dispute either that Swiss Rock did not apply these funds for either of the purposes which Mr Chappell gave to BHSL, namely, the payment of GT's fees or VAT but paid £300,000 to Mrs Ismailjee and transferred £165,000 to himself.

1053. Mr Topp gave evidence in Topp 1 that someone in the finance team queried the payment, he went to speak to Mr Chappell who told him the money was needed for a VAT reclaim and that he rang Sir Philip Green because he felt uncomfortable before finally approving the payment. He gave further evidence about this transfer in cross-examination:

> "Mr Topp, this is a payment request for a payment to Swiss Rock plc on 16 April 2015 for 521,000 or so. You remember this -- A. I do. Q. -- don't you? A. Yes. Q. Now, you were alerted to the fact that someone was trying to make this transfer, weren't you, on the 16th? A. Sorry. Is that the day before the transfer? Q. No, this is the day of the transfer. A. Oh, right. Either just before or the day before I was alerted that Mr Chappell had gone into the bank to ask for this transfer to be made -- Q. Yes. A. -- to

Barclays, which was our business account. Q. That was highly unusual, wasn't it? A. Yes. Q. And there was no basis, as far as you were aware, for that to be done, was there? A. What for the payment to be made or the process? Q. For Mr Chappell to go into a bank and try and transfer £0.5 million? A. Yes, as I said to Mr Chappell, that's not normally how we pay invoices, for sure. Q. He's put on there the description "Acquisition Fees for Grant Thornton", hasn't he? A. He has. Q. Now, that isn't what it was, is it? A. To be fair, he didn't tell me it was acquisition fees for Grant Thornton. I know it says on the -- I didn't see this -- Q. I see. But you signed the TT form, didn't you? A. The what? Sorry. Q. Sorry. You signed a payment authorisation, didn't you? A. I approved it, yes. I didn't sign it. I don't think I signed anything, actually, but I approved it, my Lord. Q. Could I have, please, bundle {C/548/1}, please. This is a payment request from Mr Chappell -- A. Yes. Q. -- for the same transaction. It's been signed by Mr Chappell and Mr Henningson? A. Yes. Q. And you've sort of endorsed it in handwriting in the top right-hand corner. And it says: "Discussions with DC ref payment needed in order to claim VAT back on transaction." A. Yes. Q. "Money will return to BHS in approx 3 weeks time". A. That's right. Q. And you've signed that? A. That's correct. That's my signature, yes. It's just different to the one you showed. Sorry. I do apologise. Q. Yes. No, that's all right. Mr Chappell gave a number of conflicting explanations for this, didn't he? A. I wasn't aware of that at the time, but I can clearly see the original one said "Grant Thornton fees", so... Q. So the explanation, so far as you were aware, then was VAT -- it was some kind of VAT reclaim? A. It was all to do with the transaction, yes. Q. Now, that explanation didn't really make any sense, did it? A. In what sense? Q. Well, Mr Chappell needing money to go to Swiss Rock, which was his company, in order to get VAT back. Is that fair? A. I don't know. So, at the time, just for clarity, I knew they'd tried to move the money or request a payment, I think the day before, at Barclays Bank. I went to see and then the payment came through Finance. Kathryn asked me about the payment. She said: I think it's the payment from yesterday. So I went to see Dominic; and Dominic said: it's all about sorting out the balance of the transaction and a true up on the transaction. And it -- it will mean that we can claim VAT back. So that's -- that's what I was told at the time. Q. Yes. But that explanation -- I suggest that explanation doesn't make any sense because there's -- there isn't any legitimate kind of VAT reclaim he could have made by paying money to his own service company, is there? A. I didn't know, is the honest answer, which is why I followed it -- followed it up to check whether -- Q. You checked with Sir Philip Green, didn't you? A. Well, because he said it was all to do with the transaction, and I knew invoices were coming in from the transaction, and -- and, to be honest, I felt uncomfortable. I wasn't sure. And the only person I knew who knew about the transaction and the mechanics of the transaction was Philip Green. So I rang Philip up and said: listen, I've got a request for payment here from Dominic. Is -- is this okay to pay, do you think or not? Now, what I was also conscious of is it had been signed by two directors; so, technically, it was -- you know, it was -- that was the approval process. But because it was going to Swiss Rock -- and if I -- and Swiss Rock, I knew, was the old name of RAL, if you like, then I did just want to check

> with Philip and say to Philip: you know, does this look right? Q. And this was only a week after you'd been appointed a director as well, wasn't it? A. Well, I'd just arrived -- sorry, I'd just been appointed. Q. Do you know who Philip Green went off and checked with himself? A. Well, I assume he had spoken to Paul Budge because there's only really him and Paul knew all the machinations regarding the transaction and what the various things outstanding were. Because Philip said: well, give me a Finn yet and I'll come back to you. And he rang me back ten minutes later and said, "Darren, I think it's fine". I said, "Okay". Q. Now, you accept now, don't you, this transaction was improper, don't you? A. I accept that now, yes. Q. And that this was just Mr Chappell effectively stealing over £0.5 million of the companies' money? A. I believe so. I don't know what -- even today I'm not sure what the reasons were or -- but if it happened today I would clearly see it in -- through a different lens; albeit, you know, I asked Philip because he was the only one who knew the transaction."

1054. Mr Curl also put the same documents to Mr Chandler and he accepted that there was no reason for the payment, that it was improper and that the VAT explanation given to Mr Topp by Mr Chappell was absurd. He also gave evidence that he found out about the payment the following day. Mr Curl then asked him about his response to this information:

> "Q. Now, as a minimum, you knew that inconsistent explanations had been given relating to a transaction involving company money in excess of half a million. That's right, isn't it? A. Yes. Q. Yes. So you know, by 11 am on [17][7] April 2015, that Mr Chappell is dishonest, don't you? A. Well, yes, I've answered that question, but yes. Q. Now, despite being on notice of the transaction, you don't do anything after three weeks to try to recover this money, do you? A. No. Q. You don't ever do anything to try to recover this money, do you? A. Well, certainly after the Grant Thornton meeting I handed responsibility over to Eddie and said: Eddie, you need to sort this out. And over the course of the next few weeks there were various discussions about it; and I made it clear to Eddie that he needed to make it clear to Mr Chappell that this was not the way to behave. Q. But Mr Parladorio isn't a director of any of the companies, is he? A. Well, no, he's a director of RAL. Q. Hmm. A. And, therefore, on the Board with Mr Chappell; and I thought had some influence over Mr Chappell's behaviour. Q. Why didn't you, as Group General Counsel, ultimately responsible for compliance, take it up with Mr Chappell? A. Because, on balance, I felt as though this was something that had taken place between two or three -- depending on Mr Henningson's level of involvement -- three of my fellow BHS Board members. By that stage, I was aware that the money was not coming back. And I -- I took the -- took the view that I -- I should not get involved It would -- it would be better for me to remain uninvolved, so that I could continue to have influence over Mr Chappell. Doing something

[7] The transcript records that Mr Curl said 11 April but this was obviously a mistake and he was referring to 17 April 2015.

> about it would not have – would not have resulted in the money coming back; and it may well have precipitated the kind of catastrophic outcome that you think we should have reached but which I reasonably didn't think that we should have -- we needed to reach, at that time, over that amount of money. Q. So a few moments ago you said that once the intention to permanently deprive engages then it's theft. So -- and you -- your last answer suggested that after three weeks you knew that the money wasn't coming back. So after three weeks it was theft, wasn't it? A. No, because after three weeks it had been -- sorry, not after three weeks. There was a meeting at Olswang, before the e-mail that you showed us earlier from Ashley Hurst, in which all of this was discussed and it was all made clear that it was going to be disclosed to the Pensions Regulator; and that it was going to be a loan from BHS to Swiss Rock that would be accounted for as an intercompany loan. And that was the way that it was resolved. And I continued to think that my decision not to involve myself in that situation between my fellow Board members was the right thing for me to do, in all of the circumstances that were pertaining at that time. And I understand that people may have a different view. That is the view that I held.

1055. Mr Henningson's evidence was that Mr Chappell and Mr Topp discussed the payment before he signed the letter dated 16 April 2015 and that Mr Chappell told him that Mr Topp had authorised the payment:

> "84. Around the time of this payment (16 April 2015), I recall being in the BHS head office at Marylebone House and that there were discussions between Mr Chappell and Mr Topp about this transfer request which had been made by Mr Chappell. 85. Mr Chappell told me that Mr Topp had initially queried the payment but, that after discussion with Mr Chappell, they had both agreed that the payment should be made and Mr Topp authorised the payment. 86. The payment authorisation was therefore presented to me as agreed and I considered that was reflected by Mr Topp's handwritten annotation on the payment instruction i.e. I understood that this was a payment needed in order to claim VAT back on the transaction. Given Mr Topp's authorisation, I did not see that it was necessary to make any further enquiry and I did approve this payment out. I also relied on what Mr Chappell told me and at that time I had no reason not to trust him."

1056. I accept the evidence of Mr Topp and I reject the evidence of Mr Henningson in relation to this issue. I find that Mr Chappell and Mr Henningson signed the letter addressed to BHSL requesting payment and submitted it to the finance team before Mr Topp had spoken to Mr Chappell or endorsed the letter. I also reject Mr Henningson's evidence that Mr Chappell told him that Mr Topp had approved the payment and endorsed it before he signed it. I also find that after that conversation Mr Topp spoke to Mr Chappell and Sir Philip Green before he annotated both the original letter and endorsed the

internal payment request form signed by Ms Morgan. Mr Topp's evidence is consistent with the internal emails (above) which show that Ms Morgan contacted Mr Topp after receipt of the letter. Moreover, the suggestion that he was shown the letter endorsed by Mr Topp before he approved the transaction is fanciful. If Mr Topp had already approved the payment, Mr Chappell would have got him to sign the letter rather than Mr Henningson.

1057. I also accept Mr Chandler's evidence and I find that he did not learn about the payment until 17 April 2015, which was the following day, and that he relied on Mr Parladorio to resolve the issue but that when Swiss Rock failed to repay the money after three weeks, he appreciated that Mr Chappell had acted improperly and misappropriated the funds. Finally, I find that he chose not to take any further action because he was assured that the Pensions Regulator would be told and that the money would be treated as an inter-company loan between BHSL and RAL.

(i) S.171

1058. There was no real dispute between the parties represented before the Court that Mr Chappell's purpose was improper in asking Mr Henningson to sign the letter and requesting the payment. Mr Curl submitted that the payment to Mrs Ismailjee related to a debt which Mr Chappell incurred in relation to certain share transactions. It is unnecessary for me to speculate further because I am not satisfied that Mr Henningson was aware of this purpose and I dismiss the claim under S.171 against both Mr Henningson and Mr Chandler.

(ii) S.173

1059. I have rejected Mr Henningson's evidence that Mr Topp had already approved or endorsed the letter when he saw it or that Mr Chappell told him that Mr Topp had approved it. However, his evidence that Mr Chappell asked him to sign the letter and that he signed it without any further enquiry or consideration rings true. I find that in breach of S.173 Mr Henningson failed to exercise any independent judgment in approving the payment and simply deferred to Mr Chappell's wishes.

(iii) S.172

1060. The more difficult issue is whether the Court should find that Mr Chandler or, for that matter, Mr Henningson failed to take steps to recover the payment from Swiss Rock once the three weeks had elapsed. I would have been inclined to dismiss this claim on the basis that it was unrealistic to expect Mr Chandler to take action when Mr Topp and Sir Philip Green had approved the payment and it is very difficult to conclude that BHSL would have recovered the money. But in any event, this claim was not pleaded against either Mr Chandler or Mr Henningson. The claim against them was that they caused or permitted the payment to be made in breach of their duties and I am satisfied that Mr Chandler did neither. I therefore dismiss this claim.

1061. I have found that Mr Henningson failed to exercise independent judgment in breach of S.173 on the basis of his own evidence. I have also found that Mr Chandler did not cause or permit the payment to be made and dismissed the wider claim against him. In those circumstances, I consider it unnecessary to consider the claims against Mr Henningson under S.172, S.174 and S.175.

(5) The arrangement fee: £2 million

1062. The Joint Liquidators alleged that on 26 June 2015 the Respondents caused or permitted Olswang to pay the £2 million arrangement to RAL in breach of their duties as directors. They alleged that this conduct amounted to breaches of S.171 to S.175 and also the duty to consider the interests of creditors. I have found that Mr Henningson knew about the payment before it took place and either agreed to it or turned a blind eye to it. I turn, therefore, to consider Mr Chandler's evidence.

1063. Mr Chandler's evidence in Chandler 1 was that before ACE II he discussed the amount of money it would produce with Mr Chappell and Mr Topp and Mr Chappell told them that it would be in the region of £19 million. He also gave evidence that when he discovered that it was only £17 million, Mr Topp and he challenged Mr Chappell at the Landmark Hotel and that he worked with Olswang to recover the money and ensured that £500,000 was returned. When Mr Curl asked him about the arrangement fee, Mr Chandler accepted that Mr Chappell misappropriated £2 million and I have set out the relevant passage at [817].

1064. I accept Mr Chandler's evidence in relation to the £2 million arrangement fee. Mr Curl did not really challenge his evidence about the discussion with Mr Chappell before ACE

II or about the meeting at the Landmark Hotel and Mr Topp gave evidence to the same effect. I find, therefore, that Mr Chandler did not discover that Olswang had made the payment of £2 million out of the funds available under ACE II until the BHSGL board meeting on 1 July 2015. I also accept Mr Chandler's evidence that he did his best to fix the situation and ensured that £500,000 was returned to BHSGL by Mr Chappell.

(i) S.171

1065. I have found that in breach of S.171(b) and for improper purposes Mr Henningson agreed to the underlying transaction which generated the arrangement fee. I have also found that he read and understood the MSA. I am satisfied, therefore, that Mr Henningson knew that the BHSGL board had not agreed to pay any fee to RAL for negotiating ACE II far less £2 million and that RAL was not entitled to this fee. Accordingly, I find that in breach of S.171(b) Mr Henningson agreed to the payment of £2 million to RAL or turned a blind eye to it. I dismiss the claim against Mr Chandler because he was not aware of the payment or its purpose.

(ii) S.172

1066. I also find that Mr Henningson agreed to the payment or turned to a blind eye to it in breach of S.172 and his duty to act in the way in which he considered in good faith would be most likely to promote the success of Lowland. No honest or reasonable director would have believed in good faith that it was in BHSGL's interests to pay £2 million to RAL unless it owed a contractual duty to do so. Mr Henningson did not give evidence that he believed that BHSGL owed a contractual obligation to pay RAL and I do not accept that he did. Even then, no honest or reasonable director would have believed in good faith that it was in the interests of BHSGL's creditors to make such a payment to its parent.

1067. I dismiss the claim against Mr Chandler. I am satisfied that Mr Chandler did not cause or permit the payment to be made by Olswang to RAL and that he did not become aware of it until 1 July 2015. Mr Curl suggested to him that he should have resigned once he knew that Mr Chappell had lied to him. But this was not a pleaded allegation either and I am satisfied that Mr Chandler did what he could to recover the money and that he and Mr Topp were successful in persuading Mr Chappell to return £500,000 of the arrangement fee. I return to the question whether Mr Chandler ought to have resigned

before ACE II rather than approve it in the context of his duties to creditors more generally (below).

(iii) S.174

1068. I am also satisfied that Mr Henningson failed to exercise reasonable care to the Notional Director standard in breach of S.174. Any Notional Director would have insisted on taking legal advice to satisfy himself that BHSGL was liable to pay £2 million to RAL before agreeing to the payment. Again, as part of the basic stewardship of the assets of the company, any Notional Director would have taken active steps to ensure that Olswang did not act solely on the instructions of Mr Chappell but insisted that they obtained the authority of the BHSGL board before releasing any of the proceeds of sale from their client account.

(iv) S.175

1069. Finally, I find that in breach of S.175 Mr Henningson failed to avoid a situation in which he had a direct conflict with the interests of BHSGL. On 26 June 2015 there was an actual conflict between BHSGL's interests and RAL's interests and the only way in which Mr Chappell and Mr Henningson could have avoided that conflict was by informing the other members of the BHSGL board about the proposed arrangement fee and leaving the decision whether to pay the fee to Mr Smith, Mr Chandler and Mr Topp who were not also directors of RAL or, alternatively, asking for authority to vote under S.176(5).

(6) Atherstone

1070. The Joint Liquidators pleaded case was that on 26 August 2015 the Respondents caused or permitted £6,177,000 of the proceeds of sale of Atherstone to be lent to RAL or otherwise applied for its benefit in breach of their duties as directors. They alleged that this conduct amounted to breaches of S.171 to S.175 and also the duty to consider the interests of creditors. The case which they advanced in opening, however, was that Mr Henningson should never have permitted BHSGL to enter into ACE I and that Mr Chandler should have challenged the validity of the ACE I Charge. Mr Curl also cross-examined Mr Chandler on the basis that he promoted the interests of RAL rather than those of BHSGL by supporting the sale of Atherstone to RAL in June 2015 and then

undertaking an internal exercise to switch the creditor from BHSPL to BHSGL and then converting the debt into a long term interest free loan in the AOI.

1071. I dismiss the Individual Misfeasance Claim in relation to Atherstone. Neither Mr Henningson nor Mr Chandler caused or permitted £6,177,000 of the proceeds of sale of Atherstone to be lent to RAL or applied for its benefit. The inference which I have drawn is that Olswang paid Mishcon directly to discharge ACE I upon the sale. It may be that Mr Chappell and Mr Henningson should not have entered into the ACE I Charge. RAL was the primary debtor yet from that date all of the directors of BHSGL appear to have assumed that the debt would be repaid out of the proceeds of sale of Atherstone. It may also be that Mr Chandler was motivated by RAL's interests rather than the interests of BHSGL in negotiating and finalising the AOI. But none of these allegations were pleaded and I express no view and make no findings in relation to them.

(7) Brokerage fees: £749,238

1072. The Joint Liquidators alleged that on 9 November 2015 and 7 December 2015 Mr Chappell, Mr Henningson and Mr Chandler caused or permitted £749,238 (inclusive of VAT) to be lent to RAL or otherwise applied for its benefit in breach of their duties as directors. They alleged that this conduct amounted to breaches of S.171 to S.175 and also the duty to consider the interests of creditors. Mr Henningson denied being a party to any meeting or any resolution to pay the fees. He could not recall attending a meeting or meetings on 5 November 2015 and relied on the fact that the minutes were unsigned. By contrast Mr Chandler gave positive evidence in Chandler 1 that he approved both fees:

> "207. I thought that RAL were entitled to a fee for helping to obtain the Grovepoint Facility; Mr Morris had been instrumental in that process and this was exactly the kind of transaction I thought the MSA was supposed to capture.
>
> 208. Furthermore, having spoken to people at Olswang, those professionals proceeded on the basis that a fee to RAL was perfectly normal.
>
> (1) As noted above, the Grovepoint Facility created the issue of RAL potentially not being able to be paid fees under the MSA. On 4 September 2015, Olswang advised us by email that payments could be made by Lowland (a company in the BHS group) and it could act as an 'invoicing hub'.

> (2) On 5 November 2015, Mr Topp and I had a call with Mr Roberts, of which I have handwritten notes. On this call, Mr Topp questioned whether the directors could agree that Lowland would make the payments in compliance with our duties and Mr Roberts reassured us that this was acceptable. In particular, Mr Roberts advised that using Lowland to make a payment was not controversial.
>
> (3) I remember that Mr Topp asked why we should pay RAL anything at all when the relevant individuals were just doing their job and already receiving a salary. Mr Roberts said that these payments were perfectly normal and RAL were providing a separate set of services under the MSA. From this, I believed that Mr Roberts thought that RAL was entitled to a fee under the MSA (which Mr Roberts knew about) for the Grovepoint Facility. Otherwise, he would not have been giving this advice.
>
> 209. The payment of a fee was agreed and then approved at board meetings on 5 November 2015. I thought this was justifiable because I genuinely thought that RAL was entitled to a fee, and the business would have the cash to do this in November.
>
> 210. I understand that the total amount was paid in two separate tranches. My recollection is that RAL needed the smaller amount urgently in order to meet RAL's liabilities and I believe I was told this by either Mr Parladorio or Mr Treacy. I was not involved in the banking mandates for these transfers; it would have been done by Mr Topp or Mr Hitchcock. I am not sure why a separate board meeting was not held for the second payment. However, I am sure that we approved the total payment to RAL of around £624, 000 on 5 November 2015. One reason I am confident of this is the fact that the figure of £624, 000 is the one that is referred to in the emails from Olswang on 4 November 2015 when discussing the 'invoicing hub' idea."

1073. Mr Curl challenged Mr Chandler's evidence that he believed that RAL was entitled to a fee under the MSA and suggested that the "invoicing hub" idea was no more than a device to sidestep the terms of the Grovepoint Facility:

> "You don't attempt to defend the ACE II 2 million on the basis that it was covered by any Management Services Agreement, do you? You attempt to defend that on the basis that RAL repaid it. That's correct, isn't it? A. Yes, I think that's right. Yes. Q. You do say that the Grovepoint fee of slightly under three quarters of a million pounds was covered by the Management Services Agreement though, don't you? A. As amended, yes. Q. That fee was paid well before the revised Management Services Agreement was signed, wasn't it? A. Yes, it was. Q. The Grovepoint Facility completed on 11 September 2015; and you would agree, would you, that that facility was an expensive and pointless step for the companies to enter into? A. No, I don't agree with that. Q. BHSGL, BHSL and Davenbush were all parties to Grovepoint, as was BHS Properties, but Lowland was not. Do you agree with that? A. I can't remember, but, yes. Q. Under the terms of Grovepoint, BHSGL, BHSL, Davenbush and BHS Properties were all precluded from

> paying any fee to anyone in relation to that facility, weren't they? A. I'm not sure if to anyone, but to RAL, yes. Q. An advice was sought on this point from Olswang, wasn't it? A. Yes. Q. To see how a fee could be paid in relation to Grovepoint, despite Grovepoint having expressly bargained for no fee to be paid. Do you agree with that? A. Well, except that the advice that we received was contrary to your submission or your question."

1074. Mr Curl then put Mr Roberts' email dated 4 September 2015 and Mr Turner's memo dated 15 September 2015 to Mr Chandler. Ms Hilliard intervened on the basis that there was no evidence that he had ever received the memo. Mr Lightman objected more generally to the way in which Mr Curl had cross-examined Mr Chandler both on this topic and more generally. After I had ruled on those objections, Mr Chandler asked to say something about the substantive issue and I invited him to do so. His evidence was as follows:

> "Q. Yes. But you would accept, though, that the substance of the advice set out in this document is to the effect that Olswang are not particularly enthusiastic about the proposal that any fee is paid for the Grovepoint facility, at that time; do you agree? A. I don't agree and I do have something to say about this. MR JUSTICE LEECH: Well, then, say it now, Mr Chandler. A. Thank you. On 8 September there were the Board meetings that approved the entry into Grovepoint. And, on that date, the Board minute for the putative 4% was sent to me. The following day I stopped any payment being made. On the Friday afternoon Mr Roberts phoned me with Mr Morris in his office; and Mr Roberts said: Mike is here and he wants me to transfer 2.7 million to RAL. And I said: well, you're not going to do that. And Mr Morris said: well, it's our money. And I said: it's not your money, it's our money. 15 minutes later Mr Chappell telephoned me and we had a -- a shouting match, where he said he wanted to sack me and I said he wouldn't sack me. Unbeknownst to me, over the course of the weekend, in advance of 15 September, Mr Chappell and Mr Parladorio -- it looks like -- took advice on it and this is the note of that advice. So at the time that this advice was written, it is my belief that Olswang thought they were being asked to advise on a 2.7 million transaction fee. That's what I think happened. And over the course of the next period of time, I having stopped that 2.7 million being paid, Darren and I agreed a different amount of money for a fee that was eventually paid. MR JUSTICE LEECH: It was based on a comparable, I think also. A. Pardon me. MR JUSTICE LEECH: It was based on a comparable -- your assessment of what the -- A. We asked Grant Thornton for their advice; they said 1%. Eventually, as we may come on to, we agreed 2% for these kind of transactions. But, at that stage, that's what we agreed. And I believed, at the time that we paid that fee -- there's another point to make, which is that that this advice is quite interesting because it absolutely accords with what me and Darren were thinking irrespective of having taken that advice. And that's actually part of my case as well that when,

> for instance, Adam Plainer is advising me in January, February, March that we're not wrongful trading, I'm listening to that, but I'm making my own judgment as to whether or not we're wrongful trading. I'm interested in his advice, of course. We came to exactly the same conclusion that Olswang came to, without seeing this advice, which was: 2.7 million not a chance. And over the course of the next period of time we -- we did take advice -- it wasn't this -- there's more advice that me and Darren took from David Roberts about the whole thing, about Lowlands, about 1%, about -- all right. So when I said in my witness statement that I believed that there was a fee properly due under the Management Services Agreement and we would have enough money to pay it, Mr Curl, in his written submissions, said: this evidence is untrue and underlined it. And that is a serious allegation against me. And I am not misleading this court. I am not."

1075. I find that Mr Henningson was present at the board meetings on 5 November 2015. Mr Chandler did not state this in terms in his written evidence but he admitted the allegation in his Points of Defence and he signed the statement of truth personally. Moreover, the trial bundle contained a ticket receipt for a flight to Stockholm at 21.05 that night and an exchange of emails with a Mr Ulf Buhne suggesting a meeting at BHS's offices at 10.30 that morning. Mr Chandler's handwritten notes of the call with Mr Roberts also raise the question whether Mr Chappell and Mr Henningson should be permitted to vote at the meetings. Finally, I can think of no reason why draft minutes of the meetings would have been prepared showing that he was present if he had not been there.

1076. I accept Mr Chandler's evidence that he did not see Mr Turner's memo dated 15 September 2015 and that he believed that the fees were properly due under the MSA. I have looked closely at Mr Chandler's handwritten notes of the call with Mr Roberts and I am satisfied that they confirm both his written and oral evidence (above). It is clear from those notes that Mr Topp questioned Mr Roberts closely about the Grovepoint brokerage fees and whether it was permissible and appropriate to pay them. Equally importantly, they record that Mr Topp and Mr Chandler addressed the critical issues with Mr Roberts. In particular:

(1) Mr Chandler recorded that Mr Roberts advised that "Ld can accept responsibility for the invoice under existing MSA" but that "Revised – sets it out more clearly than the current one" and that "revisions take effect as at 11 March".

(2) He also recorded that Mr Roberts advised "Not a breach of GP" and that when Mr Topp asked him why Lowland would circumnavigate the facility or pay RAL at all he said that "payments up/down are perfectly normal".

(3) He also recorded that Mr Topp said that "only concern is best interests of BHS" and that in response Mr Roberts said that "his duty is to company + shareholder" and that "if the owner blesses it, then can't be criticised at all".

(4) He then recorded that Mr Roberts also addressed the question whether the payments were in the interests of the creditors of BHS and that "when cash goes out, we have to be sure in best interests as a whole". Mr Chandler also noted that Mr Roberts (or possibly Mr Topp) answered this question by stating "Lowland payment → corporate benefit" and "RAL is providing services, financing".

1077. Although Mr Curl challenged Mr Chandler's evidence about Mr Turner's memo dated 15 September 2015, he did not challenge Mr Chandler's evidence about the call or the accuracy of Mr Chandler's notes or his interpretation of them. I find, therefore, not only that Mr Chandler believed that the fees were properly due or payable under the MSA but also that both Mr Topp and he believed in good faith that it was in the interests of Lowland and BHSL and their creditors to enter into the loan arrangement and to pay the fees.

(i) S.171

1078. The facts of this Individual Misfeasance Claim closely resemble the facts of *Extrasure* where the directors paid the available cash of one subsidiary to the parent in order to discharge the liability of a second subsidiary. Applying Jonathan Crow's four stage test, my analysis is as follows. The relevant powers were the power of the directors of Lowland to borrow to fund its trading and the power of the directors of BHSL to make loans and the purpose for which they were conferred was to protect the survival of both companies and to promote their commercial interests. The critical difference between *Extrasure* and the present case, however, is that Mr Chandler believed that the brokerage fees were due under the MSA and that both he and Topp believed in good faith that it was in the interests of both shareholders and creditors to pay the fees. In my judgment, therefore, Mr Chandler voted to exercise these powers for the purposes for which they were conferred.

1079. There is no documentary evidence that Mr Roberts' advice was communicated to Mr Henningson and the draft minutes do not record that Mr Chandler reported that advice at either meeting. Mr Henningson did not explain his motivation for voting to pay the brokerage fees and to borrow the money from BHSL to do so because he denied being present at the meeting. Moreover, both Mr Chappell and he formed a majority at both meetings. The inference which I draw is that their purpose was very different from that of Mr Chandler and that it was to extract as much money as possible from BHSGL and its subsidiaries on any pretext before they became hopelessly insolvent. I draw this inference not only from the findings which I have already made in relation to their conduct but also from the fact that RAL did not use the fees from Lowland to pay Mr Morris as the board had resolved to do on 25 September 2015. I find, therefore, that in breach of S.171(b) they voted to enter into the loan arrangement and pay the Grovepoint brokerage fees for an improper purpose.

(ii) S.172

1080. I dismiss the claim against Mr Chandler. I have found that he voted to pay the brokerage fees believing in good faith that it was in the interests of both the Companies and their creditors. Even though I have formed the very clear view that it was not in the interests of creditors to pay these fees, this is not a case where the Court should apply an objective test or substitute its own decision because this is a case in which the Court is satisfied that the director applied his mind to the question and reached a conclusion in good faith.

1081. The draft minutes do not record that any consideration was given to the interests of creditors at the meetings themselves and I am not satisfied that Mr Chappell and Mr Henningson applied their minds to the question. For all of the reasons which I have given in relation to ACE II and the Grovepoint Facility, they ought to have concluded that the interests of the BHS Group's creditors were paramount and that it was not in their interests to pay £749,238 in cash to RAL given the inter-company balance between RAL and the BHS Group.

1082. Indeed, the decision to pay the brokerage fees was directly contrary to the advice which Mr Turner gave in his memo dated 15 September 2015. Mr Turner identified two options, namely, to defer payment until 30 January 2016 or to defer it until the business could afford it. He described the first of those options as "red or amber" by which I took

him to mean that it was very risky indeed. But Mr Chappell ignored that advice and Mr Henningson was content to go along with him. (Indeed, it may well be that Mr Chappell and Mr Parladorio did not want Mr Chandler or Mr Topp to see this memo once they had seen it themselves.)

(iii) S.173

1083. I also find that Mr Henningson failed to exercise any independent judgment in relation to the two decisions of Lowland and BHSL. There is no documentary evidence to suggest that he ever asked to see any legal advice in relation to the payment of these fees. He was not copied into Mr Roberts emails dated 4 and 8 September 2015 nor provided with a copy of Mr Turner's memo dated 15 September 2015. I find, therefore, that on 5 November 2015 he simply deferred to Mr Chappell's wishes and agreed to both resolutions.

(iv) S.174

1084. Finally, I find that in breach of S.174 Mr Henningson failed to exercise reasonable care, skill and diligence. A Notional Director would not have agreed to the two resolutions without taking legal advice to satisfy themselves that the fees were due and payable under the MSA and that it was appropriate for the payments to be made given the BHS Group's financial condition and that inter-company balance between RAL and BHSGL. It is a very unusual feature of this claim that Mr Chandler and Mr Topp appear to have received very different advice from Mr Roberts from that which Mr Chappell and Mr Parladorio received from Mr Turner. Be that as it may, Mr Henningson asked to see neither.

(v) S.175

1085. For completeness sake, I address the claim under S.175 very briefly. Article 7.6 of the Articles of Association of both BHSL and Lowland provided that the directors could authorise any matter which would otherwise result in a director infringing his duty to avoid a situation of conflict under S.175. But Article 7.7 provided that any authorisation under Article 7.6 was effective only if any quorum at the meeting at which the matter was considered was met without counting the director in question and the matter was agreed to without the director voting (or would have been agreed to if the votes of such

director had not been counted). Finally, Article 11.3 provided that the quorum for any meeting could be fixed by the directors but unless it was so fixed, a quorum was to be two save where the consent of the directors was required under Article 7.6 where the quorum was to be one.

1086. On 5 November 2015 Mr Chandler authorised Mr Chappell and Mr Henningson to vote even though they had a conflict of interest. Under Article 11.3 there was a quorum to make this decision and under Article 7.7 the decision was valid because Mr Chappell and Mr Henningson did not vote. I was not addressed about the scope of Article 7.6 but I see no reason why the board could not have authorised individual directors to vote on a matter which might otherwise give rise to a conflict of interest. Indeed, the board meetings and the proposed resolutions were the very situations which gave rise to the conflict. Accordingly, I dismiss the claim under S.175.

(8) Darlington

1087. The Joint Liquidators alleged that between 3 December 2015 and 21 January 2016 Mr Chappell, Mr Henningson and Mr Chandler caused or permitted £2,581,428.22 to be paid by BHSL to DSHB for the purpose of buying Darlington in breach of their duties as directors. They alleged that this conduct amounted to breaches of S.171 to S.174 and also the duty to consider the interests of creditors. The Joint Liquidators' case was originally based on the assumption that the directors of BHSL failed to obtain valuation advice and by amendment on whether Mr Yates' report dated 27 November 2015 was adequate and properly took into account the extent of asbestos contamination. The Joint Liquidators did not pursue those allegations in their opening submissions or in cross-examination and I therefore consider them no further.

1088. The Joint Liquidators also alleged that there was no board authority for the decision to purchase Darlington. Mr Chandler gave evidence that on 30 November 2015 the BHSGL board (and not the BHSL board) approved the purchase. But Mr Curl did not really pursue this in cross-examination and only made the point to Mr Chandler that the transaction contemplated in the draft minutes was not the one which ultimately took place:

> "Q. Could I have, please, bundle {E/63/1}. These are a set of unsigned minute or BHSGL dated 13[8] November 2015. And this is a meeting, under point 2, 1 that has been called "so the Board could consider the proposal to buy the Freehold of the store in Darlington". But, in fact, BHSGL never bought the store -- the freehold of the store in Darlington, did it? A. I -- I don't know. Q. Did you say you don't know? A. Well, are you saying that it was the Board of SHB Darlington or BHS Darlington that should have done -- what are you -- what point are you -- Q. Darlington SHB acquired the freehold using money that had been taken from BHSGL. Do you accept that's what happened? A. Yes. Q. So these minutes concern a completely different transaction, don't they? A. No, not in substance. Q. Well, what were the terms of the loan by BHSGL to Darlington SHB? A. I don't know. Q. No. There weren't any terms considered anywhere, were there? A. I don't know. Q. So there was no upside for BHSGL on this transaction whatsoever, was there? A. Well, I -- I don't know. Was Darlington SHB not a part of the group? Q. Do you accept there was no upside for BHSGL, which is the company we're concerned with here, on this transaction? A No, I don't agree. Q. Do you accept that it was the height of irresponsibility in December -- on the last day of November 2015 to be speculating with BHSGL's money at this time? A. No -- no, I don't. Q. Do you agree that neither the interests nor the purposes of BHSGL or its creditors were served by this? A. No, I don't accept that. Q. And do you accept that it was obvious to any reasonable person at this time that the only people who stood to benefit from this proposed transaction were those who were either entitled to or who would simply take, whether they were entitled to it or not, a fee for any on sale of the Darlington freehold? A. Such as who? Q. Can you just answer the question? If you don't think there were any such people then that's -- then say that. A. Well, I didn't think that Mr Sherwood would recommend this transaction just so that he could get a bonus. I mean, that would be -- I mean, I don't believe Mr Sherwood would do that. So it's not -- it -- we -- and Darren was very heavily involved in this and Darren and I discussed it at length, on many occasions. We understood that this was going to be a positive cash flow event for BHS and that's why we did it. Q. You've said you didn't think Mr Sherwood would do that, but you knew Mr Chappell would, if he possibly could? A. No, you're saying that you knew -- that I knew that he would take money from these things if he possibly could? Q. Yes."

1089. I accept Mr Chandler's evidence that the BHSGL board approved the purchase of Darlington on 30 November 2015 as reflected in the draft minutes because without it Mr Sherwood did not have authority to agree a price. I also accept that Mr Henningson was not present at the meeting. Nevertheless, the minutes of the BHSGL board meeting on 2 December 2015 at which Mr Henningson was present record that the BHSGL board decided to keep that decision under review and resolved to hold a conference call to

[8] This should read 30 November 2015.

give final approval subject to a reduction in price and a written proposal. None of the parties or witnesses suggested that this conference call ever took place but in case there is any doubt I find that it did not take place either before exchange or before completion. I also find that Mr Sherwood asked for retrospective support for the transaction but that the BHSGL board never gave that support or approval.

(i) S.171

1090. The real issue was whether the BHSGL board or the BHSL board should have approved the purchase of Darlington when it would have the effect of reducing the BHS Group's cashflow by £2.45 million plus the costs of the transaction. The directors of BHSGL clearly had the power to buy and sell property and also to form a special purpose vehicle for that purpose. Moreover, the purpose for which that power was to be exercised was to protect the survival of the BHS Group and to promote its commercial interests.

1091. In his board paper dated 30 December 2015 Mr Sherwood stated that the purpose of the purchase of Darlington was to buy in the BHS Group's freeholds to reduce the rent and then seek an onward sale to release capital into the business. Although this paper was submitted after completion, I am not satisfied that any of the directors who attended the meetings on 30 November 2015 or 2 December 2015 had another motive for the transaction. In particular, I am not satisfied that the primary or dominant purpose of either Mr Chandler or Mr Henningson was to generate fees for RAL or Vail Williams (as Mr Curl put to Mr Chandler). I therefore dismiss the claim under S.171.

(ii) S.172

1092. However, there is no evidence that the directors took advice or considered whether it was likely to promote the success of either BHSGL, BHSL or the group as a whole or its creditors. Although I accept that the BHSGL board formally approved the purchase on 30 November 2015 and that Mr Chandler had actual authority to give Gordon Dadds instructions to exchange and complete, the conference call to consider the purchase never took place. Moreover, the draft minutes and Mr Chandler's notes of the meeting on 30 November 2015 show that the directors did not consider their duty under S.172. Accordingly, I find on a balance of probabilities that the BHSGL board did not consider their duties under S.172 or the interests of creditors before exchange of contracts or completion of the purchase of Darlington.

1093. In my judgment, Notional Directors would not have considered in good faith that the purchase of Darlington would promote the success of BHSGL or the BHS Group as a whole or, at least, that it was unlikely to do so unless BHSGL was able to enter into a back to back sale to resell it immediately. BHSGL's overall strategy was to sell properties to generate cashflow not to buy them and those property sales were critical to its survival. In his email dated 10 November 2015 Mr Hitchcock stated that it would take six weeks to raise the cash to purchase Darlington and the internal BHS cashflow update dated 27 November 2015 showed that BHSGL had a negative cash position on that date of £5.6 million. Moreover the internal BHS weekly cashflow update dated 11 December 2015 (i.e. the date of exchange) stated that there had been a downward trend in forecast sales in November and December. It also stated in red: "There remains a significant downside risk in (a) sales and (b) timing of merchandise payments which could result in a potential shortfall as early as end January."

1094. In my judgment, it was irrational for Mr Chandler to believe that the purchase of Darlington would be a "positive cashflow event" for BHSGL in the absence of a purchaser who had committed to buy the property immediately. No purchaser was identified at the meetings on 30 November or 2 December 2015 and by 27 January 2016 Mr Chappell was proposing to sell the property at a loss. In my judgment, Notional Directors would not have been prepared to take the risk that BHSGL would be able to resell the property quickly at a profit or prepared to tie up £2.45 million of cash indefinitely until it did so.

1095. It is also necessary for me to go on and consider whether reasonable directors would have considered the interests of the BHS Group's creditors were paramount and, if so, whether it was in their interests to purchase Darlington. For all of the reasons I have given in relation to ACE II and the Grovepoint Facility, the members of the BHSGL board ought to have concluded by 30 November 2015 that the interests of the group's creditors were paramount and that it was not in their interests to purchase Darlington. Whether or not its true value was £2.45 million, Darlington was a property which required expenditure of £1.42 million (as Mr Yates pointed out in Vail Williams' report). Moreover, once the BHS Group went into liquidation it would be vacant. Finally, it was highly unlikely to realise a profit on a distressed sale and in need of substantial expenditure. It was or should have been obvious that it was in the interests

of creditors to retain £2.45 million in cash. Accordingly, I find that in breach of S.172 Mr Chandler approved the purchase of Darlington.

(iii) S.173

1096. Mr Henningson was not present at the meeting on 30 November 2015 and he could not recall approving the payments to DSHBL. But he was present at the meeting on 2 December 2015 and he signed the written resolution to appoint Mr Chandler as the sole director of DSHBL. However, his evidence was that the transaction fell outside his agreed role and that he would have trusted his co-directors that the matter was in the best interests of BHSL at the time. I have rejected his evidence that his role was limited in any way and I find that in breach of S.173 he failed to exercise independent judgment in approving the appointment of Mr Chandler as the sole director of DHSBL to enable him to purchase Darlington. If he had exercised independent judgment, he would have spoken up against the transaction at the meeting on 2 December 2015 and refused to sign the resolution.

(iv) S.174

1097. I also find that in breach of S.174 both Mr Henningson and Mr Chandler failed to exercise to exercise reasonable care, skill and diligence. Reasonable directors would not have permitted the transaction to proceed until Mr Sherwood had produced the written proposal, the capital expenditure request and the profit and loss account for Darlington and ensured that the conference call to consider the purchase had taken place. Moreover, if they had done so they would not have approved the purchase and the BHSL board would have withdrawn Mr Chandler's authority to exchange contracts. When Mr Sherwood finally produced his board paper, it was a very slight and superficial piece of work and did not convince the BHSGL board that they should give their retrospective support. It was also clear from that paper that no purchaser had been identified and the property would have to be re-marketed or re-financed. In my judgment, no reasonable directors would have been prepared to proceed with the purchase on that basis.

(9) Management fee: £600,000

1098. Finally, the Joint Liquidators alleged that on 1 April 2016 Mr Chappell and Mr Henningson caused £600,000 to be paid to RAL out of the proceeds of sale of Oxford

Street and that the Respondents caused or permitted that sum to be retained by RAL in breach of their duties as directors. They alleged that this conduct amounted to breaches of S.171 to S.176 and also the duty to consider the interests of creditors. It is common ground that neither Mr Henningson nor Mr Chandler authorised the payment to RAL but that they ratified (or purported to ratify) the payment on 10 April 2016.

1099. Mr Chandler accepted that the payment of £600,000 to RAL had been made out of the VAT on the proceeds of sale, that it had not been made properly and that it was "Mr Chappell doing it again on his own again". He also accepted that Mr Plainer had advised against ratifying the payment and that no fee could be paid for Oxford Street. He did not accept, however, that he and the other directors of BHSGL then embarked on a strategy of "whitewashing" the payment. Mr Curl took him through the various provisions of the MSA (as amended) and the various invoices which Mr Parladorio had issued on behalf of RAL. He then put this to Mr Chandler:

> "Could we go to the top of that page, please. At 10 it says: "The invoices at 1 above are in respect of services which are between 5-8 months old. This is a relevant consideration of the Board since there are other creditors of the company whose payments have not been made for 120 days." Now, what you are doing, by this exercise, is you are retrospectively trying to re-paper a fee that has been wrongfully taken in relation to Oxford Street, to which RAL is not entitled, in order to give the appearance of paying historic debts. Do you agree with that? A. No, I don't. Q. It's a crude attempt to avoid being seen to make a preferential payment, isn't it? A. No."

1100. Finally, Mr Curl put the note which he prepared and circulated on 10 April 2016 to Mr Chandler and suggested to him that he urgently tried to resolve this issue for the benefit of RAL and that there was no urgency in resolving the issue from BHSGL's point of view. Mr Curl then took Mr Chandler to Mr Parladorio's "Note to BHS Board" dated 8 April 2016 upon which his own note was based:

> "Q. Could we go to {C/1543/1}, please. This is a note from Mr Parladorio to Mr Chappell of three days before the e-mail we just looked at. And if we could see the bottom of that page, please. At 6 he says: "I see you want [to put] all RAL money into Lloyds. I don't have any issue with that per se but let's have directors discussion/board meeting in the morning with Aidan (say 9 am) to resolve that and how it will work. My primary concern (as it has always been) is that RAL pays all its debt and it is not insolvent today. That is what I am working on with Aidan and DT today". So this papering exercise is being done under pressure from EP, isn't it? A. I

> wouldn't say pressure. He was interested in getting it done, as were the rest of us, because none of us wanted RAL to be the subject of a winding up order and to be made insolvent just as we were hoping to conclude the CVA. Q. Could I see the next page, please. {C/1543/2}. At paragraph 8 he says: "Once I have sorted that I can get back onto dealing with PS related matters but it would be wrong and illogical for me not to prioritise the above matters first, as they are clearly the most pressing." That is a reference to Paul Sutton, isn't it? A. Looks like it. Q. Yes. Now, both the reasons you give in your witness statement for making this payment, ie that RAL was entitled to the money, and RAL was threatening winding up proceedings -- was threatened with winding up proceedings are purposes of RAL's and not the companies', aren't they? A. No, it was absolutely in the companies' interest at that stage that its parent company was not made insolvent. Q. And this papering exercise was done solely in the interests of RAL and was against the interests of any of the BHS companies or their creditors. Do you agree with that? A. I don't agree with that. Q. Could we have {C/1555/1}, please. At the bottom of that page you are e-mailing Mr Smith and Mr Henningson saying: "Further to the below, Darren and I have discussed this, and we would like to propose the following: "That A and B be formally ratified this evening. C can wait until we have the chance to meet later this week. "Please respond ASAP with your views" {C/1555/2}. And this is in relation to the note we looked at a few moments ago. And then could I have page {C/1555/1} again please. And Mr Henningson says: "Let's do A and B and discuss the rest on Tuesday". And Mr Smith didn't reply, did he? A. I don't know. Q. So there was no ratification of these decisions; and, in any case, BHSGL could not ratify the breach because it was insolvent. Do you agree with that? A. Well, I -- I -- I don't now recall whether Mr Smith and I spoke for him to give me his approval or not. That was the first part. And then the second part, I don't agree that we were insolvent. Q. The advice from Mr Plainer is that there needs to be a Board meeting to deal with this; and there hasn't been, has there? A. No, not as far as I can see."

1101. Mr Henningson's evidence was that he could recall being asked to approve certain payments to RAL. He also gave evidence that he understood Mr Chandler to be saying that Mr Plainer had approved the payments in his email dated 10 April 2016:

> "126. I do not recall attending a board meeting, nor have I seen a minute of a board meeting, where this payment out was voted upon. 127. I do recall being asked to approve certain payments to RAL in 2016. I have reviewed an email that Mr Chandler sent an email to myself and Mr Smith on 10 April 2016 explaining that payments due to be made under the MSA were urgent but also that they had been approved by Mr Plainer at Weil. I can say that I would have relied on what Mr Chandler said in this regard and in particular that the payments had been approved by Mr Plainer. 128. As this issue fell outside of my agreed role, I trusted my co-directors and the professional advisors that the transaction was in the best interests of the companies and I had no reason to question it."

1102. Mr Chandler accepted that Mr Chappell should never have given instructions to Edwin Coe to pay £600,000 to RAL out of funds which were earmarked to pay VAT on the proceeds of sale of Oxford Street. In my judgment, he was right to do so. Although those funds were not held on trust for HMRC, it was wholly improper and a gross breach of his duties as a director for Mr Chappell to misappropriate funds which BHSL's solicitors held to pay the VAT. Moreover, Mr Topp and Mr Chandler clearly recognised this at the time.

1103. I also find that between 1 April 2016 and 10 April 2016 Mr Parladorio put pressure on Mr Chandler to ratify the payment despite the existing inter-company debt between RAL and BHSGL and the approval of the CVA and that Mr Chandler gave into that pressure and took steps to ratify the payment. I also find that in doing so he was acting in the interests and for the purposes of RAL and not in the interests or for the purposes of BHSL or Lowland. Finally, I find that he placed himself in a situation of conflict by purporting to ratify the payment because he had become an employee of RAL by 2 March 2016 (and the novation of his contract was expressed to take effect from 1 July 2015).

1104. I am not satisfied, however, that Mr Chandler either knew that BHSL was not liable for the invoice which Mr Chappell issued to Lowland or did not care whether it was or not. I am prepared to accept that he believed that RAL was entitled to a fee on the sale of Oxford Street under Attachment 2 of the MSA. His interpretation was consistent with the memorandum which the directors had signed on 3 March 2016 and the construction of Attachment 2 was not clearcut. I also accept that he continued to believe that RAL was entitled to invoice Lowland as the "invoice hub" based on Mr Roberts' advice in November 2015. Finally, I make this finding even though Chief ICC Judge Briggs expressed the contrary view in *BHS Group Ltd v Retail Acquisitions Ltd* [2017] 2 BCLC 472 at [21] and [22].

1105. I would have found, therefore, that Mr Chandler acted in breach of his duties under S.171 to S.175 although I would not have found him to be dishonest and acting in the knowledge that the fees claimed by RAL were not due. However, I am not satisfied that by the exchange of emails on 10 April 2015 a majority of the BHSGL ratified the payment or that it was effective. In any event, even if it would otherwise have been effective, it would not have been effective as a matter of law: see, in particular, *Sequana*

at [91] (above). Ms Hilliard and Mr Lightman did seek to persuade me otherwise and Mr Lightman described this issue as "something of a red herring" because the Joint Liquidators had made no attempt to set the transaction aside.

1106. I, therefore, dismiss the Individual Misfeasance Claim in relation to the proceeds of sale of Oxford Street. Mr Henningson and Mr Chandler did not cause or permit the payment to be made and they did not permit Mr Chappell to retain the relevant funds because their attempt to ratify the payment was ineffective both on the facts and as a matter of law. There was no allegation that their conduct in attempting to ratify the payment misled third parties or the Joint Liquidators themselves or that they could not have pursued a claim against Mr Chappell on the basis that there was no consideration for the payment or that it was a preference.

1107. In those circumstances it is unnecessary for me to consider the conduct of Mr Henningson in any detail because his involvement in attempting to ratify the payment was peripheral. But I am bound to say that it seems reasonable for Mr Henningson to have understood Mr Chandler's email dated 10 April 2015 in the way in which he claimed in his witness statement. Mr Chandler ought to have told him that Mr Plainer had advised against the course of action which Mr Parladorio and he were proposing. Indeed, this may be a reason in itself why there was no effective ratification of the payment.

VIII. Causation

1108. The present case is an unusual one because Mr Chappell was the principal actor in the events which I have described in this judgment and the claims against him have not yet been tried. If I had tried the claims against him at the same time and reached the same or similar conclusions, then it would have made the issues of causation considerably easier to decide. I would have been entitled to assume Mr Chandler, Mr Henningson and he would have complied with their duties and since they were a majority of the board it would have been relatively easy to decide what would have happened if they had done so. However, I severed the claims against him without any real opposition from the Joint Liquidators and I must approach the question of causation on a different basis.

1109. In my judgment, the appropriate counter-factual is to consider what would have happened if Mr Henningson and Mr Chandler had complied with their duties. Moreover, in doing so I am not required by *Lexi Holdings (No 2)* to assume that any of the other directors and, in particular, Mr Chappell would also have done so. They are not bound by this judgment and whatever conclusions I may have reached, it is possible that Mr Chappell may satisfy the Court that he was at all times acting within the scope of his duties. In my judgment, the appropriate course is to decide as a matter of fact and on a balance of probabilities how other directors would have acted if Mr Henningson and Mr Chandler had complied with their duties.

BB. Wrongful Trading

1110. The only Knowledge Date on which I have held that the Knowledge Condition in S.214(2) was satisfied was 8 September 2015. I begin by considering what the consequence would have been if Mr Henningson and Mr Chandler had believed or concluded (as they should have done) that the Companies had no real prospect of avoiding insolvent liquidation or administration. I find that if they had reached this conclusion on 8 September 2015, then the Companies would not have continued to trade and would have gone into administration for the following reasons:

(1) If Mr Chandler and Mr Henningson had reached that conclusion at the meeting on 1 September 2015 or immediately after that meeting but before 8 September 2015, I am satisfied that they would have called a meeting of the BHSGL board and insisted that Mr Roberts and Mr Turner attended the meeting to give them legal advice before entering into the Grovepoint Facility. If they had done so, Mr Roberts would have sent Mr Turner's memo dated 25 August 2015 to them immediately and before 11 September 2015.

(2) If Mr Henningson and Mr Chandler had properly considered that memo with Mr Roberts and Mr Turner, then the answer to Mr Roberts' question in paragraph 4.2 would have been obvious, namely, that the position of unsecured creditors would be substantially prejudiced by the Grovepoint Facility because of its degenerative effect. The answer to his question in paragraph 5 would have been equally obvious, namely, that it was not reasonable for the BHSGL and BHSL boards to believe that

the Grovepoint Facility would take the Companies through to a position where the July 2015 Turnaround Plan would be implemented.

(3) If Mr Roberts' memo had been tabled at the board meeting on 1 September 2015 or at a meeting called to consider it a few days later and Mr Henningson and Mr Chandler had expressed those views, then I have no doubt that they would have persuaded Mr Topp and Mr Smith to vote in favour of an immediate resolution to put the Companies into administration. In particular, I am satisfied that Mr Smith and Mr Topp would not have been willing to take the risk that they might be personally liable for wrongful trading once Mr Henningson and Mr Chandler had expressed a firm view that insolvency was unavoidable and either threatened to resign or had actually resigned.

(4) If the entire board apart from Mr Chappell had voted to put the Companies into administration, I have little doubt that Mr Chappell would have accepted the inevitable. This analysis is entirely consistent with Mr Chandler's own evidence. The evidence which he gave was that Mr Topp was critical to the business continuing to trade and if he and Mr Chandler had resigned, that would have been the end. In answer to a question I put to him in the context of the arrangement fee of £2 million, he gave the following evidence:

> "MR JUSTICE LEECH: So how did you feel able really to just, you know -- sooner or later there should have -- must have come a point at some point in time where you thought: well, I can't go on allowing him to do this. That's the point that Mr Curl is really putting to you. I mean, given that he effectively controlled the company. A. Yes, but it stopped. Until right at the end, we controlled things thereafter. The Management Services Agreement was entered into, which allowed sensible amounts of money to pass between the companies; and no doubt we'll talk about it. So we -- we stopped it. And so to that extent the -- the conversation that we had in the Landmark that night did have an effect; and actually the real power -- and I'm not sure, by that stage, but certainly going forward, the real power was with me and Darren because that -- Darren, in particular -- if Darren had resigned then that really would have been curtains. So the power shift wasn't as -- or the power wasn't exactly as Mr Curl suggests it was. And I think the real -- the real issue here would have been if the framework agreement rectification that we're, again, no doubt about to speak to -- speak about -- if that hadn't been accepted by all parties as being the true position then -- then I don't see how we could have continued. And I think there would have been an inevitable collapse of everything."

(5) Although this was not evidence of primary fact, I am entitled to have regard to it in answering the counter-factual and deciding what would have happened. But even if Mr Chandler was wrong and Mr Chappell had either allowed the other members of the board to resign or had removed them by exercising his powers as the majority shareholder of RAL (as he threatened to do in April 2016), I have no doubt that this would have precipitated insolvent liquidation immediately. Mr Chappell would have been unable to operate any of the Companies without appointing new directors and it is highly improbable that he would have been able to find any new directors who would command the confidence of the Operations Board or the employees or suppliers.

(6) In reaching this conclusion I take into account the decisions of both Mr Bourne and Mr Tasker to resign as directors of the RAL Board once the acquisition was completed. I also take into account the fact that Mr Parladorio never became a member of the BHSGL board even though he attended almost every meeting, he was a close confidant of Mr Chappell and he exerted considerable influence. The inference I draw is that Mr Parladorio knew what Mr Chappell was capable of and was too astute to take the risk that he might be the target of legal proceedings if he became a director of the Companies.

(7) Further, even if Mr Chappell had been able to recruit a new board, I consider that it is highly improbable that BHSGL would have entered into either the Grovepoint Facility or the Hudson Facility. BHSGL would have been in default immediately and unable to make the representations set out in clause 19.10 of the Grovepoint Facility Agreement. Moreover, even if a new board had been willing to authorise Mr Chappell to enter into the Grovepoint Facility and Olswang had been willing to continue acting for BHSGL (knowing that it was in default), I have no doubt that Arcadia would have refused to guarantee the Hudson Facility. Mr Topp would undoubtedly have told Sir Philip Green that he had resigned and why he had done so and without Arcadia's guarantee, BHSL was unable to get an overdraft from Barclays. By 25 September 2015, therefore, the BHS Group would have run out of cash and whoever the directors were, it would have been necessary for them to put the Companies into administration.

CC. The Trading Misfeasance Claim

(1) KD3: 26 June 2015

1111. I have held that in breach of S.171(1)(b), S.172 and S.174 Mr Henningson agreed the terms of ACE II for an improper purpose, that in doing so he failed to consider the interests of the Companies' creditors and that he failed to attend board meetings to consider whether ACE II would promote the interests of the Companies or their creditors. I have also held that in breach of S.172 and S.174 Mr Chandler resolved to enter into ACE II without considering the interests of the Companies' creditors and without calling a board meeting to consider Mr Roberts' advice and to properly record whether ACE II would promote the interests of the Companies and their creditors.

1112. I find that if they had complied with those duties, then the Companies would not have continued to trade and would have gone into administration for very similar reasons. I have set out the conclusions which Mr Henningson and Mr Chandler ought to have reached at [981] to [985]. If they had expressed those conclusions at a board meeting on 24 June 2015 I have no doubt that Mr Topp and Mr Smith would have agreed that it was not appropriate to enter into ACE II. In that event Mr Chappell would have had no choice but to appoint an insolvency practitioner and put the Companies into administration. There would have been insufficient time to remove the existing board and to appoint a new one before the June quarter day and BHSL would have insufficient funds to pay the rents due on that day.

1113. In reaching this conclusion I take into account not only Mr Chandler's evidence and the inherent probabilities but also the events of April 2016. Arcadia's consent to ACE II was required and if the members of the BHSGL board had taken the same view about ACE II as they later did about the terms of the ABL Facility, then it is more probable than not that the same outcome would have eventuated. The BHSGL board would have met with Sir Philip Green and would have refused to provide the additional support of £10 million to repay Noah II or to subordinate Arcadia's QFC to rank behind ACE.

(2) KD6: 8 September 2015

1114. I have held that in breach of S.172 and S.174 Mr Henningson and Mr Chandler failed to consider the interests of creditors or the advice of Mr Turner before approving the Grovepoint Facility and, in Mr Chandler's case, executing the documents on the Companies' behalf. I have also set out the conclusions which they ought to have reached

at [996] to [999]. I find that if they had expressed those conclusions at a board meeting before 8 September 2015 then the Companies would not have continued to trade and would have gone into administration for the reasons which I have set out in [1110](2) to (7).

DD. The Individual Misfeasance Claims

(1) North West House I: The sale

1115. On 11 March 2015 Lowland was a wholly-owned subsidiary of BHSL which was a wholly-owned subsidiary of BHSGL and following completion BHSGL was a wholly owned subsidiary of RAL. The Articles of Association of both Lowland and BHSL provided that the holder of more than 50% of the shares could remove a director by an instrument in writing: see Article 8. They also provided that a sole director could act alone. Article 7.10 of both Articles provided as follows:

> "If at any time there shall be one Director of the Company such director may act alone in exercising all the powers, discretions and authorities vested in the Directors provided that such a Director may only vote on any matter in which he is interested if (i) such matter has been the subject to [sic] a prior resolution of the members; and (ii) the manner in which such Director votes reflects and is consistent with such resolution as passed by the members."

1116. BHSGL's Articles of Association on 11 March 2015 were not in evidence in a complete form and RAL's Articles were not in evidence at all. By resolution dated 30 September 2008 the BHSGL Articles were amended and the amendments to Articles 15 and 16 suggest that they were in a very similar form to the Articles of both BHSL and Lowland. I will, therefore, assume in Mr Henningson's favour the Articles of BHSGL contained a power to remove a director and for a sole director to exercise all of the powers of the company.

1117. I have held that Mr Henningson authorised the sale of North West House in breach of his duties in S.171 to S.175 as a director of Lowland. If Mr Henningson had complied with those duties, he would have refused to authorise the sale of North West House until Lowland had obtained an independent valuation of the property. However, Lowland's parent, BHSL, could have removed him as a director of Lowland and its parent, BHSGL, could have removed him as a director of BHSL. Again, I assume in Mr

Henningson's favour that RAL could have removed him as a director of BHSGL. In my judgment, this is exactly what Mr Chappell would have done on the afternoon of 11 March 2015 if Mr Henningson had refused to authorise the sale and would have exercised his powers as the sole director of Lowland under Article 7.6.

1118. Mr Curl and Mr Perkins did not submit that the power to remove a director under Article 8 was subject to the requirement of special notice in section 168 of the CA 2006 or the procedural constraints in that section and in the absence of authority I see no reason why the Articles of Association of a company should not provide for a simple procedure for the removal of a director. Furthermore, it would have been a simple exercise for Mr Chappell to take advice from Mr Roberts and to hold a RAL board meeting before giving notice to Mr Henningson removing him from all four boards as director at the same time. It is unclear precisely when Mr Tasker and Mr Bourne resigned but they were not present at the board meeting to approve ACE I at 5.10 pm on the afternoon of 11 March 2015.

1119. Finally, I have considered whether it would have made a difference if Mr Henningson had complied with his duties as a director of Lowland by giving instructions directly to Olswang not to proceed with the sale. I am not satisfied that this would have made any difference. Mr Roberts knew that Mr Chappell owned 90% of the shares in RAL and was the ultimate beneficial owner of Lowland. If he had given instructions to Mr Roberts that he wished to remove Mr Henningson as a director and authorise the sale as the sole director of Lowland, I see no reason why he would not have carried out those instructions. The Joint Liquidators have failed to persuade me, therefore, that Mr Henningson's breaches of duty were causative of the loss which Lowland suffered as a consequence of the sale of North West House at an undervalue.

(2) North West House II: the proceeds

1120. I have held that Mr Henningson permitted Mr Chappell to instruct or authorise Olswang to pay £5.2 million to RAL and £1,778,415 to ACE in breach of his duties in S.171 to S.175. If Mr Henningson had complied with those duties and refused to authorise or permit them, then in my judgment Mr Chappell would have removed him in exactly the same way. Moreover, unlike the Swiss Rock payment, this is not a case in which Mr Roberts would have refused to act on the instructions of one director alone because he

was clearly prepared to do so. The email exchange from 12 March 2015 shows that he was not willing to act on the instructions of Mr Parladorio (who was not a director of Lowland) but he was prepared to act on the instructions of Mr Chappell alone.

1121. Again, I have considered whether the position would have been different if Mr Henningson had complied with his duties by giving instructions directly to Mr Roberts not to make the payments because they were not permitted by the SPA. However, I am not persuaded that this would have made a difference if Mr Chappell had then removed him as a director. Mr Roberts was fully aware of the terms of the SPA and must have either taken the mistaken view that the payments to RAL and ACE did not amount to a breach of clause 6.2.2 of the SPA or felt that he had to comply with Mr Chappell's instructions. Either way, the Joint Liquidators could have asked these questions of Mr Roberts and he could have made a witness statement dealing with them even if he did not intend to give evidence. The Joint Liquidators have failed to persuade me, therefore, that Mr Henningson's breaches of duty were causative of the loss to Lowland of £7 million of the proceeds of sale of North West House.

(3) The Swiss Rock payment: £521,976

1122. By contrast, I take a very different view in relation to the Swiss Rock payment of £521,976. I have found that Mr Henningson authorised that payment in breach of his duty to exercise independent judgment under S.173. I find that if Mr Henningson had refused to authorise the payment and sign the payment request, the payment would not have been made. The trial bundle contained a letter dated 15 April 2015 which proves that Mr Chappell had tried to instruct Barclays to make the payment but that it had refused to do so without carrying out security checks. Ms Hague's email dated 16 April 2015 also confirmed that the payment had been declined. If Mr Henningson had refused to sign the payment request, then Ms Morgan would have refused to process it without the authority of another director and it would never have been made.

(4) The arrangement fee: £2 million

1123. I have held that Mr Henningson agreed to the payment of the arrangement fee of £2 million to RAL or turned a blind eye to it in breach of his duties under S.171 to S.175. I have also found that he ought to have informed the other directors that Mr Chappell was proposing to pay a fee and complied with his duty under S.175 by leaving the

decision whether to agree to the payment under the MSA to the members of the BHSGL board who were not also directors of RAL. In considering what would have happened if Mr Henningson had complied with his duties, I assume for these purposes of this counter-factual that BHSGL would have entered into ACE II and would not have ceased trading and put the Companies into administration.

1124. If Mr Henningson had informed the other BHSGL board members that Mr Chappell was proposing to instruct Olswang to pay RAL an arrangement fee of £2 million, then I find on a balance of probabilities that the BHSGL board would not have agreed to this proposal under the MSA but would have instructed Mr Roberts not to make the payment. Mr Chandler and Mr Topp both gave evidence that they strongly objected to the payment and challenged Mr Chappell at the Landmark Hotel: see [817]. I am satisfied, therefore, that they would have voted against it. If Mr Henningson had exercised independent judgment and voted in good faith in a way which was likely to promote the interests of BHSGL, he would also have voted against it. Mr Topp, Mr Chandler and Mr Henningson would have been sufficient to prevent the payment because Mr Smith was the only other director who was not a director of RAL (having resigned on 8 June 2015).

1125. Finally, I am satisfied that Mr Chandler would have given instructions directly to Mr Roberts not to make the payment. By 26 June 2015 he no longer trusted Mr Chappell and in September 2015 the BHSGL board placed restrictions on Mr Chappell's ability to withdraw funds from the business. Further, on 8 September 2015 he revoked Mr Chappell's instructions to Olswang to pay £2.7 million to RAL. It is possible that Mr Chappell would have tried to dismiss the board although I consider this very unlikely. Mr Chappell did not force Mr Chandler to resign in September 2015 and although he threatened to dismiss Mr Topp and Mr Chandler over the management fee of £600,000 in April 2016 he did not do so. But if Mr Chappell had forced the BHSGL board to resign over the arrangement fee, then I am satisfied that Mr Topp and Mr Chandler would have resigned with the consequences which I have already explored: see [1110] to [1114].

(5) Brokerage fees: £749,238

1126. I have found that Mr Henningson voted in favour of paying RAL brokerage fees of £749,238 in breach of his duties under S.171 to S.174 but I have dismissed the claim against Mr Chandler because he believed in good faith that it was in the interests of the Companies and their creditors. Given this conclusion, I am not satisfied that Mr Henningson's breaches of duty had any causative effect. Mr Chandler authorised him to vote under Article 7.6 and if he had voted against the proposal, this would not have had any effect on the outcome.

(6) Darlington

1127. I have held that Mr Chandler approved the purchase of Darlington in breach of his duties under S.172 and that Mr Henningson signed the written resolution to appoint Mr Chandler as the sole director of DSHBL in breach of his duties under S.172 and S.173. I have also held that they failed to keep the decision under review in accordance with the decision on 2 December 2015 and in breach of their duties under S.174. Finally, I have set out what conclusions Notional Directors would have reached if they had considered in good faith whether the purchase of Darlington was likely to promote the success of the Companies or in the interests of creditors: see [1093] to [1095].

1128. If Mr Chandler and Mr Henningson had voiced those conclusions at the BHSGL board meeting on 2 December 2015, then I find on a balance of probabilities that the BHSGL board would have voted not to proceed with the purchase for those reasons. The correspondence and minutes at [312] at [325] show that Mr Topp and Mr Smith both supported the purchase reluctantly and if they had been asked to consider the interests of creditors, I have no doubt that they would have accepted that there was a compelling case against the sale and voted against it.

1129. But I also find on a balance of probabilities that even if the BHSGL had decided to wait until Mr Sherwood circulated the documents referred to in the minutes of the meeting on 2 December 2015, they would have voted not to proceed with the sale once he had done so. In reaching this conclusion I place significant weight on Mr Sherwood's paper dated 30 December 2015 and the fact that the BHSGL board never held the conference call referred to in the minutes or gave its retrospective approval to the transaction. Moreover, I draw the inference that the board did not do so because it was all too obvious that they should not have approved the transaction in the first place.

1130. The purpose of requiring Mr Sherwood and Ms Morgan to provide a capital expenditure request, a profit and loss statement and a detailed board paper was to ensure that the board was provided with a detailed justification for the purchase and that a proper financial evaluation of the sub-purchaser before it made a final decision. But when it came, Mr Sherwood's paper dated 30 December 2015 was unconvincing and superficial. Moreover, contrary to the representations which Mr Sherwood had made in his emails dated 10 and 30 November 2015 Mr Chappell did not have a purchaser for the property and it would have to be remarketed. Indeed, by 27 January 2016 Mr Chappell had to tell the BHSGL board that the property would be sold at a loss.

IX. Quantum

EE. The Trading Misfeasance Claim

1131. I have found that Mr Henningson and Mr Chandler failed to consider the interests of the Companies creditors in breach of their modified *Sequana* duty under S.172 before resolving or agreeing to enter into ACE II and the Grovepoint Facility. I have also held that if they had complied with those duties, then the Companies would not have continued to trade and would have gone into insolvent administration. Mr Curl and Mr Perkins assumed that the IND was the appropriate measure of loss but I was not addressed by counsel for any of the parties on the question whether this was a correct assumption to make.

1132. The IND for the period between 26 June 2015 and 25 April 2016 was £133.5 million and for the period between 8 September 2015 and 25 April 2016 was £45.5 million. Given the amounts in issue and the fact that this is a developing area of law, it would not be just to impose liability upon Mr Henningson or Mr Chandler for sums of this order without giving the parties an opportunity to make further submissions on the appropriate measure of equitable compensation before I make a final determination. I will not, therefore, consider the measure of compensation for breach of the *Sequana* duty further in this judgment.

FF. The Individual Misfeasance Claims

(1) The Carlwood Payment

1133. I have held that in breach of his duty in S.176 Mr Henningson accepted £300,000 from ACE by reason of his doing something as a director of Lowland, namely, authorising the sale of North West House or, alternatively, by reason of his doing something as a director of BHSGL, namely, agreeing to ACE II. Ms Hilliard and Ms Earle did not argue that Mr Henningson was not liable to account for it to Lowland or BHSGL for £300,000 if I made those findings. I, therefore, order him to pay £300,000 to the Joint Liquidators.

(2) The Swiss Rock payment: £521,976

1134. I have found that BHSL would not have paid £521,976 if Mr Henningson had complied with his duties as a director and that it lost that sum as a consequence. Ms Hilliard and Ms Earle did not submit that BHSL would have lost that sum even if Mr Henningson had complied with those duties or that it failed to mitigate its loss or that it was not recoverable for some other reason. Accordingly, I hold that Mr Henningson is liable to BHSL for equitable compensation of £521,976.

(3) The arrangement fee: £2 million

1135. I have also found that BHSGL would not have paid £2 million to RAL out of ACE II if Mr Henningson had complied with his duties as a director and that it lost that sum as a consequence. Again, Ms Hilliard and Ms Earle did not submit that BHSGL would have lost that sum even if Mr Henningson had complied with those duties or that it failed to mitigate its loss or that it was not recoverable for some other reason. Mr Chandler gave evidence that BHSGL recovered £500,000 from Mr Chappell and this evidence was not challenged. BHSGL must give credit for this sum and I hold that Mr Henningson is liable to BHSGL for the sum of £1.5 million.

(4) Darlington

1136. I have found that BHSGL would not have purchased Darlington if Mr Henningson and Mr Chandler had complied with their duties. I have also held that BHSL provided the funds of £255,000 and £2,300,333.42 to fund the purchase. I am satisfied, therefore, that BHSL would not have lost those funds if Mr Henningson and Mr Chandler had complied with their duties and that BHSL is entitled to recover these funds subject to giving credit for the amount which DHSBL realised on resale. In their written opening submissions, Mr Lightman and his team submitted that the true measure of loss was

£1,671,236.70. Mr Curl and Mr Perkins did not challenge this figure in their closing submissions and I accept it. I hold that Mr Chandler and Mr Henningson are liable to BHSL for this sum.

X. Section 1157

1137. Mr Henningson failed to discharge the burden of satisfying the Court that he acted either honestly or reasonably or that in all the circumstances he ought fairly to be excused for his breaches of duty or for any liability for wrongful trading. I dismiss his application for relief under S.1157 for the following reasons:

(1) Although dishonesty is not an ingredient of liability under S.176 Mr Henningson deliberately misled the Court about the Carlwood Payment and the Carlwood Invoice: see [449]. I cannot, therefore, be satisfied that he acted honestly or reasonably in relation to that breach of duty.

(2) I have held that Mr Henningson agreed to ACE II for an improper purpose and turned a blind eye the payment of the arrangement fee of £2 million to RAL: see [965] to [981]. Again, although dishonesty is not an ingredient of liability under S.171 he was not frank with the Court and he failed to satisfy me that he acted either honestly or reasonably in relation to these breaches of duty.

(3) I rejected Mr Henningson's evidence that he had no involvement in approving the Grovepoint Facility: see [848]. I am not satisfied that this can be characterised as a lapse of memory or that Mr Henningson was frank with the Court and he failed to persuade me that he acted honestly and reasonably in relation to this breach of duty or his liability for wrongful trading.

(4) I also rejected Mr Henningson's evidence that he had no involvement in approving the purchase of Darlington: see [1089]. Again, I am not satisfied that this can be characterised as a lapse of memory or that Mr Henningson was frank with the Court and he failed to persuade me that he acted honestly and reasonably in relation to this breach of duty.

(5) I have accepted Mr Henningson's evidence that he exercised no independent judgment in relation to the Swiss Rock payment and I am prepared to accept that

he acted honestly. But he did not act reasonably. It was an abrogation of his duty to sign the payment request without making any attempt to establish whether Swiss Rock had any entitlement to the funds.

(6) Finally, I am not satisfied that it would be fair in all the circumstances to excuse Mr Henningson's breaches of duty. He committed breaches of duty on the day of his appointment as a director and his conduct in relation to North West House was almost certainly dishonest (even though I cannot be satisfied that it caused the Companies any loss) and throughout the short period of his appointment he consistently put the interests of RAL and Mr Chappell above the interests of the Companies, their employees and creditors.

1138. Mr Chandler gave evidence for over three days and he satisfied me that he behaved honestly whilst he was a director of the Companies. I had some sympathy with Mr Chandler and I am satisfied that he tried to do his best in the face of Mr Chappell's conduct. But my sympathy and his good intentions are not the touchstone of relief under S.1157. After careful consideration, I am not satisfied that Mr Chandler acted reasonably or that it would be fair in all the circumstances to relieve him from liability for the following reasons:

(1) Mr Chandler owed his appointment to Mr Parladorio and was out of his depth. In my judgment, at two key points in time his lack of experience badly let him down and he failed to act with the care and circumspection which could reasonably be expected of General Counsel of the BHS Group.

(2) In my judgment, Mr Chandler did not understand or appreciate the commercial realities on 26 June 2015 and 8 September 2015 in the way that an experienced corporate lawyer would have done. The commercial reality was that the BHS Group's creditors not RAL were funding the continued trading of the group and it was important to take their interests seriously. Moreover, the BHS Group was effectively shut out from normal commercial lending and had to adopt the degenerative strategy of taking very expensive, fully secured loans to survive. An experienced corporate lawyer would have understood both of these things and realised that the decisions to enter into ACE II and the Grovepoint Facility were

existential and required proper consideration from the BHSGL board. I am not satisfied that Mr Chandler understood any of these things.

(3) Mr Chandler took the precaution of instructing Olswang to provide legal advice in relation to ACE II and the Grovepoint Facility but each time only after the decision had been taken. I found his evidence in relation to both Mr Roberts' email dated 24 June 2015 and Mr Turner's memo dated 25 August 2015 unsatisfactory: see [844] and [897]. Again, an experienced corporate solicitor would have seen the importance of the BHSGL addressing and debating the issues raised by Mr Roberts and Mr Turner before taking a decision. I am not satisfied that Mr Chandler obtained their advice except as a box-ticking exercise.

(4) In my judgment, the decision to buy and "turn" Darlington was completely irrational in circumstances where the property needed substantial sums of money spent on it, no purchaser had been identified and BHSGL's entire trading strategy was based on selling property to generate cash whilst Mr Topp turned the business around. An experienced General Counsel would have read the mood music from Mr Topp, Mr Hitchcock and Mr Smith and put a stop to it rather than give into Mr Chappell.

(5) Finally, although I accept that Mr Chandler acted honestly and with the best intentions, some of his conduct came close to the line. I have in mind his willingness to help Mr Parladorio to justify and paper over the sums which Mr Chappell had stolen from the Companies and, in particular, the legal contortions which Mr Chandler went through to justify Mr Chappell's retention of £1.5 million of the arrangement fee and his attempt to ratify the management fee of £600,000 after the CVA and when the Companies were on the point of administration. I bear in mind that Mr Parlodorio put him under pressure. But from April 2015 he knew that Mr Chappell was dishonest. He also knew that Mr Parladorio owed his loyalty only to RAL and Mr Chappell.

XI. Discretion

1139. I turn, therefore, to the final issue which I have to decide in this judgment, namely, the exercise of the Court's discretion under S.214. I have held that the Court has a broad discretion which is not "semi-structured" and that it is entitled to take into account all

relevant circumstances in deciding what is the proper contribution which a director should be ordered to make: see [514] to [518].

(1) Quantum

1140. I begin with quantum. The IND between 8 September 2015 and 25 April 2016 is agreed at £45.5 million: see [13]. This is, therefore, both the starting point and the upper limit for any contribution. There was an issue whether this figure took into account the £8 million which the Joint Liquidators had received in settlement from Sir Philip Green. In his closing reply submissions Mr Curl took me to Mr Pilgrem's second report which was not in evidence because the figures were agreed. In that report Mr Pilgrem expressly stated that in striking the IND both Mr Shaw and he had assumed the receipt of the £8 million. I am satisfied, therefore, that it is not open to Mr Henningson and Mr Chandler to re-open that issue.

1141. There was also a question whether the Joint Liquidators should give credit for the £3.5 million from Mr Smith. Mr Curl submitted that Mr Smith was only a director of BHSGL and that a £1 for £1 reduction was not justified but the Liquidators conceded that credit should be given against the IND. In the light of this concession, I, therefore, fix the quantum of the claim at £42 million.

(2) Several or joint and several

1142. In my judgment, it is not appropriate to impose liability upon Mr Henningson and Mr Chandler on a joint and several basis given the difference between their involvement and culpability. Mr Henningson was a friend and confidant of Mr Chappell, a director of RAL and he turned a blind eye to Mr Chappell's misappropriations from the Companies. By contrast, Mr Chandler was not a director of RAL and did not assist Mr Chappell. Further, Mr Chappell will not be bound by my findings in relation to his culpability and the Court will have to decide in the future whether to order him to make a contribution and, if so, how much. This is a consequence of my earlier decision to sever the trial and, in my judgment, it is a compelling reason for not ordering joint and several liability at the end of this trial. The Court may find that Mr Chappell is not liable at all or for the entire IND either at this Knowledge Date or other Knowledge Dates.

(3) Individual Contributions

1143. I also take the view that Mr Chappell is primarily liable for the IND. He agreed to purchase the BHS Group for £1 without a sustainable working capital facility or any prospect of obtaining one. He promised Sir Philip Green that he would not put the group into administration for three years no doubt to enable Sir Philip Green and Arcadia to distance themselves from the pension deficit and reduce the risk of a moral hazard investigation and he used that year as an opportunity to plunder the BHS Group as and when he could. Moreover, the only way in which he could keep the group trading was by a adopting an insolvency deepening, degenerative strategy of expensive loans. In my judgment, he should bear responsibility for 50% of the loss which it suffered as a consequence.

1144. I also take the view that the other directors should bear responsibility equally. A strong board composed of astute and experienced directors like Mr Bourne might have prevented Mr Chappell from embarking on this strategy and protected the group's creditors. I have considered whether to impose greater liability on Mr Henningson than Mr Chandler because he was close to Mr Chappell and helped him to misappropriate substantial sums but also because he lied to the Court. But in the event, I exercise my discretion not to do so because he made no greater contribution to the decision to approve the Grovepoint Facility than the other directors.

1145. I have also considered whether I should exclude Mr Topp or Mr Smith from this calculation because both have settled their claims and also because Mr Topp was primarily concerned with the retail side of the business and not with finance. Again, I exercise my discretion not to do so because both of them voted in favour of further financing on 1 September 2015 and saw the finance documents. They must have appreciated how much the Grovepoint Facility was going to cost BHSGL. However, I reduce their notional contributions by 5% each to take into account the fact that Mr Smith has paid £3.5 million to settle the claim against him and Sir Philip Green paid £8 million to settle the claims of previous directors. I, therefore, fix the individual contributions of the directors as follows: Mr Chappell 50%, Mr Henningson 15%, Mr Chandler 15%, Mr Topp 10% and Mr Smith 10%.

(4) Insurance Cover

1146. By letter dated 21 February 2023 Olephant wrote to Jones Day in the context of proposals for mediation. They stated that the overall limit of the D&O cover for Mr Smith, Mr Henningson and Mr Chandler was £20 million. They also asserted that any costs order which the Joint Liquidators obtained might well exceed the remaining cover:

> "By your clients' Amended Points of Claim, they seek as against the Second and Third Respondents recoveries capped at £163m and as against the Fourth Respondent recoveries capped at £33m. Since the overall limit of the D&O cover available to all of the active Respondents is £20m (which figure has been, as you would expect, substantially reduced since your clients' initial letter before claim dated 4 June 2019), our client has real and genuine concerns as to the outcome for the Companies' creditors even if your clients prevail at trial, and even more so in the likely event that they fail to do so. In short, it should therefore be obvious that, even if your clients were to be successful at trial, the insolvent estate, and the interests of the creditors, are likely to be harmed as substantial irrecoverable fees will have been incurred. In that event, any significant costs order in your client's favour in this case would be likely in of itself to exceed what remains in the D&O policy and our client's assets. Accordingly, even though our client strongly believes his defence will be successful, in light of those commercial realities and the CPR's overriding objective this is clearly a case where the parties ought to explore whether an agreed resolution can and should be reached as soon as possible."

1147. Mr Jan Mugerwa of Olephant also made a witness statement dated 10 November 2023 in opposing Mr Chappell's application for an adjournment. In that witness statement he stated that there was about £2.7 million remaining available to indemnify all the insureds under the policy and that if the trial proceeded as planned (and it did) there would only be £1 million of cover left at its conclusion. Mr Lightman and his team submitted that Mr Chandler' lack of means (which I consider below) and the dwindling insurance pot meant that that the amounts available would not even cover the costs incurred by the JLs.

1148. I find these figures difficult to reconcile. I have not been provided with a copy of the policy and I am not prepared to accept on the basis of Mr Mugerwa's vague assertions that defence costs would erode the policy limit (as opposed to a separate costs limit). Even assuming that the D&O insurers funded Mr Smith's settlement, this ought to leave £16.5 million of cover. Moreover, even if the D&O insurers have spent £19 million or £20 million on defence costs and those costs do erode the policy limit, this may give rise to separate costs issues.

1149. I am not satisfied, therefore, that Mr Henningson and Mr Chandler do not have insurance cover to meet the claims against them which would amount to £13 million or the costs of defending the claims. But even if they do not have adequate cover to do so, I decline to exercise my discretion to reduce the amount for which I declare them to be liable for this reason. Mr Curl submitted that to do so would be to send the wrong message to risk-taking directors that they could escape liability if they did not obtain adequate cover to indemnify themselves against wrongful trading. I agree. There is no evidence before me about when or why the BHSGL board or its brokers agreed cover limited to £20 million or £20 million (including defence costs) and this was plainly inadequate to meet the potential claims against them given the sums with which they were routinely dealing.

(5) Personal circumstances

1150. Mr Henningson did not make a witness statement of means and Ms Hilliard and Ms Earle did not submit that there were any personal circumstances which I should take into account in deciding the amount of compensation. In particular, they did not submit that I should take into account his medical condition. I also bear in mind that Mr Henningson received a secret commission of £300,000 from ACE which he still denies and for which he has failed to account. I exercise my discretion, therefore, and declare that Mr Henningson is liable to make a contribution to the Companies' assets of £6.5 million.

1151. Mr Chandler made a third witness statement of means dated 10 November 2023 in which he stated that he had personal net assets of £467,458.25. Mr Curl and Mr Perkins did not dispute this evidence and I accept it. I also remind myself that Mr Chandler was not a shareholder in RAL and that he received a total of £253,819.25 in pay and bonuses and that these were the only financial benefits which he received from working for BHSGL or the BHS Group.

1152. I accept that Mr Chandler did not receive substantial rewards from being a director of the Companies over and above what was reasonable for his services. I also accept that an award of compensation under S.214 will be potentially ruinous for him. However, I am not persuaded that it is appropriate to take these matters into account. Again, it will send a green light to risk-taking or, even, dishonest directors if the Court reduces the

amount of compensation for which Mr Chandler is liable on the basis of his ability to pay. Creditors will receive no compensation if risk-taking directors will be able to escape liability if they can prove that they have no insurance and no personal assets to meet a claim for wrongful trading (or have been able protect them from attack by a liquidator). I also exercise my discretion to declare that Mr Chandler is liable to make a contribution to the Companies' assets of £6.5 million.

XII. Summary of Findings

(1) The Wrongful Trading Claim

1153. I dismiss the Wrongful Trading Claim in relation to the Knowledge Dates KD1 to KD5 but I find that the Knowledge Condition is satisfied in relation to Knowledge Date KD6 (8 September 2015). I consider that in the exercise of my discretion it is proper to order Mr Henningson and Mr Chandler each to contribute on a several basis £6.5 million to the Companies' assets and I will make a declaration to that effect.

(2) The Trading Misfeasance Claim

1154. In relation to the Trading Misfeasance Claim, I hold that Mr Henningson agreed to ACE II for an improper purpose in breach of S.171(1)(b) and in breach of his duty under S.172 to promote the success of the Companies by considering the interests of their creditors. I also hold that Mr Chandler approved ACE II in breach of his duty under S.172 to promote the success of the Companies by considering the interests of their creditors. Finally, in the alternative to the Wrongful Trading Claim I hold that Mr Henningson and Mr Chandler approved the Grovepoint Facility in breach of his duty under S.172 to promote the success of the Companies by considering the interests of their creditors.

1155. I have also held that if Mr Henningson and Mr Chandler had complied with their duties on or before 26 June 2015 and on or before 8 September 2015 the Companies would not have continued to trade but would have gone into insolvent administration immediately. I made no further findings in relation to the appropriate measure of damage and I will give the parties the opportunity to make further submissions on that issue. For the avoidance of any doubt I dismiss the Trading Misfeasance Claim in relation to Knowledge Dates KD1, KD2, KD4 and KD5.

(3) The Individual Misfeasance Claims

1156. I have held that Mr Henningson accepted £300,000 (or the benefit of that sum) from ACE in breach of his duty to Lowland or, alternatively, BHSL under S.176. He has failed to account for that sum to either of the Companies and I will order him to pay that sum to the Joint Liquidators.

1157. I have also held that Mr Henningson is liable to BHSL for equitable compensation of £521,976 in respect of the Swiss Rock payment, £1,500,000 in respect of the RAL arrangement fee and £1,671,236.70 in respect of the purchase of Darlington. I have also held that Mr Chandler is also liable for equitable compensation of £1,671,236.70 in respect of the purchase of Darlington. For the avoidance of doubt, I dismiss the claims in relation to the sale and proceeds of sale of North West House, the proceeds of sale of Atherstone, the brokerage fees of £749,238 and the management fee of £600,000.

(4) Relief

1158. I have listed a hearing to consider consequential matters at that hearing I will hear from the parties in relation to the appropriate measure of loss for the Trading Misfeasance Claim and in relation to the question whether Mr Henningson and Mr Chandler are entitled to set off or claim a contribution for any of the sums for which I have found them liable against each other. I will also deal with interest, costs and any other relief.

XIII. Postscript

1159. Following the circulation of this judgment in draft, Olephant provided the Court with a copy of a certificate of insurance for directors' all risk cover for the period from 11 March 2015 to 10 March 2016 issued to RAL rather than BHSGL (as I had assumed). By letter dated 4 June 2015 Olephant stated that the £20 million limit for cover included defence costs. They also stated that the judgment was based on an incorrect factual premise: see [1148] to [1150].

1160. I do not accept this. Neither Mr Henningson nor Mr Chandler put the policy in evidence at the trial and I was being asked to exercise my discretion to find that it was proper to limit the amount for which they were liable to the cover which remained available to them without proof of the policy or the limit of cover or any evidence about the reasons

why cover was limited to £20 million. But in any event, I make it clear that the decision which I reached in [1149] remains unchanged even though I have now seen the policy and its limit.