Neutral Citation Number: [2022] EWHC 2205 (Ch)

Appeal Reference: CH-2021-000278

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)
On appeal from the order of Deputy ICC Judge Schaffer dated 9th December 2021 (Case Nos. CR-2016-002220, CR-2016-002221 CR-2016-002222 and CR-2016-002224)
IN THE MATTER OF BHS GROUP LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF SHB REALISATIONS LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF DAVENBUSH LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF LOWLAND HOMES LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

19th August 2022

Before :

MR JUSTICE EDWIN JOHNSON

- -

Between :

DOMINIC LEONARD MARK CHANDLER — **Appellant**

and

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

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Daniel Lightman QC and Charlotte Beynon (instructed by Olephant Solicitors) for the Appellant
Joseph Curl QC and Ryan Perkins (instructed by Jones Day) for the Respondents

Hearing date: 17th June 2022

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APPROVED JUDGMENT

This judgment was handed down remotely by circulation to the parties' representatives by email and released to The National Archives. The time and date for hand-down are deemed to be 10.30am on 19th August 2022

Mr Justice Edwin Johnson:

Introduction

1. This is my reserved judgment on the hearing of an application, made by Dominic Chandler, for permission to appeal against an order of Deputy ICC Judge Schaffer dated 9th December 2021. By that order the Deputy ICC Judge (**"the Judge"**) dismissed the application of Mr Chandler seeking to strike out certain parts of the Respondents' statements of case in these proceedings (**"the Strike Out Application"**).

2. The Judge made his order of 9th December 2021 (**"the Order"**) pursuant to his judgment on the Strike Out Application, which he delivered at the case management conference in the proceedings, on 9th December 2021 ([2021] EWHC 3501; (Ch) [2022] BCC 457). In that judgment (**"the Judgment"**) the Judge explained his reasons for refusing to strike out the relevant parts of the relevant statements of case.

3. Permission to appeal was refused by the Judge, for the reasons which he set out in a subsequent judgment at the case management conference. The renewed application for permission to appeal (**"the PTA Application"**) came before me, in the usual way, on a paper application. I decided that the PTA Application would benefit from further submissions from both parties and, in the result, I made an order on 22nd March 2022 of the kind which is sometimes referred to as a rolled-up order. My order provided for the PTA Application to be listed for a hearing, with the hearing of the appeal (subject to the question of permission) to follow.

4. At this hearing Mr Chandler has been represented by Daniel Lightman QC and Charlotte Beynon. The Respondents have been represented by Joseph Curl QC and Ryan Perkins. I am most grateful to all counsel for their helpful written and oral submissions. I have also had the advantage of a transcript of the hearing, which has been of immense benefit in reminding me of the detail of the submissions of counsel at the hearing.

5. As is often the case in hearings of this kind, I heard all the arguments relevant to both the PTA Application and (subject to the question of permission) the substantive appeal. It is convenient, in this judgment, to deal with all the arguments before coming to my decision on the PTA Application and, subject to that decision, to the question of what is to happen in relation to the substantive appeal. For ease of reference I will refer to the substantive appeal as **"the Appeal"**, but the use of this form of reference is of course subject to the question of permission.

6. The bundle of documents which was prepared for this hearing was substantial, running to well over 600 pages. I was also provided with a bundle of authorities, divided into four volumes, which ran to 41 items, and to which extensive reference was made in the course of the written and oral submissions. I mention this not by way of criticism, but rather to record that it has neither been possible nor necessary to make reference, in this judgment, to all of the material to which I was taken in the submissions. It has all been taken into account, whether or not the subject of express reference in this judgment.

The parties

7. It is convenient, in this judgment, to refer to Mr Chandler as **"the Appellant"**, and to refer to the respondents to the Appeal as **"the Respondents"**. It should however be noted, for the avoidance of confusion, that the parties have different capacities in the proceedings in which the Appeal has arisen (**"the Proceedings"**). The Respondents are the parties who, as applicants, have commenced the Proceedings. The Appellant is the third of four individuals against whom, as respondents, the Proceedings have been commenced.

The Proceedings

8. The Proceedings arise out of the collapse of the BHS group of companies (**"the BHS Group"**). The Respondents comprise the joint liquidators of four companies which were formerly part of the BHS Group, and the four companies themselves. I will refer to the four companies themselves as **"the Companies"**.

9. Prior to 11th March 2015 the BHS Group was owned by a group of companies, referred to as the Taveta group of companies, associated with Sir Philip Green. On 11th March 2015 the BHS Group was acquired by Retail Acquisitions Limited (**"RAL"**). RAL was largely owned by Dominic Chappell, who is the first respondent to the Proceedings. Mr Chappell was also a director of RAL, together with the second respondent to the Proceedings, Lennart Henningson, and the fourth respondent to the Proceedings, Keith Smith.

10. The Companies all went into administration on 25th April 2016. Thereafter the Companies went into liquidation as follows:

    (1) BHS Group Limited (**"BHSGL"**), the second applicant in the Proceedings and the holding company of the BHS Group, went into creditors' voluntary liquidation on 15th January 2018.
    (2) SHB Realisations Limited, formerly BHS Limited (**"BHSL"**), was formerly the principal trading company of the BHS Group. BHSL is the

third applicant in the Proceedings. BHSL went into creditors' voluntary liquidation on 2nd December 2016.

(3) Davenbush Limited (**"Davenbush"**), the fourth applicant in the Proceedings, went into creditors' voluntary liquidation on 15th January 2018.

(4) Lowland Homes Limited (**"Lowland"**), the fifth applicant in the Proceedings, went into creditors' voluntary liquidation on 16th January 2018.

11. The respondents to the Proceedings were all directors of the Companies, with the exception of Keith Smith (**"Mr Smith"**), who was a director of BHSGL. In the case of the Appellant his directorships were as follows:

Company	Appointed	Resigned
BHSGL	18th March 2015	6th July 2016
BHSL	20th March 2015	6th July 2016
Davenbush	17th April 2015	6th July 2016
Lowland	17th April 2015	6th July 2016

12. The Proceedings have been commenced by an Insolvency Act Application Notice dated 11th December 2020. By the Proceedings the Respondents bring claims against the Appellant and the three other respondents to the Proceedings for relief pursuant to Sections 212 and 214 of the Insolvency Act 1986.

13. Given the potential for confusion between the Respondents, as I have defined them above (the respondents to the Appeal), and the four individuals who are the respondents to the Proceedings, I will refer collectively to the four individuals who are the respondents to the Proceedings (including the Appellant) as **"the Defendants"**.

14. So far as the claims for relief under Section 212 are concerned, the Respondents allege that the Defendants breached their duties as directors during the period of RAL's ownership of the BHS Group. The Respondents allege that the Defendants thereby brought about a deterioration in the financial position of the Companies, which would have been avoided if the alleged breaches had not occurred. A variety of relief is sought under Section 212, but the essential claim is that the Defendants be required to account to the Companies for the alleged deterioration in their financial position which the Defendants are alleged to have caused.

15. Turning to Section 214, the Respondents allege that the Defendants wrongfully allowed the Companies to continue to trade during the period of RAL's ownership of the BHS Group when they knew or should have concluded that there was no reasonable prospect that the Companies would avoid going into insolvent liquidation. The Respondents again allege that the Defendants thereby brought about a deterioration in the financial position of the Companies, which would have been avoided if the alleged wrongful trading had not occurred. Again, a variety of relief is sought under Section 214, but the essential claim is that the Defendants be required to account to the Companies for the alleged deterioration in their financial position which the Defendants are alleged to have caused.

16. The sums claimed in the Proceedings pursuant to Sections 212 and 214 are very substantial. The principal claim against the Defendants (with the exception of Mr Smith) is that they should be required to contribute the sum of £163,092,249 to the Companies. This figure is derived from the respective increases in the net financial deficiencies of the Companies which are said to have been caused by the Defendants' misfeasance. The actual alleged increases amount to a figure in excess of £163,092,249, but this figure of £163 million odd has been calculated as a capped figure, on a basis which is said to eliminate any risk of double counting or duplication of the same debt. In addition to this collective claim against the Defendants, there are further claims, which are themselves substantial, against individual Defendants, on the basis of alleged acts of individual misfeasance. In the case of Mr Smith the collective claim for a contribution is limited to the sum of at least £11,497,399, which is the increase in the net financial deficiency of BHSGL said to have been caused by the Defendants' misfeasance. I assume that this is because Mr Smith was only a director of BHSGL.

17. The statements of case in the Proceedings are extensive. The Insolvency Application Notice, by which the Proceedings were commenced, is supported by Points of Claim running to 87 pages and 311 paragraphs (excluding the prayer for relief) together with four appendices. There is also a lengthy Response, dated 29th March 2021 (**"the Response"**), to a lengthy Request for Further Information served in relation to the Points of Claim. There are also individual Points of Defence served by the Defendants, and individual Points of Reply served by the Respondents.

18. The Proceedings are reasonably well advanced, in procedural terms. Directions were given by the Judge at the case management conference on 9th December 2021, when the Strike Out Application was also heard and determined. The directions included directions for the exchange of witness statements and for expert evidence in the fields of accountancy, pensions, and commercial property valuation. I understand that witness statements were, subject to agreement to the contrary, due to be exchanged at the end of July of this year (2022). Expert evidence is due to be exchanged in December of this year. The trial of the Proceedings is expected to take place in 2023. In terms of expert evidence paragraph 6 of the directions order made by the Judge is of particular relevance to the Appeal. Paragraph 6 grants permission for expert accountancy evidence, and identifies the questions to be addressed by the accountants. In very general terms, and putting matters neutrally, those questions relate to the financial position of the Companies during the relevant period of time, including the question of whether the Companies were or were likely to become insolvent.

<u>Sections 212 and 214</u>

19. Section 212 provides as follows (italics have been added to all quotations in this judgment):

> *"(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.*
>
> *(4) The power to make an application under subsection (3) in relation to a person who has acted as liquidator of the company is not exercisable, except with the leave of the court, after he has had his release.*
>
> *(5) The power of a contributory to make an application under subsection (3) is not exercisable except with the leave of the court, but is exercisable notwithstanding that he will not benefit from any order the court may make on the application."*

20. It will be noted that subsection (3) gives the court the power to require a person who falls within the terms of subsection (1) to make such payment as the court thinks just.

21. Section 214 provides as follows:

> *"(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.

(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.

(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.

(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.

(7) In this section "director" includes a shadow director.

(8) This section is without prejudice to section 213."

22. There are a number of particular points which it is convenient to note at this stage, in relation to the operation of Section 214:

(1) Claims under Section 214 are treated as causes of action; see *Re Sherborne Associates Ltd* [1995] BCC 40, at 46D-F.

(2) Subsection (1) gives the court the power to declare that a director or former director of the relevant company should be liable to make such contribution to the assets of the relevant company as the court thinks proper.

(3) Subsection (2) sets out the conditions which must be satisfied before a director or former director of the relevant company can fall within the terms of subsection (1). For present purposes the relevant condition is that contained in paragraph (b), which requires that the relevant person had the requisite knowledge or ought to have reached the requisite conclusion *"at some time"* before the commencement of the winding up of the relevant company. I will refer to this condition as **"the Knowledge Condition"**. I will refer to the date referred to in subsection (2), which must fall some time

before the commencement of the relevant winding up, as **"the Knowledge Date"**.

(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 *Re Ralls Builders Ltd (in liquidation)* [2016] EWHC 243; (Ch) [2016] Bus. L.R. 555, at [241]-[242]. Put more simply, causation of loss must be demonstrated in a claim under Section 214.

23. It is also convenient, at this stage, to set out what Snowden J said, concerning causation, in the relevant paragraphs ([241] and [242]) in *Re Ralls*:

> *"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."*

24. Turning to Section 212, its purpose and operation were summarised by Chadwick LJ in the following terms, in *Re Simmon Box (Diamonds) Ltd; Cohen v Selby* [2002] BCC 82, at 87E-F.

> *"20. The submission that the judge failed to appreciate the distinction between s. 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 p. 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 Sir Raymond Evershed MR in Re B Johnson & Co (Builders) Ltd [1955] Ch 634, at p. 648."*

25. In the same paragraph of his judgment (87F-H), Chadwick LJ went on to explain the need to establish causation in relation to a claim under Section 212:

> *"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 at p. 286H 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."*

26. Section 212 does not therefore create new liabilities, and is different in kind to Section 214. Section 212 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. Where breach of a common law duty to take care is alleged, loss and causation must be demonstrated, as if the relevant company had brought an action in its own name.

The pleaded case

27. As I have already noted, the statements of case in the Proceedings are lengthy. It is however necessary to set out the relevant parts of the relevant statements of case in some detail, in order to understand the issues raised by the PTA Application and the Appeal. My reference to the relevant parts of the relevant statements of case should not be misunderstood. It is not my intention to cover all those parts of the statements of case which were raised in the argument and were said to be relevant. The purpose of this part of the judgment is to explain and identify the parts of the Respondents' pleaded case which were under attack in the Strike Out Application.

28. Paragraphs 299-305 of the Points of Claim set out the pleaded elements of the wrongful trading claim, that is to say the claim under Section 214, against all of the Defendants. Paragraph 299 identifies the Respondents' case as to the date on which the Knowledge Condition was satisfied, or in simpler terms the Respondents' case on the Knowledge Date, in the following terms:

> *"299. In the premises set out above, by 17 April 2015 or alternatively by some later date prior to 25 April 2016, the Respondents or any of them knew or ought to have concluded that there was no reasonable prospect that the Companies or any of them would avoid going into insolvent liquidation or entering insolvent administration."*

29. Paragraph 301 identifies the loss to the Companies in the following terms (I also include the previous paragraph 300 in this quotation):

> *"300. After the time referred to in Paragraph 299 above, the Respondents or any of them failed to take every step with a view to minimising the potential loss to the Companies' creditors as they ought to have taken.*
> *301. The losses occasioned by the Companies' continued trading after 17 April 2015 represent the increase in the net deficiency of assets between that date and the Companies' insolvent administrations on 25 April 2016."*

30. Paragraph 302 introduces Appendix 3, which is said to explain how the Respondents have calculated the increases in net deficiencies of assets of the Companies. I will use the expression **"IND"** to refer to the increase in net deficiency of assets which each of the Companies is said to have experienced between 17th April 2015 and 25th April 2016. I will refer to the specified period between 17th April 2015 and 25th April 2016 as **"the Specified Period"**.

31. Paragraph 303 then sets out a table showing what is said to be the IND for each of the Companies over the course of the Specified Period. As I have already noted, the aggregate total of the INDs shown for the Companies in this table amounts to a figure in excess of £163,092,249. Paragraph 304 explains however that the figure of £163,092,249 has been calculated on a basis which is said to eliminate any risk of double counting or duplication of the same debt.

32. Paragraphs 305 and 306 then summarise the claims against the Defendants under Section 214 in the following terms:

> *"305. Orders for a contribution to the Companies' assets in the foregoing sums, with recoveries capped at £163,092,249, together with interest, are sought against Mr Chappell and/or Mr Henningson and/or Mr Chandler on a joint and several basis under s.214(1) of the IA 1986.*
> *306. An order for a contribution to BHSGL's assets in the sum of at least £11,497,399 together with interest is sought against Mr Smith under s.214(1) of the IA 1986."*

33. Paragraphs (1), (2) and (3) of the prayer to the Points of Claim identify the following relief sought in respect of the wrongful trading claim under Section 214:

> *"(1) A declaration that from 17 April 2015 onwards or from some later date prior to 25 April 2016: a. the Respondents or any of them knew or ought to have concluded that there was no reasonable prospect that the Companies or any of them would avoid going into insolvent liquidation or entering insolvent administration; and b. failed to take every step with a view to minimising the potential loss to the Companies' creditors as they or any of them ought to have taken.*
> *(2) An order under s.214(1) of the IA 1986 that Mr Chappell and/or Mr Henningson and/or Mr Chandler jointly and severally contribute the following sums together with interest: a. £11,497,399 to the assets of BHSGL; b. £169,390,639 to the assets of BHSL; c. £67,719,224 to the assets of Davenbush; and d. £21,245,185 to the assets of Lowland, subject to a cap on recoveries of £163,092,249.*
> (3) *An order under s.214(1) of the IA 1986 that Mr Smith contributes £11,497,399 together with interest to the assets of BHSGL."*

34. Turning to the claim under Section 212, described in this section of the Points of Claim as the misfeasant trading claim, paragraph 307 identifies the breaches of duty the Defendants are said to have committed as directors of the Companies:

> *"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."*

35. Paragraphs 308 and 309 then set out what it is said would have happened if the Defendants had complied with their duties as directors, in the following terms:

> *"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 and the losses occasioned by that continued trading would not have been incurred.*
>
> *309. Had the Respondents not breached their duties as set out in these Points of Claim, they would have caused the Companies to cease trading on 17 April 2015 or alternatively on some subsequent date prior to 25 April 2016. In the premises set out above, the entirety of the Companies' trading after the Respondents should have ceased trading was misfeasant. Had the Respondents not breached their duties in that way, then the Companies and their respective unsecured creditors would not have suffered the increase in net asset deficiency particularised at Paragraphs 303 to 305 above."*

36. Paragraph 310 then identifies the compensation claimed, which is done by reference to paragraphs 305 and 306 of the Points of Claim, in the following terms:

> *"310. Orders for equitable compensation in like sums to those set out at Paragraphs 305 and 306 above capped at £163,092,249 together with interest compounded in equity is sought against the Respondents on a joint and several basis under s.212(3) of the IA 1986 or otherwise."*

37. Paragraphs (4), (5) and (6) of the prayer to the Points of Claim identify the following relief sought in respect of the misfeasant trading claim under Section 212:

> *"(4) Further or alternatively, a declaration that in their conduct of the Companies' business from 17 April 2015 onwards or from some later date prior to 25 April 2016, the Respondents or any of them acted in breach of duty to the Companies or any of them and had they discharged their duties they would have caused the Companies to cease trading.*
>
> *(5) An order against Mr Chappell and/or Mr Henningson and/or Mr Chandler for equitable compensation under s.212(3) of the IA 1986 or otherwise in the following sums: a. £11,497,399 to the assets of BHSGL; b. £169,390,639 to the assets of BHSL; c. £67,719,224 to the assets of Davenbush; and d. £21,245,185 to the assets of Lowland, subject to a cap on recoveries of £163,092,249.*
>
> *(6) An order against Mr Smith for equitable compensation under s.212(3) of the IA 1986 or otherwise in the sum of £11,497,399 in favour of BHSGL."*

38. Turning to the Response, the request numbered 8 sought the following information:

> *"8. Please give details of the estimate by the Schemes' actuary of the Schemes' funding deficit on a buy-out basis: a. as at 17 April 2015 (or as at the date closest to that date at which that estimate is known); and b. as at such (currently unidentified) "alternative later date prior to 25 April 2016" by which it is alleged that had Mr Chandler not breached his duties as a director he would have caused the Companies to cease trading."*

39. The response was in the following terms (I will refer to the response to this request as **"Response 8"**, and so on for other responses to which I refer in this judgment):

> *"8. Details as to the Scheme's funding deficit on a buy-out basis as at 31 March 2015 is clearly pleaded in Paragraph 55, and is contained in the Determination Notice at Item 208 of the Initial Disclosure List. It would be disproportionate at this stage for the Applicants to provide the information requested as to alternative dates for wrongful trading (which are outlined in further detail below at Response 119)."*

40. On the theme of alternative dates, the most relevant part of the Response for present purposes is the response to the request numbered 119 (Response 119). The relevant request was one of several requests for further information made in respect of paragraph 299 of the Points of Claim, which I have quoted above. It will be recalled that paragraph 299 of the Points of Claim sets out the

Respondents' case on the Knowledge Date. The Knowledge Date is identified as *"by 17 April 2015 or alternatively by some later date prior to 25 April 2106"*. Request 119 sought the following information:

> *"Please identify the alternative later date prior to 25 April 2016 by which it is alleged that Mr Chandler knew or ought to have concluded that there was no reasonable prospect that the Companies or any of them would avoid going into insolvent liquidation or entering insolvent administration, and if so, please identify with full particularity the basis on which this allegation is made."*

41. Response 119 was in the following terms:

> *"The alternative dates subsequent to 17 April 2015 and prior to 25 April 2016 are clear from the pleading.*
>
> *For the avoidance of doubt, Mr Chandler knew or ought to have concluded that that there was no reasonable prospect of the Companies or any of them avoiding going into insolvent liquidation or entering insolvent administration on the following dates subsequent to 17 April 2015:*
>
> - *6 May 2015: the date of the Second LoC Facility: Paragraphs 192 to 197, and in particular Paragraphs 196 and 197, set out the deterioration in the Companies' financial position since 17 April 2015 and the falsification of the purported basis on which the Respondents decided to continue trading on 17 April 2015 (cf Paragraphs 177 to 179).*
> - *26 June 2015: the date of ACE II: Paragraphs 203 to 222, and in particular Paragraphs 204(a), 204(b), 205 and 206 set out the deterioration in the Companies' financial position since 17 April 2015; the falsification of the purported basis on which the Respondents had decided to continue trading on 17 April 2015 (cf Paragraphs 177 to 179); and the failure to put in place an Adequate Plan, without which there was no reasonable prospect that the Companies would avoid going into insolvent liquidation or administration (see Paragraph 106).*
> - *13 July 2015: July 2015 Turnaround Plan: Paragraphs 223 to 224 set out that the July 2015 Turnaround Plan was (a) not an Adequate Plan; and (b) did not include any proposal for restructuring the Schemes, without either of which there was no reasonable prospect that the Companies would avoid going into insolvent liquidation or administration (see Paragraphs 82, 102 and 106).*
> - *26 August 2015: Repayment of ACE I: Paragraphs 225 to 228 set out the deterioration in the Companies' financial position since 17 April 2015.*
> - *8 September 2015: Grovepoint Facility: Paragraphs 229 to 238, and in particular Paragraphs 231 and 233, set out the deterioration in the Companies' financial position since 17 April 2015; and the falsification of the purported basis on which the Respondents decided to continue trading on 17 April 2015 (cf Paragraphs 177 to 179).*
>
> *Further, the Applicants advance the overarching case that without an Adequate Plan (see in particular Paragraph 106) and/or a restructuring of the Schemes (see in particular Paragraphs 62, 82 and 102), there was no*

reasonable prospect that the Companies would avoid insolvent liquidation or administration."

42. As can be seen, what Response 119 did, after asserting that the alternative dates within the Specified Period were clear from the Points of Claim, was (i) to introduce a series of five dates as alternative dates for the Knowledge Date (**"the Alternative Dates"**), and (ii) to introduce the so-called overarching case (**"the Overarching Case"**) which appears at the end of Response 119.

43. The request numbered 119 was followed by request 120, which raised the following query:

> *"120. Please state whether it is alleged that by that alternative date Mr Chandler knew that there was no reasonable prospect that the Companies or any of them would avoid going into insolvent liquidation or entering insolvent administration, and if so, in accordance with the requirements of 16PD, para 8.2(5), please identify all facts and matters relied upon in support of this allegation."*

44. The response to this request (Response 120) was simply to repeat Response 119:

> *"120. Response 119 is repeated."*

45. The requests numbered 121 and 122 then raised the following queries on the first part of paragraph 300 of the Points of Claim, which I have quoted above:

> *"121. Please identify what steps it is alleged that Mr Chandler ought to have taken after 17 April 2015 with a view to minimising the potential loss to the Companies' creditors."*
>
> *"122. Please identify what steps it is alleged that Mr Chandler ought to have taken after the (unspecified) "later date prior to 25 April 2016" with a view to minimising the potential loss to the Companies' creditors."*

46. The responses given to these requests (Responses 121 and 122) were as follows:

> *"121. The burden is on Mr Chandler to establish the statutory defence in s.214(3) of the IA 1986, i.e. to establish that he took every step, not on the Applicants to show that he did not."*
>
> *"122. Response 121 is repeated."*

47. The requests numbered 126 and 127 then raised the following queries, in relation to paragraph 309 of the Points of Claim:

> *"126. Please identify the basis on which it is alleged that had Mr Chandler not breached his duties as a director he would have caused the Companies to cease trading on 17 April 2015."*
>
> *"127. Please:*
>
> *a. identify the alternative subsequent date prior to 25 April 2016 by which it is alleged that had Mr Chandler not breached his duties as a director he would have caused the Companies to cease trading; and*

b. identify the basis on which it is alleged that had Mr Chandler not breached his duties as a director he would have caused the Companies to cease trading on that date."

48. The responses given to these requests (Responses 126 and 127) were as follows:
"126.Those matters relied upon in support of this allegation are quite clearly pleaded in the Points of Claim, and dealt with above."
"127.Responses 119 and 126 are repeated."

49. The request numbered 128 raised the following request in relation to the opening part of paragraph (1) of the prayer to the Points of Claim, which I have quoted above:
"128. Please identify the alternative later date prior to 25 April 2016."

50. The response to this request (Response 128) was as follows:
"128. This request is repetitive. Response 119 is repeated."

51. Finally, in relation to the Response the request numbered 129 raised the equivalent request in relation to the opening part of paragraph (4) of the prayer to the Points of Claim, which I have also quoted out above:
"129. Please identify the alternative later date prior to 25 April 2016."

52. The response to this request (Response 129) was as follows:
"129. This request is repetitive. Response 119 is repeated."

53. Finally, I should mention the Points of Reply served by the Respondents in response to the Points of Defence served by the Appellant. A series of exchanges took place, as between Points of Defence and Points of Reply, concerning the alternative dates set out in Response 119. The terms of these exchanges can be illustrated by taking one of these exchanges. In paragraph 114c of the Points of Defence, the Appellant asserted as follows:
"In the premises, paragraph 197(c) [of the Points of Claim] *is denied. Insofar as the Liquidators intend to suggest (having regard to RFI Response 119) that 6 May 2015 is an alternative date for the purposes of a wrongful and/or misfeasant trading claim against Mr Chandler, such a claim is embarrassing for want of particularity and Mr Chandler cannot and does not plead to it."*

54. Paragraph 86f of the Points of Reply responded in the following terms:
"Paragraph 144.c is denied: the grounds for advancing 6 May 2015 as an alternative date are clear from Paragraphs 168 to 185 and 192 to 197 of the PoC and RFI Response 119."

55. There were equivalent exchanges, as between the Points of Defence and the Points of Reply in relation to the other alternative dates identified in Response 119. The final relevant exchange, as between these two statements of case, was in more general terms. Paragraph 244 of the Points of Defence responded to paragraph 299 of the Points of Claim in the following terms:
"Paragraph 299 is denied, in light of the facts and matters set out in this Points of Defence. It is specifically denied:

a. that the Applicants are entitled to pursue an alternative wrongful trading claim against Mr Chandler "by some later date prior to 25 April 2016" without pleading the specific date(s) by which they maintain that the provisions of s. 214(2)(b) IA 1986 apply with in relation to him and fully particularising their case against him as to the basis on which they maintain that the provisions of s. 214(2)(b) apply in relation to him as at that date; and

b. for the reasons pleaded in these Points of Defence, that Mr Chandler knew or ought to have concluded there was no real prospect that the Companies or any of them would avoid going into insolvent liquidation or entering solvent administration by 17 April 2015 or on any of the five alternative dates identified in RFI Response 119 (the "Alternative Dates")."

56. This drew the following response, in paragraph 148 of the Points of Reply:

"As to Paragraph 244:

a. the alternative dates for the purposes of s.214 of the IA 1986 are properly and sufficiently pleaded;

b. the alternative dates for the purposes of s.214 of the IA 1986 are 6 May 2015, 26 June 2015, 13 July 2015, 26 August 2015 and 8 September 2015, as Mr Chandler is aware from RFI Request 119;

c. further and in any event the Applicants advance the overarching case that without an Adequate Plan (see Paragraphs 104 to 108 of the PoC) and/or a restructuring of the Schemes (see Paragraphs 62, 82 and 102 of the PoC), there was no reasonable prospect that the Companies would avoid insolvency liquidation or administration;

d. it is noted that Mr Chandler has pleaded to the alternative dates in the Defence; and

e. save as aforesaid Paragraph 244 is denied."

<u>The Strike Out Application</u>

57. The Strike Out Application was expressed to be made, by Insolvency Act application notice dated 26th November 2021, under rule 12.1(1) of the Insolvency (England and Wales) Rules 2016 (which applies the CPR to the Proceedings) and CPR Rule 3.4(2)(a). The application notice described the Strike Out Application as an application to strike out *"the parts of the Applicants'* [the Respondents'] *pleadings (as specified in the attached draft Order) which relate to the Applicants' five purported alternative claims for alleged wrongful trading"*.

58. Paragraph 1 of the draft order (**"the Draft Order"**) attached to the application notice (**"the Application Notice"**) identified the relevant parts of the statements of case which were the subject of the Strike Out Application in the following terms (the bold print is not added):

*"1. The parts of the Points of Claim which relate to the Applicants' five purported alternative claims for alleged wrongful trading (the **"Alternative Date Wrongful Trading Claims"**) be struck out pursuant to CPR r.3.4(2)(a) being:*

a. The words "or alternatively by some later date prior to 25 April 2016" at paragraph 299 of the Points of Claim.

b. The words "or alternatively on some subsequent date prior to 25 April 2016" at paragraph 309 of the Points of Claim.

c. The words "or from some later date prior to 25 April 2016" at paragraphs 1 and 4 of the Prayer to the Points of Claim.

d. Of the RFI Response to R3: the second sentence of Response 8; Responses 119, 120 and 122; the words "or some subsequent date prior to 25 April 2016 (as set out at Response 119)" at Response 124; and Responses 127, 128 and 129.

e. Paragraphs 86(f), 87(g), 102, 106, 109 and 148 of the Points of Reply to R3."

59. As can be seen, the specified pleadings are among the parts of the statements of case which I have identified in the previous section of this judgment. The exception is that I have quoted only paragraph 86f of the Points of Reply, on the basis that paragraph 86f exemplifies the content, for each of the alternative Knowledge Dates relied upon by the Respondents, of paragraphs 86f, 87g, 102, 106 and 109 of the Points of Reply.

60. If one goes through the parts of the Respondents' statements of case which were specified in the Draft Order one can see that the object of the Strike Out Application was as follows. In relation to the claim under Section 214, the object of the exercise was to restrict the claim to a claim based on the Knowledge Date being 17th April 2015. In relation to the claim under Section 212, the object of the exercise was to restrict the claim to a claim based on 17th April 2015 as the latest date by which the Defendants would have caused the Companies to cease trading, if the Defendants had discharged their duties properly. Putting matters the other way round, the Appellant was contending that the pleading of these claims by reference to alternative dates or unspecified dates was defective, and should be struck out.

61. The essential case which was put by the Appellant in support of the Strike Out Application was that the claims based on the Alternative Dates (**"the Alternative Date Claims"**) and/or the claims based on the Overarching Case were not satisfactorily or adequately pleaded. It was not acceptable to base these claims on a Knowledge Date which was left open ended, in the manner set out in paragraph 299 of the Points of Claim (*"or alternatively by some later date prior to 25 April 2016"*) and in the Overarching Case. In relation to the claim under Section 212 it was not acceptable to leave the date in paragraph 309 as an alternative open ended date. In addition to this, and so far as the claims were based on the Alternative Dates and/or the Overarching Case and/or an open ended date, the Respondents' case on causation and quantum was not pleaded, either by reference to the Alternative Dates or by reference to the Overarching Case, either in the Points of Claim or in Response 119 or in the Points of Reply.

The Judgment

62. As I have already noted, the Judge delivered the Judgment at the case management conference in the Proceedings, on 9th December 2021. References to paragraphs of the Judgment, in this judgment, are given as [J1], for paragraph 1 of the Judgment, and so on.

63. At [J3] to [J17] the Judge summarised the background to the Proceedings, the Proceedings, the Strike Out Application and the competing arguments in the Strike Out Application. The Judge then dealt with the law, setting out CPR Rule 3.4(2) and citing from the judgment of Arnold LJ in *Sofer v Swiss Independent Trustees SA* [2020] EWCA Civ 699, at [24]. In this paragraph of his judgment Arnold LJ made the following general points about the particulars of a pleaded case:

> *"To these principles there should be added the following general points about particulars:*
>
> *i) The purpose of giving particulars is to allow the defendant to know the case he has to meet: Three Rivers at [185]-[186]; McPhilemy v Times Newspapers Ltd [1999] 3 All ER 775 at 793B (Lord Woolf MR).*
>
> *ii) When giving particulars, no more than a concise statement of the facts relied upon is required: McPhilemy at 793B.*
>
> iii) *Unless there is some obvious purpose to be served by fighting over the precise terms of a pleading, contests over their terms are to be discouraged: McPhilemy at 793D."*

64. The Judge then summarised what it was he had to decide in the following terms, at [J20]:

> *"20 The issue here is a stark one. Does Mr Chandler and those advising him know what alternative dates the Joint Liquidators are choosing to adopt in determining what is the IND suffered by the companies from any of those alternative dates in continuing to trade?"*

65. The Judge then came to his conclusions, at [J21]-[J24]. The essential reasoning of the Judge is set out in the opening part of [J21], in the following terms:

> *"Having considered these submissions and, in particular, the criticisms made of the relevant parts of the points of claim and points of reply, irrespective of there being no direct authority on the point, that quantifying claims of this nature need to be pleaded, I am clearly of the view that there is insufficient substance to the respondents' criticisms to support this application. The following eight factors are material in reaching that conclusion:"*

66. The Judge then set out the eight factors which supported this reasoning, in numbered paragraphs (1) to (8). I will need to come back to these eight factors later in this judgment. For present purposes it is only necessary to record that, in sub-paragraph (1), in addition to the citation of Arnold LJ in *Sofer*, the Judge also cited what Saville LJ (as he then was) stated in *British Airways Pension Trustees Ltd v Sir Robert McAlpine and Sons Ltd* [1994] 45 Con LR 81, at pages 4-5:

> *"The basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it. To my mind, it seems that in recent years there has been a tendency to forget this basic purpose and to seek particularisation even when it is not really required. This is not only costly in itself, but is calculated to lead to delay and to interlocutory battles in which the parties and the court pore over endless pages of pleadings to see whether or not some particular point has or has not been raised or answered when in truth*

each party knows perfectly well what case is being made by the other and is able properly to prepare to deal with it. Pleadings are not a game to be played at the expense of litigants, nor an end in themselves, but a means to the end and that end is to give each party a fair hearing."

67. At [J22] and [J23] the Judge dealt with issues of conduct and delay raised in respect of the timing of, and alleged motivation behind the Strike Out Application. As I read these paragraphs of the Judgment, the Judge did not consider that these factors provided additional reasons for refusing the Strike Out Application.

68. At [J24] the Judge reached his formal decision to dismiss the Strike Out Application. As I read the Judgment, the decision to dismiss the Strike Out Application was based upon the Judge's reasoning at [J21], and the eight factors there identified.

The PTA Application and the Appeal

69. By the Appeal, assuming the success of the PTA Application, the Appellant seeks to set aside paragraphs 1 and 3 of the Order. By paragraph 1 of the Order the Judge dismissed the Strike Out Application. By paragraph 3 of the Order the Judge ordered the Appellant to pay the bulk of the costs of the Strike Out Application. The relief sought in the Appeal is an order striking out the parts of Respondents' pleaded case specified in the Draft Order (as attached to the Application Notice), and costs.

The grounds of appeal

70. There are four grounds of appeal. By reference to the grounds of appeal attached to the appellant's notice filed by the Appellant, the grounds of appeal are as follows.

71. The first ground of appeal (**"Ground 1"**) is that the Judge misdirected himself as to the issue which he had to determine on the Strike Out Application. For ease of reference, I repeat the Judge's identification of the issue, at [J20]:

> *"20 The issue here is a stark one. Does Mr Chandler and those advising him know what alternative dates the Joint Liquidators are choosing to adopt in determining what is the IND suffered by the companies from any of those alternative dates in continuing to trade?"*

72. The Appellant's contention is that the issue raised by the Strike Out Application, as correctly stated, was whether the Respondents had pleaded legally recognisable claims pursuant to (i) Section 214 and Section 212 arising in respect of the Alternative Dates, and (ii) the alternative overarching case under Section 214 (the Overarching Case), including pleading loss, causation and any remedy of contribution and the quantum thereof. As a result of this misdirection, so it is said, the Judge erred in law in focussing on the Respondents' failure to plead quantum in respect of the Alternative Date Claims and failed to consider, whether adequately or at all, their failure to plead loss, causation and the remedy sought in respect of each of the Alternative Date Claims.

73. The second ground of appeal (**"Ground 2"**) is that the Judge failed to address the Overarching Case which, so it is said, impermissibly seeks to pursue a claim pursuant to Section 214 without reference to any specific date as the Knowledge Date. As such, so it is contended, the Judge erred in law in not striking out the Overarching Case.

74. The third ground of appeal (**"Ground 3"**) is that the Judge erred in law in finding that office holders (here meaning the Respondents as liquidators of the Companies) are not ordinary litigants for the purposes of pleading claims under Section 214 and are entitled to rely on a different test when the adequacy of a pleaded claim under Section 214 comes to be considered. It is said that the Judge went wrong in law in deciding that the test to be applied, when considering the adequacy of an officeholder's pleaded claim under Section 214, was a test of *"fair notice with fair opportunity to rebut"* ([J21(5)]).

75. The fourth ground of appeal (**"Ground 4"**) is that the Judge erred in the exercise of his discretion in refusing to strike out the Alternative Date Claims and/or the Overarching Case. Specifically, it is said that the Judge went wrong in finding that no unfairness would be caused to the Appellant as a result of these claims proceeding in their current form and in finding that it would not be proportionate in all of the circumstances for the Respondents to be obliged properly to plead these claims.

76. It seems to me, reviewing the written and oral arguments, that the issues between the parties have become somewhat entangled. It also seems to me that my summary of the grounds of appeal set out above, which is based on the grounds of appeal attached to the appellant's notice, does not accurately reflect the structure of the arguments between the parties, as those arguments were developed in the oral submissions.

77. For these reasons, I will adopt the following approach to my consideration of the grounds of appeal. I will first set out my own analysis of the position, following my hearing of the written and oral arguments of the parties. I will then turn to consider what the Judge decided, and see where that leaves the grounds of appeal, both in terms of the PTA Application and the Appeal.

<u>My analysis</u>

78. The starting point is to identify the structure of the Appellant's arguments, as I understood that structure to be framed by Mr Lightman in his oral submissions:
    (1) The Appellant's first objection to the pleaded case was that the Section 214 claim could not be pleaded by reference to an unspecified series of dates, between 17th April 2015 and 25th April 2016 (the Specified Period), as the Knowledge Date. Mr Lightman's submission was that this was not permissible, as a matter of pleading. The Respondents could plead the Knowledge Date as 17th April 2015, as they had in paragraph 299 of the Points of Claim. The Respondents could plead the Knowledge Date as one of the five Alternative Dates, as they had in Response 119. What they could not do was to leave the Knowledge Date open, as they had sought to do in the relevant part of paragraph 299 of the Points of Claim and in the last part of Response 119.

(2) The Appellant's second objection to the pleaded case was that the Section 212 claim could not be pleaded by reference to an unspecified series of dates, within the Specified Period (between 17th April 2015 and 25th April 2016), as the dates when the Defendants would have caused the Companies to cease trading if the Defendants had not breached their duties as directors of the Companies. The Respondents could plead this date as 17th April 2015, as they had in paragraph 309 of the Points of Claim. I understood Mr Lightman to accept that the Respondents could plead this date as one of the five Alternative Dates, as (in my view) they had done in Response 127. What they could not do was to leave this date open, as they had sought to do in the relevant part of paragraph 309 of the Points of Claim which was the subject of the Strike Out Application.

(3) The Appellant's third objection to the pleaded case was that the Respondents had failed to plead causation and quantum in relation to the claims under Section 212 and Section 214, so far as those claims were made by reference to the Alternative Dates and/or by reference to an open ended date within the Specified Period.

79. For the Respondents Mr Curl sought to argue, by way of a preliminary point, that the claim under Section 212 was not the subject of the Strike Out Application. In support of this argument Mr Curl relied upon the description of the order sought in the Strike Out Application which appeared on the face of the Application Notice. The relevant part of the Application Notice reads as follows:

> *"The Third Respondent seeks an order (a draft of which is attached) that:*
>
> (a) *The parts of the Applicants' pleadings (as specified in the draft Order) which relate to the Applicants' five purported alternative claims for alleged wrongful trading be struck out."*

80. Mr. Curl also relied upon the wording of the witness statement of Jan Mugerwa, the Appellant's solicitor, which was made in support of the Strike Out Application. Paragraph 4 of this witness statement described the Strike Out Application in the following terms:

> *"I make this statement in support of Mr Chandler's application (the "Application") pursuant to CPR r.3.4(2)(a) to strike out the parts of the Applicants' pleadings which relate to the Applicants' five purported alternative claims for alleged wrongful trading (defined below as the Alternative Date Wrongful Trading Claims)."*

81. I reject the argument that the Section 212 claim was not included in the Strike Out Application. The Draft Order, which was attached to the Application Notice, clearly identified the parts of the Respondents' statements of case which were the subject of the Strike Out Application. The relevant parts, which I have quoted above, clearly included parts of what was pleaded in relation to the Section 212 claim. It is the case that the Application Notice and the supporting witness statement were not as accurately worded as they might have been, but if there was any doubt in the matter it was dispelled by the terms of the Draft Order, as attached to the Application Notice. I reject the argument that the terms of the Draft Order were somehow overridden or amended by the description of the Strike Out Application given in the Application Notice itself or in the supporting witness statement.

82. I also have the benefit of a transcript of the hearing of the Strike Out Application before the Judge. Mr Lightman showed me an extract from that transcript which made it quite clear that the Section 212 claim was, in its relevant parts, included in the Strike Out Application, as the Strike Out Application was heard before the Judge. Turning to the PTA Application and the Appeal, it was also quite clear that the relevant parts of the Section 212 claim were included in the Appellant's attack on the Respondents' pleaded case.

83. With this preliminary objection cleared away, the next step is to remind myself that the Strike Out Application was made pursuant to CPR Rule 3.4(2)(a), which provides as follows:

> *"(2) The court may strike out a statement of case if it appears to the court—*
>
> *(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;"*

84. CPR Rule 3.4(1) provides that reference to a statement of case includes reference to part of a statement of case.

85. It follows that I am only concerned, in the PTA Application and in the Appeal, with what is pleaded in the Respondents' statements of case in this action. There is no summary judgment application, and I am not concerned with trying to determine any of the issues raised by the statements of case, either on a summary basis or otherwise.

86. The next step is to identify the guidance which I should apply, in deciding what was required of the Respondents, in terms of the pleading of the relevant parts of their claims under Section 214 and Section 212. In this context my attention was drawn to the following, among other cases which seem to me to provide appropriate general guidance on what is required, in terms of pleading.

87. The first of these cases is *Pantelli Associates Ltd v Corporate City Developments Number Two Ltd* [2010] EWHC 3189 (TCC); [2011] P.N.L.R. 12. At [11] Coulson J (as he then was) said this, in the context of pleading a claim for breach of contract or in negligence (the underlining is my own):

> *"CPR r.16.4(1)(a) requires that a particulars of claim must include "a concise statement of the facts on which the claimant relies". Thus, where the particulars of claim contain an allegation of breach of contract and/or negligence, it must be pleaded in such a way as to allow the defendant to know the case that it has to meet. <u>The pleading needs to set out clearly what it is that the defendant failed to do that it should have done, and/or what the defendant did that it should not have done, what would have happened but for those acts or omissions, and the loss that eventuated.</u> Those are "the facts" relied on in support of the allegation, and are required in order that proper witness statements (and if necessary an expert's report) can be obtained by both sides which address the specific allegations made."*

88. The second of these cases, *Dhillon v Barclays Bank plc* [2020] EWCA Civ 619; [2020] 2 P.&C.R. 19, contains a further statement by Coulson LJ of the

importance of adequate pleading in statements of case. The statement was made in the context of an action for rectification of the Land Register. The Chief Land Registrar wished to argue that the claim was not a claim for rectification, but only for alteration. The point was potentially important as it affected the question of whether there might be a liability on the part of the Land Registry to pay an indemnity. Coulson LJ considered that this argument was not open to the Chief Land Registrar. As he explained, at [19], in justification of this decision:

> *"19 This is not, I hope, a dry technical point. The question of the relief being claimed by Mrs Dhillon was central to this case. If the CLR had wanted to say that this was not a case of rectification at all, then it was required to plead such a contention. That was in order that the parties could properly marshal their arguments to address that submission and so that, in due course, the court would know what issues it was being asked to decide. It is too often the case in civil litigation that the pleadings become forgotten as time goes on, and the trial can become something of a free-for-all. That is not appropriate. I can only echo and agree with the recent warning by David Richards LJ in UK Learning Academy Ltd v Secretary of State for Education [2020] EWCA Civ 370 when he said:*
>
> > *"47. I would add here that I endorse the view expressed by the judge to the parties at the trial and repeated in his judgment at [11] that the statements of case ought, at the very least, to identify the issues to be determined. In that way, the parties know the issues to which they should direct their evidence and their challenges to the evidence of the other party or parties and the issues to which they should direct their submissions on the law and the evidence. Equally importantly, it enables the judge to keep the trial within manageable bounds, so that public resources as well as the parties' own resources are not wasted, and so that the judge knows the issues on which the proceedings, and the judgment, must concentrate. If, as he said, there was 'a prevailing view that parties should not be held to their pleaded cases', it is wrong. That is not to say that technical points may be used to prevent the just disposal of a case or that a trial judge may not permit a departure from a pleaded case where it is just to do so (although in such a case it is good practice to amend the pleading, even at trial), but the statements of case play a critical role in civil litigation which should not be diminished."*

89. The third of these cases is a decision of Cockerill J in *King v Stiefel* [2021] EWHC 1045 (Comm); [2022] 1 All ER (Comm) 990. In this case the judge made considerable criticism of the particulars of claim, which she described as a profoundly unsatisfactory document. At [145] to [148] the judge provided the following invaluable summary of the function of pleadings.

> *"145. A pleading in these courts serves three purposes. The first is the best known – it enables the other side to know the case it has to meet. That purpose, and the second are both expressly referenced in the following citation from the speech of Lord Neuberger MR in Al Rawi v Security Service [2010] EWCA Civ 482; [2010] 4 All ER 559, [18]:*

> *"a civil claim should be conducted on the basis that a party is entitled to know, normally through a statement of case, the essentials of its opponent's case in advance, so that the trial can be fairly conducted, and, in particular, the parties can properly prepare their respective evidence and arguments at trial."*
>
> *146. The second purpose then is to ensure that the parties can properly prepare for trial – and that unnecessary costs are not expended and court time required chasing points which are not in issue or which lead nowhere. That of course ties in with the Overriding Objective, which counts amongst its many limbs "(d) ensuring that [the case] is dealt with expeditiously and fairly; (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases…".*
>
> *147. This is a point which feeds into the dictum of Teare J in Towler v Wills [2010] EWHC 1209 (Comm), at [18]-[21]:*
>
> > *"The purpose of a pleading or statement of case is to inform the other party what the case is that is being brought against him. It is necessary that the other party understands the case which is being brought against him so that he may plead to it in response, disclose those of his documents which are relevant to that case and prepare witness statements which support his defence. If the case which is brought against him is vague or incoherent he will not, or may not, be able to do any of those things. Time and costs will, or may, be wasted if the defendant seeks to respond to a vague and incoherent case. It is also necessary for the Court to understand the case which is brought so that it may fairly and expeditiously decide the case and in a manner which saves unnecessary expense. For these reasons it is necessary that a party's pleaded case is a concise and clear statement of the facts on which he relies."*
>
> *148. The third purpose for the pleading rules is less well known but no less important. The process of pleading a case operates (or should operate) as a critical audit for the claimant and its legal team that it has a complete cause of action or defence."*

90. At [149] the judge added the following specific point, in relation to particulars of claim (the underlining is my own):

> *"149. <u>Particulars of Claim, in particular, should generally aim to set out the essential facts which go to make up each essential element of the cause of action</u> – and thought should be given to whether any more than that is either necessary or appropriate, bearing in mind the functions which a pleading serves and whether any components of what is pleaded are subject to rules requiring specific particularisation."*

91. I have already noted that, in the Judgment at [J19] and [J21(1)], the Judge made reference to what was said by Arnold LJ in *Sofer*, and by Saville LJ in *British Airways Pension Trustees Ltd* in relation to the requirements and purpose of pleadings. I have quoted the relevant extracts from the judgments in these cases earlier in this judgment. There is some criticism of the Judge in the Appellant's

skeleton argument for relying upon these authorities, which had not been cited to him, in making his decision. I do not think that it is necessary for me to go into this criticism. The relevant extracts are well-known statements of the purpose and requirement of pleadings. In my view there is nothing said in either of these extracts which is inconsistent with what has been said in the three authorities which I have cited above. In my judgment, neither Arnold LJ nor Saville LJ said anything, in the extracts quoted by the Judge, to suggest that it is not necessary to plead the essential elements of a claim.

92. *British Airways Pension Trustees Ltd* is of course a pre-CPR case. The Appellant's skeleton argument drew attention, in a footnote, to the commentary on this case in Zuckerman on Civil Procedure (4th Edition 2021). The relevant commentary makes the point that, in pre-CPR times, pleadings could all too easily provide fertile ground for technical and expensive procedural skirmishes. The Appellant's point is that the Judge was wrong to describe what was said by Saville LJ as being *"apt"* in the present case; see [J21(1)]. I think however that it is important to separate out two questions here. The first question, which arises in the present case, is whether the Appellant's objections to the relevant parts of the Respondents' statements of case are well founded, or amount to complaints about a case which is adequately and properly pleaded and which is perfectly well understood by the Appellant. Saville LJ's comments about the risk of parties playing procedural games with pleadings, which are necessarily at a high level of generality, are not apt to answer that first question. The second question is whether Saville LJ's comments are capable of being relevant in the post CPR world. In my view they are. It seems to me that courts should be astute to ensure that arguments about pleadings are properly confined, and do not descend into the playing of procedural games of the kind referred to by Saville LJ. The starting point however, in a case where a pleading is said to be defective, is to look at the relevant pleading and decide whether it pleads the essential elements of, as the case may be, the relevant claim or defence.

93. Turning specifically to the question of whether a specific date or dates must be pleaded as the Knowledge Date, in a claim under Section 214, Mr Lightman sought to persuade me that, at least in a complex and substantial case such as the present case, a claim under Section 214 must identify a specific date or dates by which the Knowledge Condition is said to have been satisfied. Mr Lightman submitted that the Knowledge Date cannot be pleaded as an open ended date, as it is in in the alternative case pleaded in paragraph 299, and as it appears to be in the articulation of the Overarching Case in Response 119.

94. In this context Mr Lightman referred me to the decision of Jack J (then His Honour Judge Jack sitting as a High Court Judge) in *Re Sherborne Associates Ltd* [1995] B.C.C. 40. In this case, which involved a claim under Section 214, the liquidator argued that the Knowledge Date had fallen, at the latest, on 22nd or 30th January 1988. The liquidator also sought to argue that if this case was not made out, the Knowledge Date had fallen on subsequent dates. Jack J declined to permit this alternative case, which had not been pleaded. As he said, at 42D-E:

> *"The liquidator also sought to argue that, if his case was not made out as to the dates in January 1988, the directors should have concluded on subsequent dates that there was no reasonable prospect of Sherborne*

> *avoiding going into liquidation. This alternative case was not pleaded. It was only made clear that the liquidator was seeking to advance such a case after the evidence had been heard. It would not be fair to the respondents to permit the liquidator to pick a series of subsequent dates, or to invite the court to pick a subsequent date, saying in respect of such a date or dates that at least then the conclusion that there was no reasonable prospect that Sherbome would avoid insolvent liquidation should have been reached. Such a case would have required the examination of each date for this purpose."*

95. I do not think that this case establishes any rule that the Knowledge Date in a Section 214 claim must be pleaded by reference to a specific date or dates. Rather, the case is an example of a party not being permitted to pursue an unpleaded case at trial, in circumstances where this would be unfair to the other party. As Jack J pointed out in *Re Sherborne*, in the extract from his judgment quoted above, the alternative case would have required the examination of the proposed subsequent dates.

96. I was also referred to what Park J said in *Re Continental Assurance Co of London plc (in liquidation) (No 4)* [2007] 2 BCLC 287. At 328e-f, Park J had to deal with an issue, in a Section 214 claim, concerning the date for which the liquidators could contend as the Knowledge Date. Park J explained the position in the following terms (the underlining is my own):

> *"All the witness statements, expert evidence and calculations of loss have been made on the basis that the liquidators have committed themselves to 19 July 1991 as the latest date at which the directors ought to have caused Continental to cease to trade and to initiate the process towards liquidation. However, the points of claim para 45 have the wording 'from at least 19 July 1991, <u>alternatively at such other date as the court may determine</u>'."*

97. The case is of direct relevance in the present case, because it will be seen that Park J was dealing with a pleaded case which sought to include an alternative case, in relation to the Knowledge Date, which left the Knowledge Date open ended. The relevant wording of this alternative case was *"such other date as the court may determine"*.

98. Park J was not prepared to allow this alternative case on the Knowledge Date to be run. As he explained, at 328f-h:

> *"I am asked to rule on whether I am prepared to consider evidence or submissions arguing for a later date than 19 July 1991. My conclusion is that in principle I am not.*
>
> *I accept that in some cases under the same statutory jurisdiction the court itself has selected the starting date on which the period of wrongful trading commenced. However, in a case of the magnitude and complexity of this one I believe that it would be wholly unsatisfactory for the starting date to remain at large. In this connection I agree with observations of Jack J, then His Honour Judge Jack sitting as a High Court judge, in Re Sherborne Associates [1995] BCC 40. I would not wish my decision to be cited hereafter as authority for the proposition that in all cases under s 214 the*

> *liquidator must always specify his starting date, and must lose the whole case if he cannot satisfy the court that his case is made out by reference to that particular date. Cases vary in detail and complexity. This case is as complex as any s 214 case is likely to be, and I think that, given the procedural history so far, the liquidators' case must stand or fall with their chosen date of 19 July 1991."*

99. As with *Re Sherborne*, it does not seem to me that Park J was laying down any rule that a claim under Section 214 must always be pleaded by reference to a specific date or dates as the Knowledge Date. Nor does it seem to me that Park J was laying down any rule that a Section 214 claim must necessarily fail if a specified date is pleaded as the Knowledge Date, and that date is not established at trial as the Knowledge Date. The position is more flexible than this. On the facts of *Re Continental* the liquidators' problem, in seeking to run their alternative case, was that all of the relevant evidence and calculation of loss had been prepared on the basis that the liquidators had committed themselves to 19th July 1991 as the latest date at which the directors ought to have caused Continental to cease to trade. As Park J explained, the procedural history required that the liquidators' case should stand or fall on their chosen date of 19th July 1991.

100. I was referred to a good deal of additional authority on the question of how much flexibility is permissible, in terms of the Knowledge Date, in a Section 214 claim. I did not however find any of this additional authority particularly helpful. It seems to me that the submissions and citation of authority on both sides on this point confused two different questions. The first question is what is permissible, in terms of pleading the Knowledge Date in a Section 214 claim. The second question is what latitude the court has, at trial, in terms of finding a claim under Section 214 to be established by reference to a Knowledge Date which has not actually been specified in the relevant pleaded case.

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 *Re Sherborne* and *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 17th 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.

102. Returning to the first question, I do not find any specific rule stated in the authorities on what is permissible, in terms of pleading the Knowledge Date in a

Section 214 claim. I do however accept Mr Lightman's argument in this context, to this extent. The present case is a complex case, involving very substantial claims. It seems to me that it would be unsatisfactory in the present case if the Knowledge Date was allowed to remain at large, over the whole of the Specified Period. Applying what was said by Park J in *Re Continental*, I think that it would be unsatisfactory for this to be permitted.

103. Equally, I do not think that it is any answer to what I have just said to point to the flexibility which the court may be prepared to exercise, at the trial of a Section 214 claim, in terms of the court's findings on the timing of the Knowledge Date. This is to confuse the first and second questions which I have just identified. The court's flexibility, so far as the court is prepared to exercise such flexibility falls to be applied to the pleaded case on the Knowledge Date. What is permissible, in terms of the latitude available to a party in pleading a case on the Knowledge Date is a different question. In the circumstances of the present case, and applying what Park J said in *Re Continental*, I do not think that leaving the Knowledge Date at large over the entirety of the Specified Period is permissible, as a matter of pleading.

104. In my judgment therefore, in the circumstances of the present case and without laying down any rule for other cases, I do not think that the Respondents should be permitted to run their claim under Section 214 on the basis of a Knowledge Date which is left at large for the entirety of the Specified Period. I think that the Respondents must be more specific than this, as they have been in identifying the Knowledge Date as falling on, or more accurately by 17th April 2015 or on one of the Alternative Dates.

105. In fact, and as happens all too often with fiercely contested pleading arguments, this particular dispute appears to me to have turned out to be something of a storm in a teacup. I understood Mr Curl to accept, in his oral arguments, that the Respondents were in fact content to rest their case on the Knowledge Date on 17th April 2015 and on the Alternative Dates, and did not in fact wish to rely on a case that the Knowledge Date was at large within the Specified Period. If I have understood Mr Curl's position correctly, this position struck me as a realistic one. The case law demonstrates that the courts are prepared to be flexible, in terms of the extent to which a party may be held to a specified date as the Knowledge Date. In these circumstances, one might have thought that pleading the Section 214 claim by reference to six alternative dates over the course of the Specified Period gave the Respondents as much flexibility, in terms of their case as to when the Knowledge Condition was satisfied, as they could reasonably or fairly require.

106. What Mr Curl did not accept was that there was any need or justification for any part of the Respondents' pleaded case to be struck out, by reason of this position. I do not agree. Whether or not I have understood the Respondents' position correctly, in terms of reliance upon a Knowledge Date left at large in the Specified Period, it seems to me that it is not permissible, in this case, for the Respondents to plead a case which leaves the Knowledge Date at large in this way. It also seems to me that the relevant part of paragraph 299 of the Points of Claim is seeking to do just this. The same applies to the relevant part of paragraph (1) of

the prayer to the Points of Claim. The same appears to apply to what has been identified as the Overarching Case in Response 119.

107. In the context of the Overarching Case I confess to having some difficulty in understanding the purpose of what is described as *"the overarching case"* in the last part of Response 119. It appears to be doing the same as the relevant part of paragraph 299 of the Points of Claim; that is to say leaving the Knowledge Date at large over the Specified Period. If and in so far as the last part of the Response 119 is intended to do anything else, it is not clear to me what it is seeking to do. The relevant point is that, as I read the last part of Response 119, it is seeking to leave the Knowledge Date at large over the Specified Period. In my judgment, and for the reasons which I have given, it seems to me that this is not permissible, in terms of the pleading of the Section 214 claim.

108. On the basis of my analysis thus far, it seems to me that those parts of the Respondents' statements of case which, in the context of the Section 214 claim, seek to leave the Knowledge Date at large over the Specified Period should be struck out. The relevant parts of the Respondents' case principally include the relevant part of paragraph 299 of the Points of Claim (as specified in the Draft Order), the relevant part of paragraph (1) of the prayer to the Points of Claim (as specified in the Draft Order), and the last part of Response 119 which pleads the Overarching Case.

109. This brings me to the Appellant's second objection, which is that it is not open to the Respondents to leave the date in paragraph 309 of the Points of Claim at large over the entirety of the Specified Period. Here the issue is not quite the same as it is in relation to the pleading of the Knowledge Date in the Section 214 claim. Paragraph 309 comprises part of the Section 212 claim, and the date referred to (**"the Cessation Date"**) is the date when the Defendants would have caused the Companies to cease trading if they had not been in breach of their duties as directors of the Companies.

110. It seems to me however that the reasoning which I have applied to the pleading of the Knowledge Date should also apply to the Cessation Date. Given what is pleaded in the Points of Claim, in terms of the alleged breaches of duty on the part of the Defendants, there is clearly a link between the Respondents' case on the Knowledge Date and the Respondents' case on the Cessation Date. Given my view that it is not acceptable for the Respondents to leave the Knowledge Date at large over the entirety of the Specified Period, it seems to me that the same should apply to the pleading of the Cessation Date. Again, I rely principally upon what was said by Park J in *Re Continental*, as quoted above.

111. It may be that the Respondents do not actually wish to pursue the case that the Cessation Date is at large, falling anywhere within the Specified Period. As I understood Mr Curl's submissions, this was the position with the Knowledge Date, in the context of the Section 214 claim. This however points up another difficulty with the Section 212 claim, which arises from the unsatisfactory way in which it is currently pleaded. So far as the Cessation Date is concerned, it is clear from paragraph 309 of the Points of Claim that the Respondents' case is that the Cessation Date fell on 17th April 2015, or alternatively (and subject to the

view which I have just expressed that this part of the case is not permissible as a pleading) on any date falling within the Specified Period. Is it however the Respondents' case that, in the alternative, the Cessation Date fell on one of the five Alternative Dates?

112. Response 127 suggests to me that the Respondents are running the alternative case that the Cessation Date fell on one of the Alternative Dates. Response 127 responds to a request which is raised on paragraph 309 of the Points of Claim. The Respondents were asked to *"identify the alternative subsequent date prior to 25 April 2016 by which it is alleged that had Mr Chandler not breached his duties as a director he would have caused the Companies to cease trading"*. Response 127 is expressed to repeat Response 119. This appears to incorporate into the Respondents' case on the Cessation Date, both the alternative case that the Cessation Date fell on one of the Alternative Dates, and the Overarching Case which, applying my reasoning from my discussion of the Respondents' case on the Knowledge Date, seems to me to be the same as the alternative case advanced in paragraph 309 of the Points of Claim; namely that the Cessation Date fell on a date which is at large within the Specified Period.

113. It is not satisfactory that it is necessary to speculate on the nature of the Respondents' case in this way. The situation comes about because, instead of amending their Points of Claim in order to make their case clear on the Knowledge Date and the Cessation Date, the Respondents have instead used the Response as a means of adding to their case on the Knowledge Date and the Cessation Date, and have done so in terms which leave the position ambiguous.

114. Returning to my analysis of the position, it seems to me that those parts of the Respondents' statements of case which, in the context of the Section 212 claim, seek to leave the Cessation Date at large over the Specified Period should be struck out. The relevant parts of the Respondents' case principally include the relevant part of paragraph 309 of the Points of Claim (as specified in the Draft Order), and the relevant part of paragraph (4) of the prayer to the Points of Claim (as specified in the Draft Order). As I construe Response 127, the relevant parts of the Respondents' case, in this context, also include the last part of Response 119 which pleads the Overarching Case.

115. This leaves the Appellant's third objection, which is that the Appellant's case on causation and quantum is not pleaded, either in relation to the Respondents' alternative case on the Knowledge Date or in relation to the Respondents' alternative case on the Cessation Date.

116. I take first the Respondents' case on causation and quantum in relation to the claim under Section 214. So far as the case is pleaded by reference to the Knowledge Date being 17th April 2015, it seems to me that there is no problem. Putting matters very simply, the Respondents' case is pleaded on the basis that if the Defendants had appointed administrators as at 17th April 2015, as it is said they should have done assuming that the Knowledge Condition was satisfied by 17th April 2015, the Companies would have avoided an IND which the Respondents put at the aggregate figure of £163,092,249.

117. So far, so good. The position is not however the same when one turns to consider the Respondents' case based on the Knowledge Date being one of the five Alternative Dates or, although this may be said to be academic given my decision on whether it is open to the Respondents to leave the Knowledge Date at large over the Specified Period, when one turns to consider the Respondents' case based on the Knowledge Date being at large over the Specified Period. In relation to these alternative cases I cannot find any pleading of the Respondents' case on causation and quantum. The case is not pleaded in paragraphs 299-306 of the Points of Claim. Nor does it seem to me that the case is pleaded elsewhere in the Points of Claim, or in the Response, or in the Points of Reply.

118. In this context, it seemed to me that there was a confusion in the Respondents' position. Their submissions concentrated on the argument that it was neither necessary nor reasonable to require the Respondents to carry out alternative calculations of the IND on the hypothesis of the Knowledge Date falling after 17th April 2015. This seems to me however to confuse two different questions. The first question is whether it is necessary for the Respondents to identify what their case is on causation and quantum on the hypothesis that the Knowledge Date fell after 17th April 2015. The second question is whether it is necessary, in terms of quantum and at this stage of the action, for the Respondents to plead a table of figures, equivalent to that which appears in paragraph 303 of the Points of Claim, for each date which is an alternative candidate to 17th April 2015 as the Knowledge Date.

119. So far as the first question is concerned, it is clear from *Re Ralls*, cited earlier in this judgment, that causation and quantum must be proved in a Section 214 claim. As such, causation and quantum are, in my view, correctly viewed as essential elements of a claim under Section 214, and are clearly within the *"essential facts which go to make up each essential element of the cause of action"* referred to by Cockerill J in *King v Stiefel* at [149]. As such, it seems to me that causation and quantum must be pleaded as essential elements of a claim under Section 214. Equally, if the Section 214 claim is pleaded by reference to alternative Knowledge Dates, the relevant pleading needs to set out the case on causation and quantum by reference to each of the alternative Knowledge Dates. In some cases one would not expect this to be an onerous task. It is reasonable to assume, in some cases, that the basic case on causation will remain the same, but will simply operate by reference to a later date. It is also reasonable to assume, in some cases, that the basic case on quantum will remain the same, save that the quantum will be lower if the Knowledge Date is later. In other cases the case on causation and/or quantum may change, and may change dramatically if the alternative Knowledge Date is later. What is essential is that the relevant pleading identifies what the case is on causation and quantum for each of the alternative dates relied upon as the Knowledge Date. This seems to me to fall squarely within the basic requirements of a set of particulars of claim, as identified by Coulson J in *Pantelli.*

120. I do not think that it is any answer to this point to say that it is obvious what the alternative case is, or to argue that the alternative case can be identified from some other source. So far as I can see, the Respondents' case on causation and quantum looks as though it will remain essentially the same, on the hypothesis that the

Knowledge Date fell after 17th April 2015. It may be that the existing case on causation and quantum pleaded in paragraphs 300-306 of the Points of Claim will be said to operate in the same way on the hypothesis of a later Knowledge Date. It may be said that the quantum of the claim falls to be assessed using the same methodology as in Appendix 3 to the Points of Claim. It may be said that the figure for quantum is still an IND figure, but is a lower figure than £163,092,249 because the hypothesis is that the Defendants should have taken action to appoint administrators at a later date than 17th April 2015. All this however misses the essential point, which is that the alternative case should not be a matter of speculation. The Points of Claim should spell out the alternative case clearly, not only so that the alternative case is clear, but also so that the court can see what issues arise on the alternative case, and how those issues do or do not differ from the issues arising if the Knowledge Date is assumed to be 17th April 2015. All this seems to me to be basic good practice, in terms of pleading, and squarely within what is required of a pleading, as identified in *Pantelli*, *Dhillon*, *King v Stiefel* and plenty of other cases.

121. In the present case therefore, it seems to me that the answer to the first question is that it is necessary for the Respondents to identify what their case is on causation and quantum on the hypothesis that the Knowledge Date fell after 17th April 2015. In my judgment, the existing statements of case of the Respondents do not do this. I say this independent of the point that it seems to me that the correct place for this case to be pleaded is the Points of Claim, rather than the Response or the Points of Reply.

122. The answer to the second question which I have identified above is not necessarily so straightforward in the present case. I can see the argument that it may be disproportionate to expect the Respondents to produce actual alternative calculations for each of the Alternative Dates. This may be said particularly to be so because the existing directions for expert evidence contemplate that the accountancy experts will address themselves to the figures for IND by reference to each of the Alternative Dates. It may be said that it is sufficient for the pleading of quantum by reference to the Alternative Dates simply to indicate how the respondents say that the quantum should be calculated, without the Respondents being required, in advance of the expert evidence, to plead specific figures.

123. It seems to me however that what I have said in my previous paragraph is premature at this stage. As matters stand the Respondents' case on causation and quantum, in relation to the Alternative Date Claims (here meaning claims made under Section 214 based on a Knowledge Date falling after 17th April 2015), is not pleaded. As matters stand therefore, the second question does not arise.

124. Returning to my analysis of the position, it seems to me that the Alternative Date Claims, as I have just defined them, fall to be struck out, on the basis that two essential elements of the Alternative Date Claims, namely causation and quantum, are not pleaded.

125. This leaves the claims made under Section 212. Here the position seems to me to be effectively the same as it is in relation to the Alternative Date Claims, as I have just defined them.

126. There is the question of whether causation and quantum actually have to be shown in the case of a claim under Section 212. As I have explained earlier in this judgment, a claim under Section 212 is different in kind to a claim under Section 214. That said, I have already set out what Chadwick LJ said in *Cohen v Selby*; to the effect that causation and quantum must be shown where what is alleged is common law negligence. In the course of oral submissions I was also referred to the judgment of Jonathan Gaunt QC, sitting as a Deputy Judge of the Chancery Division, in *French v Cipolletta* [2009] EWHC 223 (Ch). At [16] Mr Gaunt QC said this:

> *"16. In my judgment, it is quite clear from the authorities (including the older cases referred to in Mr Banner's Skeleton Argument and in the Judgment of the Learned Registrar) that proof of loss to the Company is a necessary ingredient of a cause of action for breach of fiduciary duty or negligence under section 212. I do not accept that the section justifies a laxer approach to pleading than would be called for in a writ action. In my judgment the Defendant director is entitled to know what case is being made against him and it is necessary that the Claimant should (a) allege loss to the Company and (b) at least make clear the types of loss that are alleged to have been caused by the breaches of duty or negligence in question."*

127. Applying these authorities to the pleaded allegations of breach of directors' duties in the present case, it seems to me that the present case is one where the Respondents are required to demonstrate causation and loss, in order to make good their claim under Section 212. Indeed, I understood from the oral submissions that this was common ground between the parties.

128. So far as a claim is made by reference to a Cessation Date of 17th April 2015, the case on causation and quantum is pleaded in paragraphs 308-310 of the Points of Claim. Essentially what is said, in paragraph 309 of the Points of Claim, is that if the Defendants had not breached their duties as directors, the IND set out in paragraphs 303-305 of the Points of Claim would not have occurred.

129. In theory, the same case is pleaded in paragraph 309 on the footing that the Cessation Date fell after 17th April 2015. By way of reminder, paragraph 309 is pleaded in the following terms:

> *"309. Had the Respondents not breached their duties as set out in these Points of Claim, they would have caused the Companies to cease trading on 17 April 2015 or alternatively on some subsequent date prior to 25 April 2016. In the premises set out above, the entirety of the Companies' trading after the Respondents should have ceased trading was misfeasant. Had the Respondents not breached their duties in that way, then the Companies and their respective unsecured creditors would not have suffered the increase in net asset deficiency particularised at Paragraphs 303 to 305 above."*

130. In theory, it might be said that this wording includes the case that, if the Cessation Date had fallen after 17th April 2015, the IND particularised in paragraphs 303-305 of the Points of Claim would have been avoided. In theory, and on this basis, it might be said that the case in causation and quantum is pleaded both in relation

to the case based on the Cessation Date being 17th April 2015 and in relation to the case based on the Cessation Date falling on a later date within the Specified Period.

131. In reality this does not make sense, either in terms of the wording of paragraph 309 of the Points of Claim or in terms of the reality of the position. So far as the wording of paragraph 309 is concerned, paragraph 309 incorporates the figure for quantum in paragraphs 303-305 of the Points of Claim. The IND particularised in paragraphs 303-305 is calculated over the whole of the Specified Period, from 17th April 2015 to 25th April 2016. It is therefore applicable only to a claim under Section 212 based on a Cessation Date of 17th April 2015, involving the Orderly Wind-down Scenario referred to in paragraph 303. In terms of the reality of the position, I cannot see how the case on quantum which is pleaded in paragraphs 303-305 can be applied to the claim under Section 212 if the Cessation Date is assumed to be a date falling anywhere within the Specified Period. If, to take matters to the extreme, the alternative Cessation Date fell on 24th April 2016, which is a possibility contemplated by the existing wording of paragraph 309, it is difficult, if not impossible to accept that paragraph 309 is intended to plead a case that the IND which would have been avoided, on this hypothesis, remains at the figure of £163,092,249. One can make the same point by reference to the Alternative Dates, as they are identified in Response 119. The last of the alternative dates is 8th September 2015; that is to say some five months after 17th April 2015. One might think it unlikely that the IND, which would have been avoided if the Defendants had complied with their duties, would have remained at £163,092,249 if the Cessation Date fell some five months after 17th April 2015. If this is the Respondents' case, it seems to me that it needs to be pleaded.

132. The last example in my previous paragraph raises the question of whether the claims under Section 212 are intended to include the equivalent of the Alternative Date Claims under Section 214; that is to say claims based on the Cessation Date being one of the five Alternative Dates. It seems to me that the answer to that question is yes, based on my reading of Response 127. If however the answer to that question is yes, it seems to me that causation and quantum are not adequately pleaded in relation to any claims under Section 212 which are based on a Cessation Date falling after 17th April 2015.

133. Returning to my analysis of the position, it seems to me that the claims made under Section 212, so far as based upon a Cessation Date falling after 17th April 2015, fall to be struck out, on the basis that two essential elements of these alternative claims, namely causation and quantum, are not pleaded.

134. In conclusion, my analysis of the position is that all three of the objections made by the Appellant to the pleaded case of the Respondents, as I have summarised those objections at the beginning of this section of this judgment, are well founded. With this conclusion in place, I turn to consider the individual grounds of appeal.

Ground 1 – discussion

135. It seems to me that Ground 1 is well founded, so far as it is asserted that the Judge asked himself the wrong question at [J20]. I think that the Judge did ask himself

the wrong question. The question was not whether the Appellant and his legal team knew what alternative dates the Respondents were choosing to adopt in determining what was the IND suffered by the Companies, from any of those alternative dates, in continuing to trade. This formulation seems to me, with due respect to the Judge, to have confused different questions.

136. The Appellant did know what alternative dates the Respondents were relying upon, respectively, as the Knowledge Date and the Cessation Date. By reference to paragraphs 299 and 309 of the Points of Claim the Respondents knew that the alternative dates were every date within the Specified Period after 17th April 2015. By reference to Responses 119 and 127 (in the latter case as I construe Response 127), the Respondents knew that the alternative dates were the five Alternative Dates and, as I construe the Overarching Case, every date within the Specified Period after 17th April 2015.

137. What the Appellant did not know, because it was not pleaded, was what loss the Companies were alleged to have suffered by reference to the alternative dates after 17th April 2015.

138. What the Appellant knew, or what the Appellant might reasonably have inferred, or what might or might not have been obvious to the Appellant was not, in my view, relevant. What mattered was whether the Respondents had adequately and legitimately pleaded their case on the basis of an alternative case that the Knowledge Date and the Cessation Date fell after 17th April 2015. That question itself entailed three questions; namely (1) whether it was open to the Respondents to plead a claim under Section 214 which left the Knowledge Date at large, over the entirety of the Specified Period, (2) whether it was open to the Respondents to plead a claim which left the Cessation Date at large over the entirety of the Specified Period, and (3) whether the Respondents had actually pleaded their case on causation and quantum, on the hypothesis that the Knowledge Date and the Cessation Date, respectively, fell after 17th April 2015.

139. The Judge's misdirection, at [J20] would not have mattered, if the Judge had then gone on to ask himself the questions which I have set out in my previous paragraph. It seems to me however that the Judge's misdirection was carried over into the eight factors identified by the Judge at [J21]; being the eight factors which, as I read the Judgment, caused the Judge to conclude that the Strike Out Application should be dismissed. In his discussion of the eight factors the Judge essentially reasoned that the Appellant knew exactly the case which he had to meet and that the Respondents had done sufficient to make their case clear on what the quantum of loss was in relation to the alternative dates relied upon by the Respondents.

140. I repeat the analysis which I have set out in the previous section of this judgment. On the basis of that analysis I respectfully disagree with the reasoning of the Judge at [J21]. It seems to me that the Judge's analysis of the position was fundamentally flawed, and cannot stand.

141. I therefore conclude that Ground 1 is well founded. So far as the PTA Application is concerned, it follows from what I have just said that Ground 1 qualifies for the

grant of permission to appeal. So far as the Appeal is concerned, it seems to me that Ground 1 succeeds and that, for this reason, the decision of the Judge to dismiss the Strike Out Application should be set aside.

142. Strictly speaking, this renders it unnecessary to consider the remaining grounds of appeal. I will however proceed briefly to deal with the remaining grounds of appeal, before coming back to the question of what should be done in relation to the Strike Out Application, given my decision that the dismissal of the Strike Out Application should be set aside.

Ground 2

143. The argument in Ground 2 is that the Judge failed to address the Overarching Case. As I read [J21] the Judge appears to have approached the Strike Out Application on the basis that the Strike Out Application was concerned with the five Alternative Dates. So far as I can see, the Judge did not address the Overarching Case.

144. I am doubtful as to whether this failure had any material effect upon the reasoning of the Judge. As I have already noted earlier in this judgment, I have some difficulty in understanding what the final part of Response 119 was intended to achieve. If, as seems to me to be the case, the object of the exercise was to leave the Knowledge Date open during the Specified Period, it seems to me that this had already been achieved by the wording of paragraph 299 of the Points of Claim. On this basis the Overarching Case did not really add anything to the Respondents' case on the Knowledge Date.

145. The relevant point, so far as Ground 2 is concerned, seems to me to be that the Judge did not address himself to the three questions which I have identified in my discussion of Ground 1. For ease of reference those questions were (1) whether it was open to the Respondents to plead a claim under Section 214 which left the Knowledge Date at large, over the entirety of the Specified Period, (2) whether it was open to the Respondents to plead a claim which left the Cessation Date at large over the entirety of the Specified Period, and (3) whether the Respondents had actually pleaded their case on causation and quantum, on the hypothesis that the Knowledge Date and the Cessation Date, respectively, fell after 17th April 2015.

146. The Judge's failure to address the Overarching Case is, as it seems to me, one aspect of the Judge's failure to address the three questions set out in my previous paragraph. If and in so far as the Overarching Case was a reiteration of the Respondents' case that the Knowledge Date was an open date, which might fall anywhere within the Specified Period, the questions for the Judge were whether it was legitimate to plead the Section 214 claim on this basis and whether the case on causation and quantum had been pleaded on this basis. As I read the Judgment the Judge did not address himself to these questions.

147. I therefore conclude that Ground 2 is well founded, in the sense that it identifies what was, in my judgment, a part of the Judge's failure to address himself to the right questions. Putting the matter more simply, the argument in Ground 2 seems to me to be a subset of the wider argument in Ground 1.

148. It follows that, so far as the PTA Application is concerned, Ground 2 qualifies for the grant of permission to appeal. So far as the Appeal is concerned, it seems to me that Ground 2 succeeds and, as what is in effect a part of Ground 1, provides part of the reason why the decision of the Judge to dismiss the Strike Out Application should be set aside.

Ground 3

149. I do not think that either limb of Ground 3 has merit. Ground 3 rests upon what the Judge said in his judgment, delivered separately to the Judgment itself, on the question of whether permission to appeal should be granted. The relevant paragraph of this separate judgment (**"the Permission Judgment"**) reads as follows:

> *"28 Thirdly, you make the point that it will be unfortunate to countenance a different practice for officeholders as opposed to ordinary litigants.. The point I make here is that this claim is discrete, specifically a recovery which can be made under statute only by officeholders. They are not ordinary litigants and when you take all the facts of this case in the round, liquidators are entitled to rely on different approaches by the court, particularly the ICC which specialises in these types of cases, when considering whether or not the pleadings, which are very, very substantial, are sufficient to allow the respondents in this case to identify exactly what claims are being made against them, particularly on the issue of knowledge which is critical given that the primary period, the twelve month period, has been identified, has been particularised in terms of quantum, and the five alternative dates which have been produced are alternative dates which fall within that twelve month period band. It would be to the advantage of the respondents to identify in due course whether losses within that primary twelve month period, can be reduced if any of the alternative date periods find favour with the trial judge, so I do not find that a sufficient ground to give permission to appeal."*

150. So far as the first limb of Ground 3 is concerned, I am doubtful that it is fair to read this paragraph as amounting to a decision that different rules apply to liquidators pleading claims under Section 214. It seems to me that a fairer reading of this paragraph is that the Judge considered that he was justified in adopting a more flexible approach to what was required of the Respondents, in terms of pleading, in a case of this kind. It seems to me that what is required, in terms of pleading, in any particular case is inevitably a matter which is case sensitive. The authorities which I have cited earlier in this judgment do seem to me to lay down certain minimum requirements when it comes to the pleading of a claim, but beyond this I can see that what is required, in terms of pleading, is capable of varying according to the circumstances of the particular claim. For the reasons which I have already explained, I respectfully disagree with the Judge's analysis of and approach to the pleaded claims in the present case, as set out by the Judge in the Judgment itself, and as set out in this paragraph of the Permission Judgment. Subject to this disagreement, I do not think that the Judge was wrong in principle to suggest that the court might, in a case of this kind, to adopt a more flexible approach to what was required in terms of pleading.

151. There is however what seems to me to be a more fundamental reason why the first limb of Ground 3 lacks merit. If one assumes, contrary to my view, that the Judge was stating in this part of the Permission Judgment that the pleading requirements were different in respect of claims brought by liquidators, this statement was made in the Permission Judgment. No such statement appears in the Judgment, and it does not seem to me that the Judge's reasoning in the Judgment proceeded on the basis that the rules of pleading were any different for liquidators. If, contrary to my view, this was the Judge's view at all, it seems to me that this view was confined to the Permission Judgment, and did not affect the Judge's reasoning in the Judgment.

152. Turning to the second limb of Ground 3, I do not think that the Judge made the error of which he is accused. At [J21(5)] the Judge made reference to the decision of David Foxton QC, sitting as a Deputy Judge (as he then was) in *Brooks v Armstrong* [2016] EWHC 2893 (Ch). At [114] of his judgment, from which the Judge cited an extract, Mr. Foxton QC said this:

> *"114. I have concluded that the approach taken by the liquidators to setting out and particularising their case as to the amount of compensation which the directors should be ordered to pay was fundamentally deficient throughout. The importance of one party setting out the parameters of the case it is advancing so that the other party may prepare for the case it has to meet, both in its evidence and its argument, is obvious. If authority is needed for this proposition notwithstanding its obviousness, it can be found in any number of authorities, including McPhilemy v Times Newspapers Ltd [1999] 3 All E.R. 775 at 792–793, Guild v Eskander Ltd [2002] EWCA Civ 316; [2003] F.S.R. 3 and Jones v Environcom Ltd [2011] EWCA Civ 1152; [2012] P.N.L.R. 5. It is obviously the best course, and in some cases the required course, for those parameters to appear from statements of case and particulars of statements of case. However, the authorities make it clear that where the details of a party's case emerges sufficiently from the material it has served, including witness statements, the court will want to decide the real points in issue between the parties, where this can be done without unfairness to the other party, rather than allowing one party to take a stand on a "pleading point" in respect of a point of which it has had fair notice and a fair opportunity to address."*

153. The argument in the second limb of Ground 3 is that the Judge applied the wrong test, in considering whether the Respondents' case was adequately pleaded. I cannot however see that there is anything in what the Judge took from *Brooks* which is wrong. All that the Deputy Judge was saying in *Brooks*, in the extract from his judgment quoted above, was that there are cases where one party is not entitled to take a stand on a pleading point in respect of a point of which that party has had fair notice and a fair opportunity to rebut. In considering a pleading point, I can see nothing wrong with asking the question whether the objecting party has had fair notice of the relevant point and a fair opportunity to rebut.

154. In the present case however it seems to me, for the reasons which I have explained earlier in this judgment, that there were failures in the pleading of the Respondents' case which existed at a much more fundamental level than was contemplated in *Brooks*. As such, I do not think that the Judge was right simply to ask himself the question, at [J21(5)], whether there had been fair notice and a fair opportunity to rebut. In the circumstances of this case, it seems to me that this was the wrong question to ask. The right questions were those which I have identified in my discussion of Grounds 1 and 2 above. In order to answer those questions it seems to me that it was necessary for the Judge to direct himself by reference to the basic requirements of a pleading, as laid down in cases such as *Pantelli*, *Dhillon*, and *King v Stiefel*. I do not think however that the Judge was wrong in law in his reference to *Brooks*. Where the Judge seems to me to have gone wrong was in his application of what was said in *Brooks* to the pleading of the Respondents' claims in the present case.

155. So far as the PTA Application is concerned, I think that there is sufficient in the arguments in Ground 3 to qualify for permission to appeal. I think that it is fair to say that these arguments had a real prospect of success. So far as the Appeal is concerned, and for the reasons which I have briefly set out, it seems to me that Ground 3 fails.

Ground 4

156. The argument in Ground 4 contends that the Judge failed to give weight to various factors which, so it is said, should have caused him to strike out the parts of the Respondents' statements of case which were the subject of the Strike Out Application. Specific reference is made to [J21(8)], where the Judge said this:

> *"(8) So far as Mr Lightman's submissions on the failure to plead loss or the seeking of a contribution are concerned, they are not sufficiently compelling in these circumstances as it is looking at the pleadings through a prism of perfection, a trap which Saville LJ's comments referred to above cautioned against. The pleadings include the further and better information which is linked to the phrase "some other date" at para.299 of the points of claim, and the prayer. The primary IND claim is encapsulated within the twelve-month period. This may be ameliorated by expert analysis of the five alternative date claims within that 12-month period. I accept that there may be, at present, some prejudice to the respondents in not knowing at the moment what may be the exact quantification of those alternative date claims because these have not yet been calculated but to ask the Joint Liquidators to embark on that task now when it will be addressed by experts for all parties would not be proportionate."*

157. There are essentially two points to be made here.

158. First, and if all other things were equal, I am doubtful that I would be persuaded to interfere with the exercise of the Judge's discretion by reason of any of the particular factors relied upon by the Appellant. In particular, I do not think that the Appellant is necessarily correct in arguing that he is entitled to know, now, the precise sum being claimed by the Respondents on the basis of the Alternative Date Claims; here using this expression to encompass both the claims under

Section 214 made on the basis of the Alternative Dates and the claims under Section 212, if and in so far as made on the basis of the Alternative Dates. This is a question which I have deliberately left open in my own analysis of the position, in a previous section of this judgment. I have left the question open because, as I have already explained, it seems to me that it is a question which has yet to arise, in circumstances where the Respondents' case on causation and quantum, in relation to the Alternative Dates, has yet to be pleaded. There may be good reasons for not requiring the Respondents to plead specific calculations for the Alternative Dates but, as matters stand, this question does not arise. The relevant point, for present purposes, is that I do not necessarily accept that the Appellant is entitled to see such specific calculations as part of what is required to fill the existing gap in the Respondents' statements of case in relation to causation and quantum. [J21(8)] may be said to contain good reasons why this should not be required at this stage.

159. Second, all other things are not equal. For the reasons which I have explained, I do not think that the Judge asked himself the right questions in relation to the Strike Out Application, with the consequence that his reasoning in [J21] was, in my judgment, fundamentally flawed. In these circumstances, and so far as the Judge had a discretion in dealing with the Strike Out Application, it seems to me that the exercise of that discretion was equally flawed.

160. This can be illustrated by reference to the Judge's discussion in [J21(8)]. As I have commented, the Judge's discussion in that sub-paragraph may be said to contain good reasons why the Respondents should not be required to plead specific calculations for the Alternative Dates. None of this alters the fact that the Respondents have not actually pleaded their case on causation and quantum in relation to the Alternative Date Claims; again using this expression to encompass both the claims under Section 214 made on the basis of the Alternative Dates and the claims under Section 212, if and in so far as made on the basis of the Alternative Dates. It seems to me that it is important to keep separate the question of (1) whether the Respondents have pleaded their case on causation and quantum, by reference to the Alternative Dates, and (2) the question of what is required as the content of that pleading. The answer to question (1) is, for the reasons which I have given, no. Question (2) has yet to arise.

161. In these circumstances it seems to me that the exercise by the Judge of his discretion in relation to the Strike Out Application was fundamentally flawed, and cannot be upheld. Putting the matter the other way round, I do not think that the Judge's decision to dismiss the Strike Out Application can be upheld on the basis that he made a decision which was within the scope of his discretion.

162. I therefore conclude that Ground 4 is well founded, if not for quite the same reasons as those relied upon by the Appellant.

163. It follows that, so far as the PTA Application is concerned, Ground 4 qualifies for the grant of permission to appeal. So far as the Appeal is concerned, it seems to me that Ground 4 succeeds and provides an additional reason why the decision of the Judge to dismiss the Strike Out Application should be set aside.

What should be done in relation to the Strike Out Application?

164. I have concluded, following my discussion of the grounds of appeal, that the dismissal of the Strike Out Application by the Judge should be set aside. This therefore brings me to the question of what should be done in relation to the Strike Out Application.

165. Following the logic of my own analysis of the position, the Appeal falls to be allowed, and a striking out order should be made on the Striking Out Application. Given that I have accepted all three of the objections made by the Appellant to the Respondents' pleading of their case against the Appellant, it seems to me that all those parts of the Respondents' statements of case which are specified in the Draft Order will fall to be struck out, if a striking out order is made, on the basis that the relevant parts of the Respondents' statements of case disclose no reasonable grounds for bringing the relevant claims. All this however assumes that I should follow the logic of my analysis, and proceed to make a striking out order.

166. In the course of the oral submissions I canvassed with counsel what course I should take, if I came to the conclusion that some or all of the parts of the Respondents' statements of case which are the subject of the Strike Out Application should be struck out. I canvassed this question because I had in mind the ability of the court, on a strike out application, to afford the respondent an opportunity to retrieve the position by an application to amend the relevant statement of case. Brief reference was made in the submissions to *Kim v Park* [2011] EWHC 1781 (QB). At [40] Tugendhat J said this:

> *"40. However, where the court holds that there is a defect in a pleading, it Is normal for the court to refrain from striking out that pleading unless the court has given the party concerned an opportunity of putting right the defect, provided that there is reason to believe that he will be in a position to put the defect right. In para 19 of his Judgment the Master recorded that the Claimant had informed him that he already had witnesses. On 17 January 2011 the Claimant demonstrated that that was not wishful thinking, or a bluff, by submitting the statements that he did submit."*

167. Mr Lightman submitted that this was not an appropriate case to allow the Respondents an opportunity to retrieve the position. He drew my attention to the pre-Strike Out Application correspondence and, in particular, to the letter from the Respondents' solicitors, dated 22nd November 2021, which concluded the pre-Strike Out Application correspondence. At paragraphs 6-8 of that letter the Respondents' solicitors made it quite clear that there would be no application to amend in response to the objections made by the Appellant's solicitors to the pleading of the Respondents' case. Mr Lightman's essential point on this correspondence was that the Respondents had made their election not to amend, and should be held to that election.

168. For his part Mr Curl contended that the Respondents should be given a fair opportunity to take on board my decision, and make amendments within a reasonable period of time, if I was to be against the Respondents on their submissions. Essentially Mr Curl submitted that this was not one of those delinquent cases where the court was entitled to say that enough was enough, and

that there should be no opportunity to retrieve the position by amendment. Rather it was a case where the Respondents could not be said to have behaved unreasonably in contesting the Strike Out Application, and where the case would be going to trial in 2023, with substantial sums at stake, in any event. In all the circumstances, the Respondents should be given the opportunity to make amendments, if amendments turned out to be required.

169. I have some sympathy for Mr Lightman's submission that the Respondents have made their election not to amend, and should be held to that election. It seems to me that the pleading of the Respondents' case in the Points of Claim contained some relatively simple and basic flaws, which could have been dealt with by some relatively simple amendments. Instead the Respondents, by their solicitors, attempted to take their stand on a combination of the relevant parts of the Points of Claim and the Response which, in my view, was never going to be a satisfactory way to plead the Respondents' case. Thereafter positions became entrenched, as can all too easily happen with arguments over pleading.

170. I have however come to the conclusion that Mr Curl is right, and that the Respondents should be given an opportunity to retrieve the position by an appropriate application to amend. I have reached this conclusion essentially for four reasons.

171. First, if I was to make a striking out order, this would leave the Respondents with a claim under Section 214 which relied upon a single date, 17th April 2015, as the Knowledge Date. Equally, this would leave the Respondents with a claim under Section 212 which relied upon the same single date, 17th April 2015, as the Cessation Date. In my view this would not be a fair or satisfactory basis on which the Proceedings should go to trial. It seems to me that the Respondents should fairly be permitted more flexibility in this part of their case. If I have understood Mr Curl correctly, the Respondents do not actually wish to try to keep the Knowledge Date at large over the entirety of the Specified Period, but are content to rely on the Alternative Dates as possible alternatives to 17th April 2015. The position may be the same in relation to the Cessation Date. As I have already commented, this seems to me to be a permissible way for the Respondents to plead their case on the Knowledge Date and the Cessation Date.

172. Second, it does seem to me that the problems which I have identified in the relevant parts of the Respondents' statements of case can be resolved by some fairly simple amendments. In case management terms, the obvious way forward is to require the Respondents to make clear the relevant parts of their case by appropriate amendments, as opposed to the more draconian step of striking out those parts of the Respondents' case.

173. Third, I accept Mr Curl's argument that this is not, to use his expression, a delinquent case. The case is not one, in my judgment, where the court is entitled to say that enough is enough, and that the relevant party has reached the end of the road, in terms of pleading a viable claim. The argument in the Strike Out Application relates to parts only of the pleaded case. There is no suggestion that the Proceedings as a whole should be struck out and, to my knowledge, there has been no application for summary judgment in respect of the Proceedings. The

Proceedings are due to come to what I assume will be a substantial trial in 2023. The sums claimed in the Proceedings are very substantial. All of this points strongly against denying the Respondents an opportunity to retrieve the position.

174. Fourth, I keep in mind that the arguments between the parties have included the argument over whether it is necessary for the Respondents to plead exact sums as the sums claimed by reference to the Alternative Dates. The Appellant has said that this is required. The Respondents have said that this should not be required. This is a question which I have left open. If the Respondents are given the opportunity to make amendments, and if application is made for permission to make such amendments, this is an argument which may have to be resolved. If the argument does have to be resolved, it remains to be seen who will be successful in that argument. If the Respondents were to be successful in that argument, they would be entitled to say that, in that respect at least, their position has enjoyed some vindication. A situation of this kind is not one which strikes me as the appropriate circumstance in which to make a striking out order.

175. I therefore conclude that the Respondents should be given an opportunity to retrieve the position. What I have in mind, subject to the drafting of the appropriate order, is a form of unless order. The order will provide for the relevant parts of the Respondents' statements of case to be struck out unless (i) within a certain period of time the Respondents apply for permission to amend their statements of case in order to cure the defects in their pleaded case which I have identified in this judgment, and (ii) thereafter permission is granted, on the application, for the relevant amendments to be made. I cannot stress too highly, given what I regard as the relative simplicity of what is required by way of amendment, the importance of both parties (Appellant and Respondents) adopting a sensible and reasonable attitude to any such application to amend.

176. The reference in my previous paragraph to the relevant parts of the Respondents' statements of case means, for the avoidance of any doubt, those parts of the statements of case which are identified in the Draft Order. In terms of the relevant period of time for making application to amend, I have in mind a relatively short period of time, given that what is required does not seem to me to be extensive. Subject to hearing any argument on this question, I have in mind a period of no longer than 28 days.

Conclusion – the PTA Application

177. In respect of the PTA Application, and for the reasons which I have given, I grant permission to appeal on all four grounds of appeal advanced by the Appellant.

Conclusion – the Appeal

178. The Appeal is allowed, for the reasons which I have given, on the basis of Ground 1, Ground 2, and Ground 4.

Outcome

179. The overall outcome of the PTA Application and the Appeal is as follows:
    (1) Permission to appeal is granted on all four grounds of appeal.
    (2) The Appeal is allowed.
    (3) I will make an order setting aside paragraphs 1 and 3 of the Order.

(4) I will make an order providing for the relevant parts of the Respondents' statements of case to be struck out unless (i) within a certain period of time the Respondents apply for permission to amend their statements of case in order to cure the defects in their pleaded case which I have identified in this judgment, and (ii) thereafter permission is granted, on the application, for the relevant amendments to be made. The reference to the relevant parts of the Respondents' statements of case means, for the avoidance of any doubt, those parts of the statements of case which are identified in the Draft Order. In terms of the relevant period of time for making application to amend, and subject to hearing any argument on this question, I have in mind a period of no longer than 28 days.

180. The parties are encouraged to agree as much as possible between themselves as to the terms of the order to be made consequential upon this judgment. I will hear the parties separately on any terms which remain in dispute.