Neutral Citation Number: [2022] EWHC 3028 (Ch)

Appeal Reference No: CH-2022-000116

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

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

Date: 29 November 2022

IN THE MATTER OF DEBENHAMS PLC (COMPANY NO. 5448421) (IN COMPULSORY LIQUIDATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

BETWEEN:

FRASERS GROUP PLC

Applicant/ Appellant

and

(1) THE OFFICIAL RECEIVER
(2) GEOFFREY ROWLEY AND ALASTAIR MASSEY
(IN THEIR CAPACITY AS ADMINISTRATORS OF DEPARTMENT STORES REALISATIONS (PROPERTIES) LIMITED
(3) LUCID TRUSTEE SERVICES LIMITED
(4) SILVER POINT CAPITAL LP
(5) GLAS TRUST CORPORATION LIMITED
(6) GLOBAL LOAN AGENCY SERVICES LIMITED

Respondents/ Respondents

AND BETWEEN:

FRASERS GROUP PLC

Claimant/ Appellant

and

(1) GEOFFREY ROWLEY AND ALASTAIR MASSEY

(IN THEIR CAPACITY AS ADMINISTRATORS OF DEPARTMENT STORES REALISATIONS (PROPERTIES) LIMITED
(2) LUCID TRUSTEE SERVICES LIMITED
(3) SILVER POINT CAPITAL LP
(4) GLAS TRUST CORPORATION LIMITED
(5) GLOBAL LOAN AGENCY SERVICES LIMITED

Defendants/ Respondents

Before:

SIR PAUL MORGAN
(Sitting as a Judge of the Chancery Division)

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Adrian Beltrami KC and Lloyd Tamlyn (instructed by **Clarion Solicitors Limited**) for the **Appellant**

Tom Smith KC and William Willson (instructed by **Kirkland & Ellis International LLP**) for **Silver Point Capital LP**

Charlotte Cooke (instructed by **DLA Piper UK LLP**) for **GLAS Trust Corporation Limited**

Hearing date: 16 November 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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SIR PAUL MORGAN:

The appeal

1. This is an appeal by Frasers Group plc ("Frasers") against two paragraphs in the order of ICC Judge Jones made on 23 May 2022. By those paragraphs in his order, ICC Judge Jones dismissed an application by Frasers for permission to amend its pleading, described as the Umbrella Points of Claim, and made a consequential order for costs. The appeal is brought with the permission of Falk J granted on 23 June 2022. The Appellant's Notice relied on a single ground of appeal. The Respondents to the appeal are Silver Point Capital LP ("Silver") and GLAS Trust Corporation Ltd ("GLAS"). Silver and GLAS have served Respondent's Notices stating that they wish the court to uphold the relevant paragraphs in the order on different or additional grounds. Silver's Respondent's Notice identified four such grounds and GLAS's Respondent's Notice adopted those grounds. Silver and GLAS have served skeleton arguments in which they have stated that they do not seek to uphold ICC Judge Jones' decision on the ground which he gave and which was the subject of the Appellant's Notice. At the hearing, Silver and GLAS indicated that they did not wish to proceed with one of the four grounds set out in Silver's Respondent's Notice.

The background

2. These proceedings arise out of the liquidation of Debenhams plc ("Debenhams"). Frasers is the beneficial owner of some 29.9% of the shares in Debenhams. It is also a creditor of Debenhams. On 9 April 2019, Debenhams entered administration and on the same day there was a pre-pack sale of all of its assets. On 25 January 2021, the court ordered the winding up of Debenhams and the Official Receiver became the liquidator of the company.

3. Debenhams had two indirect subsidiaries known as Debenhams Retail Ltd ("Retail") and Debenhams Properties Ltd ("Properties") which were the principal operating companies in the Debenhams group. Retail and Properties have subsequently changed their names but it is convenient to continue to use their earlier names. Retail and Properties went into administration on 9 April 2020 and Mr Rowley and Mr Massey were appointed Joint Administrators ("the Joint Administrators") of both of those companies.

4. The Debenhams group of companies owed substantial sums to creditors and those creditors had taken security over, amongst other things, the assets of Retail and Properties. In particular, certain fixtures and fittings owned by Retail and Properties were the subject of security interests. Legal title to those security interests was vested in GLAS who held that title on trust for various creditors which included Silver. GLAS released its security interests over the fixtures and fittings and Retail and Properties sold the fixtures and fittings to Sportsdirect.com Retail Ltd ("SRL") which is a wholly owned subsidiary of Frasers. At the same time, various parties entered into a Claims Release Deed with Frasers and SRL pursuant to which, amongst other things, Frasers and SRL agreed to release all claims against certain parties. The Claims Release Deed also contained certain provisions dealing with the appointment of a liquidator in relation to Debenhams.

5. In the present proceedings, Frasers seeks declarations that the Claims Release Deed, alternatively certain of its provisions, are illegal and unenforceable, alternatively that it is void or voidable (and has been avoided). In the proceedings, Frasers advances three main contentions in support of its claim. First, Frasers contends that the Claims Release Deed tends to abuse, prevent or impede the due course of justice, namely the winding up of Debenhams by the court, and is contrary to public policy, illegal and unenforceable. Secondly, Frasers contends that by entering into the Claims Release Deed, the Joint Administrators of Retail and Properties committed a criminal offence under section 164 of the Insolvency Act 1986 ("the 1986 Act") with the result that the Deed is illegal and unenforceable. Thirdly, Frasers contends that the Joint Administrators of Retail and Properties exercised their powers for an improper purpose, namely, to stifle an investigation into the affairs of Debenhams whereby the Claims Release Deed is void alternatively voidable (and has been avoided). Linked to this third contention, Frasers says that it understands that the Joint Administrators acted as they did as they were required to do so by GLAS (acting on the instruction of certain creditors, including Silver) and that GLAS exercised its powers for the same improper purpose. The parties to these proceedings include the Joint Administrators of Retail and Properties, GLAS and Silver.

6. Frasers disagrees with the majority of the creditors (including Silver) as to who should be the liquidator of Debenhams. In January 2022, a liquidator nominated by the majority of the creditors (including Silver) replaced the Official Receiver. Frasers wants that liquidator removed by the court and a new liquidator appointed. Frasers' case is that there ought to be a liquidator who will investigate the affairs of Debenhams and who will bring claims against those who might be responsible for any wrongdoing. The enforceability of the Claims Release Deed against Frasers may be highly relevant to this dispute as to the choice of liquidator for Debenhams.

7. In their Defence in the present proceedings, the Joint Administrators have pleaded that when GLAS was asked to release its security interests over the fixtures and fittings belonging to Retail and Properties, GLAS required the Joint Administrators to procure Frasers and SRL to enter into a deed in the form of the Claims Release Deed and the Joint Administrators did so. There ensued a composite transaction which involved the release of the security interests over the fixtures and fittings, the sale of the fixtures and fittings and the entry into the Claims Release Deed.

8. Frasers has sought permission to amend its Umbrella Points of Claim. In relation to the claim that the Joint Administrators committed a criminal offence under section 164 of the 1986 Act, it now wishes to allege that GLAS and Silver also committed an offence under that section. As already stated, ICC Judge Jones refused permission to amend and Frasers now appeals.

The Security Release Deed

9. As I have explained, Retail and Properties owned various fixtures and fittings in various Debenhams properties. The Joint Administrators wished to sell those fixtures and fittings. The fixtures and fittings were subject to various security agreements which charged the fixtures and fittings as security for repayment of certain sums owed by Retail and Properties. Legal title to the security interests in question was vested in GLAS.

10. On 24 February 2021, there was a Deed of Release of the security interests in relation to the fixtures and fittings which the Joint Administrators wished to sell. The parties to the Deed of Release were GLAS, as security trustee for the Secured Parties as defined in an Intercreditor Agreement which was itself defined in the Deed of Release, Retail and Properties, acting through their Joint Administrators, acting as agents and without personal liability, and then separately the Joint Administrators.

11. The Deed of Release of the security interests recited the existence of the security interests and the agreement of Retail and Properties to sell the fixtures and fittings to SRL and the agreement of the parties that the fixtures and fittings should be released from the security interests. By clause 2.1 of the Deed, GLAS released the fixtures and fittings from the security interests. Clause 2.1 stated that GLAS was acting on the instructions of the Majority First Lien Creditors which I assume was a term defined in the Intercreditor Agreement. I was told that Silver was one of these creditors but it was not the only such creditor. Applying a conventional analysis, the consideration in the form of the release of the security interests was given by GLAS to Retail and Properties acting through the Joint Administrators.

The sale and purchase agreement ("the SPA")

12. On 24 February 2021, Retail and Properties sold the fixtures and fittings to SRL pursuant to the SPA. The parties to the SPA were Retail and Properties acting by the Joint Administrators acting as agents and without personal liability, SRL and separately the Joint Administrators. By clauses 2 and 3 of the SPA, Retail and Properties sold the fixtures and fittings to SRL for an initial consideration of £1.8 million, subject to the possibility of later adjustment. By clause 4.2, Retail and Properties as the Sellers and SRL as the Purchasers agreed, on completion of the sale, to deliver or perform the documents and other matters referred to in Schedule 3 to the SPA. Part A of Schedule 3 set out the obligation on Retail and Properties to deliver to SRL a duly executed Deed of Release and a duly executed Claims Release Deed (to which I will later refer). Part B of Schedule 3 set out the obligations on SRL which included an obligation to deliver a duly executed Claims Release Deed executed by SRL and Frasers. Applying a conventional analysis, Retail and Properties gave consideration to SRL by selling the fixtures and fittings to SRL and SRL gave consideration to Retail and Properties by buying and paying for the fixtures and fittings.

The Claims Release Deed

13. The Claims Release Deed, as referred to in the SPA, was a deed which was also entered into on 24 February 2021. The parties who executed the Claims Release Deed included Frasers, SRL, Retail, Properties and the Joint Administrators. Frasers and SRL were referred to as the "FG Parties". The persons named as parties to the Claims Release Deed included "Any investor that accedes to this Deed".

14. The Claims Release Deed recited the agreement to enter into the SPA, the fact that the FG Parties had previously asserted various claims and made various allegations against persons defined as "the Released Parties" in connection with, inter alia, the insolvency of Debenhams and also recited the winding up order made in relation to Debenhams and the appointment of the Official Receiver as liquidator. Recital (4) then stated:

> "In connection with [the SPA], and in consideration of the mutual promises and covenants set out therein, the FG Parties have agreed to the release and waiver of any Released Claims they may have against the Released Parties, to communicate to the Official Receiver the Released Claims have been released and not to encourage or procure that any other party bring claims arising out of or in connection with the subject matter of the Released Claims."

15. The Claims Release Deed contained detailed and elaborate provisions designed to secure that the FG Parties released a large number of persons from a great variety of claims or potential claims. It is not necessary to refer to the detail of those provisions save for the two provisions which are at the heart of the present dispute, namely, clauses 3.2(a) and 3.4(b).

16. By clause 3.2(a) of the Claims Release Deed, it was provided that:

> "Subject to clauses 3.4, 3.6, and 5 (*Accession*), each of the FG Parties agrees:
>
> (a) not to vote for or seek the appointment of a replacement liquidator for the OR, as selected by the FG Parties, their Affiliates or Connected Parties, in accordance with the provisions of the Insolvency Act 1986;".

17. By clause 3.4(b) of the Claims Release Deed, it was provided that:

> "The FG Parties agree:
>
> (a) …
>
> (b) not to oppose any application by any Party to this Deed either:
>
> (i) …
>
> (ii) …; and/or
>
> (iii) to procure the appointment of a replacement liquidator for the OR, as selected by the relevant creditors of Debenhams PLC including Lucid Trustee Services Linited, in accordance with the provisions of the Insolvency Act 1986:".

18. Clauses 3.2(a) and 3.4(b) created obligations on the part of the FG Parties. Clause 3.3 operated in the opposite direction and, apparently, imposed obligations on others for the benefit of the FG Parties. Clause 3.3 provided that:

> "Subject to clauses 3.4 and 3.5 below, each of the Debenhams Parties, each Released Company upon becoming a Party to this Deed, each Acceding Investor, and the Officeholders agree:
>
> (a) not to continue, commence, voluntarily aid in any way, fund, prosecute or cause or be commenced or prosecuted; and

(b) not to assist, encourage, procure, induce, fund or in any way cause any other person to continue, commence, voluntarily aid in any way, prosecute or cause to be commenced or prosecuted,

(c) against or in respect of the FG Parties, any Proceedings based on, arising out of, or concerning the Released Claims."

19. The layout of clause 3.3 seems to be in error; it seems that there should not have been a sub-paragraph (c) but instead the wording following "(c)" should simply have governed what was set out in (a) and (b).

20. Clause 5 of the Claims Release Deed, headed "Accession", provided for an Acceding Investor or a Released Party to become a party to the Deed. Clause 5.1 stated that the obligations of the FG Parties pursuant to, inter alia, clause 3.2 should not be effective in relation to an Acceding Investor unless and until that Acceding Investor is or becomes a Party to the Deed. Clause 5.2 provided for the means by which an Acceding Investor could become a party to the Deed.

21. Clause 6 of the Claims Release Deed provided for enforcement by one party against another. In summary, by clauses 6.1 and 6.2, an Acceding Investor and a Released Party could enforce the terms of the Deed against the FG Parties and by clause 6.3, the FG Parties could enforce the terms of the Deed against the Released Parties.

22. Schedule 1 to the Claims Release Deed set out a list of the Released Parties. This list included Silver in a specified capacity; it is not necessary for present purposes to refer further to that capacity. The Deed defined "Investor" so as to include Silver. The list also included GLAS, again in a specified capacity which it is not necessary to describe. On 26 February 2021, Silver acceded to the Claims Release Deed. I was told that GLAS has not at any time acceded to the Claims Release Deed. I understand it to be accepted that Silver thereby became a party to the Claims Release Deed and that GLAS has not become a party to it.

23. Applying a conventional analysis, by the Claims Release Deed, Retail and Properties and Silver gave consideration to Frasers. Further, the parties bound by clause 3.3, which apparently operated in favour of Frasers, included the Joint Administrators, who came within the definition of the Officeholders who were referred to in that clause.

Sections 136 and 139 of the 1986 Act

24. It is relevant to refer to sections 136 and 139 of the Insolvency Act 1986. On the making of the winding up order in relation to Debenhams, the Official Receiver became the liquidator of the company. Pursuant to section 136(2), the Official Receiver would remain the liquidator until another person became the liquidator in accordance with the 1986 Act. By section 136(4), the Official Receiver had the power to seek nominations from the company's creditors and contributories for the purpose of choosing a replacement liquidator. Section 139 of the 1986 Act applies where nominations are sought from the company's creditors and contributories. By section 139(2), the creditors and the contributories may nominate a person to be the liquidator. By section 139(3), the liquidator is to be the person nominated by the creditors but where no person

is so nominated, then the liquidator is to be the person, if any, nominated by the contributories. Section 139(4) provides that in the case of different persons being nominated, any contributory or creditor may, within 7 days after the date on which the nomination was made by the creditors, apply to the court for an order either (1) appointing the person nominated by the contributories to be the liquidator instead of or jointly with the person nominated by the creditors or (2) appointing some other person to be the liquidator instead of the person nominated by the creditors.

What happened in relation to ss 136 and 139

25. In this case, the Official Receiver exercised his power under section 136(4) to seeks nominations from the creditors and the contributories as to a replacement liquidator. The majority of the creditors nominated one pair of joint liquidators and the contributories (essentially only Frasers) nominated a different pair of joint liquidators. In the skeleton argument filed by Silver on the present application before me, it was submitted that the nomination by Frasers was a clear breach of the Claims Release Deed. By reason of section 139(3), the persons nominated by the majority of the creditors became the joint liquidators. I was told that, thereafter, Frasers applied to the court under sections 139(4) and 172 of the 1986 Act for the removal of those liquidators and for the persons nominated by it to be appointed as the joint liquidators. The skeleton argument filed by Silver on the present application before me again submitted that these proceedings by Frasers were a clear breach of the Claims Release Deed. I was also told that the court ordered a stay of the proceedings brought by Frasers pending the determination of the current proceedings.

26. In the last paragraph, I noted the written submission on behalf of Silver that the nomination of replacement liquidators by Frasers, and Frasers' proceedings under sections 139(4) and 172, were clear breaches of the Claims Release Deed. That seems to have been based on the view that Frasers was bound by clause 3.2(a) of that Deed not to seek the appointment of a replacement liquidator for the Official Receiver. However, in the course of his oral submissions, Mr Smith KC explained to me that clause 3.2(a) (and the similar wording in clause 3.4(b)(iii)) when it referred to "a replacement liquidator for the OR" did not extend to the appointment of a replacement liquidator for the liquidators who had been nominated by the creditors and who, on their nomination, had become replacement liquidators for the OR. That submission seemed to be different from the earlier written submission that the proceedings brought by Frasers under section 139(4) and 172 were a clear breach of the Claims Release Deed. In his reply submissions, Mr Beltrami KC asked for confirmation that Mr Smith's oral submission represented the position which would henceforth be taken by Silver. Mr Smith did not give that confirmation. I have not been given any further information as to what might have passed between Frasers and Silver on this point following the oral hearing. Beyond noting what occurred in this respect, I was not asked to determine any issue as to this matter.

Section 164 of the 1986 Act

27. Section 164 of the 1986 Act has the heading "Corrupt inducement affecting appointment" and provides:

> "A person who gives, or agrees or offers to give, to any member or creditor of a company any valuable consideration with a view to securing his own appointment

> or nomination, or to securing or preventing the appointment or nomination of some person other than himself, as the company's liquidator is liable to a fine."

Observations on section 164

28. For the purposes of this present judgment, which concerns an application by Frasers to amend its pleading, it is not necessary or appropriate for me to give a definitive ruling on the meaning and effect of section 164 of the 1986 Act. However, I will indicate what seems to me to be the prima facie meaning of the section.

29. Prima facie, "a person" means what it says. The section can potentially apply to any person, including a corporate body: see the Interpretation Act 1978, section 5. Of course, a person only commits an offence under section 164, if he or it does the things described in the section with the intentions therein described (by use of the words "with a view to").

30. Section 164 refers to three different things, by the use of three different verbs or phrases. The first is "gives"; the second is "agrees … to give" and the third is "offers to give". The object of all three verbs or phrases is "any valuable consideration". Therefore, the section appears to refer to three different ways in which an offence under section 164 can be committed. Prima facie, a person "gives" valuable consideration if valuable consideration passes from that person to a recipient of it. Similarly, a person "agrees to give" valuable consideration to a recipient where he agrees to give valuable consideration to a recipient, whether or not he later did so. Finally, a person "offers to give" valuable consideration to a recipient where he offers to do so, whether or not he later agreed to do so or actually did so.

31. "Valuable consideration" has a well understood meaning in the law and is to be contrasted with nominal consideration. If there were an issue as to whether a person gave valuable consideration to a recipient, then one would expect to find the answer to that issue by examining the transaction in question. If the transaction involved performance of a written agreement, then one would expect to find the answer by considering the meaning and effect of the written agreement. If there were an issue as to whether a person agreed to give valuable consideration to a recipient, then one would expect to find the answer to that issue by examining the terms of the agreement. If there were an issue as to whether a person offered to give valuable consideration to a recipient, then one would expect to find the answer to that question by examining the terms of the relevant offer.

32. Section 164 refers to valuable consideration being given etc to any member or creditor of a company. In the present case, there is no issue as to meaning of that requirement. Frasers was both a member and a creditor of Debenhams.

33. Section 164 contains a requirement of a mental element for the commission of an offence. There are three possible mental elements which will satisfy the requirements of the section. The different cases referred to are that a person does what is described in the section with a view to:

    i) securing his own appointment or nomination as liquidator; or

ii) securing the appointment or nomination of someone other than himself as liquidator; or

iii) preventing the appointment or nomination of someone other than himself as liquidator.

34. Prima facie, clause 3.2(a) of the Claims Release Deed involved an agreement by Frasers which had the effect of preventing the appointment or nomination of a replacement liquidator for the Official Receiver. Indeed, the skeleton argument for Silver submitted that Frasers' nomination of replacement liquidators was a clear breach of the Claims Release Deed. Frasers submitted that it is at least arguable that such an agreement had the effect of preventing the appointment or nomination of "someone other than [Silver]". Frasers would then submit that if a contracting party entered into a contract which had such an effect then that party had entered into that contract "with a view to" that result and that would be contrary to section 164.

35. As to clause 3.4(b)(iii), Frasers thereby agreed not to oppose any application by any (other) party to the Claims Release Deed to procure the appointment of, in effect, the creditors' nominee as a replacement liquidator for the Official Receiver. On the facts, what the creditors did was to nominate replacement liquidators and that nomination took effect pursuant to section 139 of the 1986 Act. Mr Smith submitted that the words "an application" in the clause referred to an application to the court and the creditors had not made such an application. Mr Beltrami did not, as I understood him, submit to the contrary. However, the application of section 164 might not depend on what actually happened in this case but could depend on the potential operation of the clause, on the assumption that a party to the Deed entered into the clause "with a view to" the clause taking effect in accordance with its terms. The question would then be: if a party to the Deed did apply to the court for the appointment of a replacement liquidator for the Official Receiver and Frasers was prevented from objecting to that application, would that produce a result contrary to what was envisaged by section 164? Frasers would submit that a result whereby the creditors' nominee would be appointed as liquidator would be a case of securing the appointment of a person other than Silver and, possibly, also a case of preventing the appointment of Frasers' nominee.

The Umbrella Points of Claim

36. The relevant pleading on the part of Frasers has been described as "the Umbrella Points of Claim". I will set out the part of that pleading which advanced the case against the Joint Administrators based on the allegation that they committed a criminal offence contrary to section 164 of the 1986 Act:

> "37. Under section 164 of the 1986 Act, a person who gives, or agrees or offers to give, to any member or creditor of a company any valuable consideration with a view to securing his own appointment or nomination, or to securing or preventing the appointment or nomination of some person other than himself, as the company's liquidator is liable to a fine.
>
> 38. In the premises (including as pleaded in paragraph 32n above), Frasers avers that:

a. Under the SPA, valuable consideration was given to Frasers, a creditor and member of the Company, by the Retail and Properties Administrators, who procured Retail and Properties (which they wholly controlled) to enter into the SPA and were parties to it. The valuable consideration given to Frasers was the consideration acquired by SRL, a wholly-owned subsidiary of Frasers, under the SPA: Recital (4) of the Claims Release Deed recited that the FG Parties (including Frasers) had agreed to the Claims Release Deed "In connection with the Asset Purchase Agreement, and in consideration of the mutual promises and covenants set out therein..." That valuable consideration was also agreed or offered to be given by the Retail and Properties Administrators, prior to execution of the Claims Release Deed. If (which Frasers denies) the valuable consideration was not given (or agreed or offered) by the Retail and Properties Administrators within the meaning of section 164, but by the companies Retail and Properties, Frasers avers that Retail and Properties committed an offence under section 164 and the Retail and Properties Administrators committed an offence by procuring Retail and Properties to commit that offence;

b. As pleaded above, it was a condition of the SPA that SRL deliver or ensure delivery of the Claims Release Deed duly executed by SRL and Frasers and valuable consideration was given (and agreed and offered) with a view to:

i. preventing the appointment or nomination as liquidator of the Company of some person other than the Retail and Properties Administrators, that is, preventing the appointment/nomination of Frasers' choice of insolvency practitioner as liquidator of the Company; and/or

ii. securing the appointment or nomination of a liquidator of the Company as selected by the relevant creditors of the Company, including Lucid.

Frasers avers and infers (prior to disclosure herein) that the Retail and Properties Administrators read, understood and were advised on the terms of the Claims Release Deed prior to its execution. Frasers avers that the provisions of the Claims Release Deed (in particular, clause 3.2 and, in respect of (ii) above, clause 3.4(c) (*sic*)) were intended to prevent and secure the matters pleaded at (i) and (ii) above and that the Retail and Properties Administrators thus acted with a view to preventing and securing those matters.

39. In the premises, Frasers contends that the Retail and Properties Administrators have committed a criminal offence under section 164 of the 1986 Act, such that the Claims Release Deed involved the commission of a legal wrong, alternatively was made with the purpose of the commission of a legal wrong.

40. In the premises, and further or in the alternative to the pleas at paragraphs 35 and 36 above, the Claims Release Deed is illegal and unenforceable."

37. It can be seen that Frasers contended that the relevant consideration was given and agreed to be given and was offered to be given. The persons alleged to have given etc the consideration were the Joint Administrators of Retail and Properties alternatively Retail and Properties (with this alternative possibility, it was alleged that the Joint Administrators had procured Retail and Properties to do so).

38. The consideration which had been allegedly given etc was the consideration acquired by SRL; therefore, the relevant consideration was the acquisition by SRL of the unincumbered title to the fixtures and fittings.

39. The consideration was alleged to have been given to Frasers, a member and a creditor of Debenhams.

40. Finally, it was pleaded that the Joint Administrators acted as they did with a view to preventing the appointment or nomination of Frasers' choice of liquidator who was a person other than the Joint Administrators and/or securing the appointment or nomination of a liquidator as selected by the creditors.

The Defence of the Joint Administrators

41. The Joint Administrators have served a Defence which puts in issue each of the allegations made by Frasers in relation to section 164. Nonetheless, the Joint Administrators have not applied to strike out that claim against them. At present, the claim is due to be tried in May 2023.

42. At the hearing of this appeal, Frasers referred me to various other statements in the Defence dealing with other allegations made by Frasers in its Umbrella Points of Claim. The Joint Administrators pleaded:

    i) the secured lenders to the Debenhams group would not give their consent to the release of the security over the fixtures and fittings, which was needed to bring about the sale of the fixtures and fittings, without Frasers and SRL entering into the Claims Release Deed;

    ii) the negotiations for the sale of the fixtures and fittings were with "Frasers" and no offers, other than from "Frasers" were received for the purchase of all of the fixtures and fittings.

43. The Joint Administrators provided Further Information in relation to their pleading that the secured lenders would not give consent to the release of the security over the fixtures and fittings without the Claims Release Deed and identified GLAS as trustee for the secured lenders and Silver as one of those lenders.

Frasers' draft amended pleading

44. I will now refer to the draft amendments to the Umbrella Points of Claim for which Frasers seeks permission to amend. In summary, Frasers now wishes to plead that both GLAS and Silver committed an offence contrary to section 164 of the 1986 Act. At paragraph 27 of the Umbrella Points of Claim, Frasers amended the pleading to refer to the Security Release Deed. The further draft amendments are as follows:

> "38A. Further or in the alternative to paragraphs 38 above, Frasers contends that GTCL and/or the Silver Point (as one of the Secured Parties) have committed a criminal offence under section 164 of the 1986 Act:
>
> (a) Paragraph 27 above is repeated;

(b) The Retail and Properties Administrators' pleaded defence (now pleaded at paragraphs 24-25 of their Amended Umbrella Points of Defence and Counterclaim) is that in order to effect a sale of the fixtures and fittings under the SPA, the consent of the secured creditors of the Debenhams group, who held full fixed and floating security over the assets of Retail and Properties, was required. Frasers understands, from responses 9 and 10 dated 13 September 2021 to requests for further information made by Frasers dated 24 August 2021 ("RFI"), that the secured creditor referred to was "GLAS" (GTCL, Frasers infers) and that GTCL acted on the instruction of a majority of the Secured Parties. The Retail and Properties Administrators further plead that the Secured Parties required the entry into the Claims Release Deed as a condition of releasing their security, and that based on regular discussions with certain Secured Parties, it was clear to the Retail and Properties Administrators from early December 2020 that it would not be possible to obtain the security release without a compromise and release of all potential claims available to Frasers and its associates relating to the conduct of the affairs of the Company. According to the Retail and Properties Administrators' response 10 to the RFI, the Secured Parties with whom they held the regular discussions included Silver Point. Frasers infers (prior to disclosure) that following the Winding-up Order on 25 January 2021, Silver Point (and other Secured Parties) and GTCL would not agree the release of their security save on condition of delivery of the Claims Release Deed (including clauses 3.2 and 3.4, which prevented Frasers from, inter alia, nominating or voting on the appointment of a liquidator and also secured or helped to secure the appointment of a liquidator selected or supported by Silver Point and other Secured Parties);

(c) In the premises, and on the basis that the Retail and Properties Administrators' allegations referred to at (b) above are correct, Frasers avers that:

i. GTCL (as legal owner of the security) and/or Silver Point (as a beneficial owner) gave, agreed or offered to give valuable consideration to Frasers, the valuable consideration being the release of the fixtures and fittings transferred under the SPA from the security (by execution of the Security Release Deed), with the effect that the title in the fixtures and fittings transferred or agreed to be transferred to SRL was free of the security interest of GTCL and Silver Point (and the other Secured Parties). If and to the extent that the valuable consideration was given, agreed or offered to be given not by GTCL or Silver Point, but by Retail and Properties/the Retail and Properties Administrators, then Retail and Properties/the Retail and Properties Administrators acted as agents (innocent or otherwise) of GTCL and Silver Point;

ii. The valuable consideration given to Frasers (a creditor and member of the Company) was the consideration acquired by SRL, a wholly-owned subsidiary of Frasers, under the SPA: Recital (4) of the Claims Release Deed recited that the FG Parties (including Frasers) had agreed to the Claims Release Deed "In connection with the Asset Purchase Agreement, and in consideration of the mutual promises and covenants set out therein..." That valuable consideration was also agreed or offered to be given by GTCL and/or Silver Point prior to execution of the Claims Release Deed. Further and in any event, consideration was given to Frasers under clause 3.3 of the Claims Release Deed;

iii. it was a condition of the SPA that SRL deliver or ensure delivery of the Claims Release Deed duly executed by SRL and Frasers and valuable consideration was given (and agreed and offered) with a view to:

a) securing the appointment or nomination of some person (other than GTCL or Silver Point) as liquidator of the Company. In fact, subsequent to execution of the Claims Release Deed Lucid (acting, Frasers understands, on the instruction of Silver Point in its capacity as Noteholder, together with other unidentified Noteholders) nominated and voted for the appointment of liquidators of the Company at a virtual meeting of creditors of the Company (as expressly prefigured by clause 3.4(b)(iii) of the Claims Release Deed); and Silver Point has relied on the Claims Release Deed to claim that, unless and until that deed is declared unenforceable, Frasers is unable to challenge the appointment of Lucid's nominees/appointees; and/or

b) preventing the appointment or nomination of some person (other than GTCL and Silver Point) as liquidator of the Company, that is, preventing the appointment/nomination of Frasers' choice of insolvency practitioner as liquidator of the Company.

Frasers avers and infers (prior to disclosure herein) that GTCL and Silver Point (who each acted through the same solicitors, Kirkland & Ellis International LLP) read, understood and were advised on the terms of the Claims Release Deed prior to its execution. Frasers avers that the provisions of the Claims Release Deed (in particular, clause 3.2 and, in respect of (ii) above, clause 3.4(c)) were intended to secure and prevent the matters pleaded at (i) and (ii) above and that GTCL and Silver Point thus acted with a view to securing and preventing those matters. If and to the extent that GTCL did not act with a view to the matters pleaded at (i) and (ii) above (which Frasers denies), then GTCL acted as innocent agent of Silver Point.

39.In the premises, Frasers contends that the Retail and Properties Administrators, further or alternatively GTCL and/or Silver Point, have committed a criminal offence under section 164 of the 1986 Act, such that the Claims Release Deed involved the commission of a legal wrong, alternatively was made with the purpose of the commission of a legal wrong.

40.In the premises, and further or in the alternative to the pleas at paragraphs 35 and 36 above, the Claims Release Deed is illegal and unenforceable"

45. It can be seen that:

i) Frasers relies on the facts pleaded by the Joint Administrators that the secured creditors, including GLAS and Silver, required the Claims Release Deed to be entered into as a condition of their releasing the security over the fixtures and fittings;

ii) it is alleged that the persons who gave etc consideration within section 164 were GLAS (as trustee) and Silver (as a beneficial owner); alternatively, it is alleged that if the persons who gave etc the consideration were Retail and Properties or

the Joint Administrators, then those persons acted as agents (innocent or otherwise) for GLAS and Silver;

iii) it is alleged that GLAS and Silver gave, and agreed to give and offered to give consideration;

iv) it is alleged that the consideration was the release of the security over the fixtures and fittings and then the sale of the fixtures and fittings to SRL;

v) it is alleged that the consideration was given to Frasers because SRL was its wholly owned subsidiary;

vi) there is a separate allegation that consideration was given to Frasers under clause 3.3 of the Claims Release Deed;

vii) it is alleged that GLAS and Silver acted as they did with a view to securing the appointment or nomination of some person as a liquidator other than themselves and with a view to preventing the appointment or nomination or Frasers' choice of liquidator.

The judgment under appeal

46. ICC Judge Jones refused to grant Frasers permission to amend. In his judgment, he made various comments about the timing of the amendment and its drafting and further comments about section 164 of the 1986 Act. However, it is agreed that the single reason which he gave for refusing permission to amend was expressed as follows:

> "However, the fundamental point is that this court does not decide whether or not someone has committed a criminal offence. It would be wholly inappropriate to allow an amendment to make such an allegation in order to try to cause this court to declare that those two companies or either of them have committed a criminal offence."

The ground of appeal

47. Frasers appeals the judge's refusal of permission to amend on the ground that his reasoning as quoted above was wrong in law.

48. Mr Beltrami and Mr Tamlyn have served a detailed skeleton argument in support of this ground of appeal. They submitted that the judge was plainly wrong in law. They contended that it is not uncommon for civil courts to deal with allegations of criminal conduct as a necessary element in a civil claim and that the civil court determines the facts alleged by applying a civil standard of proof. They cited a number of authorities to illustrate the position including *Patel v Mirza* [2017] AC 467.

49. GLAS and Silver do not seek to uphold the judge's decision on the basis of the reason which he gave.

50. I conclude that the judge was wrong in law to refuse permission to amend on the basis of the single reason which he gave. However, GLAS and Silver seek to uphold the judge's refusal of permission by relying on further grounds to which I will now turn.

The Respondent's Notices

51. Silver has served a Respondent's Notice asking the appeal court to uphold the order of ICC Judge Jones on different or additional grounds as set out in the Respondent's Notice. There were originally four such grounds but Mr Smith on behalf of Silver told me that he did not pursue one of them. I need not further refer to the ground which is not pursued. The remaining grounds, as renumbered by me, were:

> "(1) The Judge ought to have held that, as a matter of statutory construction, "a person" in Section 164 of the Insolvency Act 1986 ("IA86") must (and can only) be an insolvency practitioner who would be able to be appointed as liquidator of the company. Accordingly, since Silver Point and/or GTCL are not insolvency practitioners who would be able to be appointed as liquidators of Debenhams Plc ("the Company"), Section 164 is of no application to them, and the Amendment Application should have been dismissed on the basis that the amendments had no real prospect of success.
>
> (2) Further, or alternatively, the Judge ought to have held that, on Frasers' own pleaded case, Silver Point and/or GTCL did not give, or agree, or offer to give "valuable consideration" to Frasers in its capacity as a member or creditor of the Company. In relation to this:
>
> (a) On Frasers' pleaded case in paragraph 38A(c)(i) of the Draft Amended Umbrella Points of Claim, the purported consideration was the release of security over certain fixtures and fittings by execution of the Security Release Deed. However: (i) the parties to the Security Release Deed were GTCL, Retail/Properties and the Administrators but not Silver Point such that no consideration was given by Silver Point; and (ii) Frasers was not a party to the Security Trust Deed and the release of the security was not consideration given to it.
>
> (b) To the extent that any consideration was provided, this was the transfer of title to the fixtures and fittings. However: (i) the transfer was made by Retail/Properties under the terms of the Asset Purchase Agreement (acting by the Retail/Properties Administrators), and not by either Silver Point or GTCL; (ii) there is no basis for the allegation that in transferring the fixtures and fittings Retail/Properties/the Retail/Properties Administrators were acting as "agents" on behalf of Silver Point and/or GTCL (whether innocent or otherwise); and (iii) the fixtures and fittings were transferred to Sportsdirect.com Retail Limited, which is a separate entity from Frasers which was neither a member nor creditor of the Company.
>
> (c) Alternatively, the purported consideration, as pleaded in paragraph 38A(c)(ii), was "given to Frasers under clause 3.3 of the Claims Release Deed". However, there is no evidence (nor is there anything to suggest) that Silver Point and/or GTCL had any "Released Claims" against Frasers which they agreed not to commence/continue (and did not commence/continue) against Frasers under Clause 3.3.
>
> (3) Further, or alternatively, the Judge should have concluded that the proposed amendment was flawed since, even on Frasers' own case, there was no arrangement between GTCL and/or Silver Point and Frasers for "securing the appointment of

some person (other than GTCL or Silver Point) as liquidator of the Company" contrary to the proposed pleaded allegation in paragraph 38A(c)(iii)(a). In this regard:

(a) there is no provision in the Claims Release Deed ("the CRD") which compelled any party to vote either in favour of or against the appointment of any liquidator; and

(b) the CRD did not secure the appointment of Alastair Beveridge and Clare Kennedy of AlixPartners as liquidators since its terms did not require any party to vote for these persons (or for any other persons)."

52. GLAS has served a Respondent's Notice asking the appeal court to uphold the order of ICC Judge Jones on the grounds set out in Silver's Respondent's Notice.

The test for permission to amend

53. Mr Smith, relying on *Kawasaki Kisen Kaisha v James Kemball Ltd* [2021] EWCA Civ 33, [2022] 1 CL C 286 at 18] per Popplewell LJ, submitted that the test to be applied when considering an application to amend a pleading was as follows:

    i) it is necessary for the party seeking permission to amend to show that the proposed amendment has a real prospect of success;

    ii) it is not enough that the claim is merely arguable; it must carry some degree of conviction;

    iii) the pleading must be coherent and properly particularised;

    iv) the pleading must be supported by evidence which establishes a factual basis which meets the merits test; it is not sufficient simply to plead allegations which if true would establish a claim; there must be evidential material which establishes a sufficiently arguable claim that the allegations are correct.

54. Mr Beltrami did not quarrel with this statement of the appropriate test and it is therefore the test which I will apply.

The Respondents' first ground

55. In their skeleton argument, Mr Smith and Mr Willson submitted that when section 164 referred to "a person" it referred to, and only to, a person who was capable of being nominated and appointed as liquidator of the company in question i.e. a duly qualified insolvency practitioner.

56. Mr Beltrami and Mr Tamlyn served a skeleton argument in response which gave a number of detailed reasons why it would not be right to confine the meaning of "a person" in section 164 to a duly qualified insolvency practitioner. They argued that "a person" meant what it said and that what was required by the section was to ask a series of questions as to whether a person had committed one of the various acts referred to in the section with a mental element which satisfied one of the various mental elements referred to in the section. If so, then that person had committed the relevant *actus reus* with the necessary *mens rea* and ought not to escape criminal liability because he was

not at the relevant time a qualified insolvency practitioner. I was referred to various sections of the 1986 Act including sections 230(3), 389, 390 390B and section 432 (which referred to section 164). Mr Beltrami also submitted that it would be entirely appropriate to bring within section 164 the giving of consideration by an LLP with a view to securing the appointment as liquidator of one of its members; in that example, the LLP itself would not be a qualified insolvency practitioner.

57. In his oral submissions, Mr Smith indicated that he was going to modify his original submission. He no longer contended for the purposes of this hearing that "a person" had to be a qualified insolvency practitioner. Instead, he moved from construing "a person" in a limited way to a different submission focussing on different words in section 164, namely, the words which refer to relevant acts being done "with a view to" achieving a result described in the section. He submitted that the acts of the person in question only came within the section if they were done "with a view to securing his own appointment". That formulation plainly complied with the first way in which the mental element is described in the section. Mr Smith also submitted that this formulation also accorded with the further words in the section which referred to "preventing the appointment … of some person other than himself" as Mr Smith would say that one could try to prevent the appointment of another in order to secure the appointment for oneself and therefore that would be a case where one did the acts in question with a view to indirectly securing one's own appointment. However, Mr Smith had more difficulty with the part of the section which refers to the acts being done with a view to "securing … the appointment … of some person other than himself". Mr Smith tried to limit such a case to where the appointment of some other person was to be as a co-appointee. Mr Smith then agreed with the formulation that a person came within the section if he did the relevant acts with a view, directly or indirectly, to secure his own appointment as a sole or a co-appointee.

58. Mr Smith then moved away from construing the words of the section and contended that whatever they meant they could not possibly cover a case where a creditor or a member of a company, who was not seeking his own appointment as liquidator, was agreeing to restrict its own behaviour in the process of appointing a liquidator.

59. My overall conclusion is that Frasers has a real prospect of success in arguing that "a person" in section 164 means any person, so that if a person does the acts referred to in the section with the mental element referred to in the section, then that person commits the offence. I conclude that Frasers has a real prospect of defeating the argument raised in the Respondent's Notice that the relevant person must be someone capable of being appointed as a liquidator or the similar argument advanced by Mr Smith that the relevant person must be a qualified insolvency practitioner.

60. Mr Smith's argument as advanced at the hearing did not involve the construction of "a person" and would not seem to be within the Respondent's Notice. In any case, his argument as to what was meant by "with a view to" is not obviously right and I conclude that Frasers has a real prospect of success in defeating that argument.

61. Accordingly, I do not uphold the first ground in the Respondent's Notice.

The Respondents' second ground

62. The second ground relates to the requirement in section 164 that a person gives valuable consideration to a member or creditor of Debenhams. Frasers was a member and a creditor of Debenhams; SRL, who acquired the fixtures and fittings, was not a member or creditor of that company. I understand that Retail and Properties were also creditors of Debenhams and GLAS gave consideration to Retail and Properties by the Security Release Deed but the draft amended pleading does not appear to rely on their status as creditors of Debenhams.

63. The draft amended pleading relies upon, amongst other things, clause 3.3 of the Claims Release Deed. Prima facie, that clause involved the giving of consideration to Frasers. By clause 3.3, a number of parties agreed not to assist in any way the bringing of claims against Frasers based on, arising out of or concerning the Released Claims (a term which is very widely defined). Prima facie, that clause conferred a benefit on Frasers as it not only released any claims which might come within the wide wording of the clause but also gave to Frasers the certainty of knowing that it could defeat any attempt by a party to the Deed to make a claim even if that claim would be without foundation. Mr Smith sought to counter this view by saying that there were no Released Claims against Frasers. However, the wording of clause 3.3 is not restricted to cases where there were Released Claims against Frasers. Secondly, Frasers can rely on the prima facie position that a clause of this kind does confer a benefit on the released party, here Frasers.

64. If clause 3.3 of the Claims Release Deed did involve the giving of consideration to Frasers, the next question is: who gave that consideration? As I explained above, Silver became a party to the Claims Release Deed and so it (amongst others) gave that consideration to Frasers. Accordingly, I do not accept that Frasers has no real prospect of showing that Silver gave consideration to Frasers. Conversely, GLAS did not become a party to the Claims Release Deed and so this particular argument, based on clause 3.3, does not get Frasers home as against GLAS. For the sake of completeness, I note that although the Joint Administrators gave the consideration in clause 3.3 to Frasers, that fact is not relied upon in the case as pleaded against the Joint Administrators.

65. The above conclusion may be sufficient for Frasers' purposes at least as against Silver. However, the draft amended pleading pleads the giving etc of consideration in other ways in addition to relying on clause 3.3. Frasers says that the other relevant consideration was the release of security over the fixtures and fittings and the transfer of the fixtures and fittings. There are some obvious difficulties with those arguments. The consideration in the form of the release of the security was given by GLAS to Retail and Properties, not to Frasers. The consideration in the form of the transfer of the fixtures and fittings was given by Retail and Properties, acting through the Joint Administrators, to SRL. Although SRL was wholly owned by Frasers, it was still a separate legal entity. Although the Security Release Deed, the SPA and the Claims Release Deed were all connected, that ought not to change the analysis of who gave what consideration to whom. Frasers relies on Recital (4) in the Claims Release Deed, which I have quoted earlier in this judgment. That stated that Frasers and SRL agreed to various releases "in consideration of the mutual promises and covenants set out [in the SPA]". I can see that that might have the effect that if Silver or GLAS had been parties to the SPA and had made a promise or given a covenant, that could amount to consideration given to Frasers by virtue of Recital (4). But Silver and GLAS were not

parties to the SPA and did not make promises or give covenants in the SPA. Although the SPA did contain a promise by Retail and Properties to deliver the Security Release Deed to SRL and the Security Release Deed did involve consideration passing from GLAS, I do not consider that the consideration from GLAS in that Deed became a promise or a covenant in the SPA within Recital (4).

66. If the draft amended pleading put forward a claim against Silver alone, and not GLAS, I might take the view that because of Frasers' ability to rely on the effect of clause 3.3, the whole of the draft amended pleading ought to be permitted. After all, I was not asked to "blue pencil" the pleading and turn it into a different more limited pleading. Further, many of the issues raised by the draft amended pleading overlap with the issues raised by the case alleged against the Joint Administrators and that case is going to trial. Further, the wider matters relied upon in the draft amended pleading principally turn on the construction of three documents which are not unduly complex and could be considered at the trial without unduly lengthening it.

67. However, the draft amended pleading also makes a claim, relying on section 164, against GLAS and GLAS was not a party to the Claims Release Deed and to clause 3(3) of it. This means that I do need to look more closely at the draft amended pleading.

68. The draft amended pleading pleads the facts and matters put forward by the Joint Administrators in their Defence to the claim that there was interference with the due course of justice. The claims in the draft amended pleading against GLAS and Silver are based on those facts and matters. They include allegations that there were negotiations to sell the fixtures and fittings to "Frasers". Although the fixtures and fittings were ultimately sold to SRL, the pleadings suggest that the negotiations were with Frasers direct and not its subsidiary, SRL. There was plainly a connection between the release of the security by GLAS over the fixtures and fitting and their sale to "Frasers". There was also a connection between the release of the security and the sale to "Frasers". It may well be possible to analyse the transaction as one where GLAS offered to release the security if Frasers entered into the Claims Release Deed. If that is a possible analysis, then it can be said that GLAS offered the release of the security as consideration for Frasers entering into the Claims Release Deed. It can be said that the negotiations did not just involve two parties, GLAS and Frasers, but was tripartite. GLAS made its position known to Retail and Properties, acting through the Joint Administrators, and they made GLAS's position known to Frasers. The result was that GLAS did what it had offered to do, and GLAS and its beneficiaries obtained the ability to accede to the Claims Release Deed.

69. I note that, in addition to pleading that GLAS "gave" consideration to Frasers, the draft amended pleading asserts that GLAS "offered to give" consideration to Frasers. The fact that the consideration was ultimately given to Frasers' wholly owned subsidiary may not affect the argument based on what GLAS offered to give to Frasers.

70. I recognise that the trial judge might find some of the above reasoning to be unacceptably imprecise and not rigorous enough in dealing with the question of consideration and with the difference between Frasers and its subsidiary, SRL. Nonetheless, at this stage, I consider that I should not refuse permission to amend the pleading as against GLAS on the basis of the second ground in the Respondent's Notice.

The Respondents' third ground

71. This ground relates to the part of the draft amended pleading which pleads that the acts complained of were done "with a view to" certain consequences. This ground does not challenge the pleading in paragraph 38A(c)(iii)(b) that the acts complained of were done with a view to preventing the appointment of Frasers' choice of liquidator. Instead, the challenge is to the pleading in paragraph 38A(c)(iii)(a) that the acts complained of were done with a view to securing the appointment of some person (other than GLAS or Silver) as liquidator.

72. Frasers' argument is that if the acts were done with a view to preventing Frasers' choice being appointed as liquidator, that cleared the way to the creditors being able to nominate their choice of liquidator and to prevent Frasers from applying to the court under section 139(4) for a different liquidator to be appointed. I consider that Frasers' case on this point is sufficiently arguable to be put forward with a real prospect of success. Accordingly, I would not uphold the third ground in the Respondents' Notice.

73. At the hearing of this appeal, there was reference to a possible requirement of section 164 that the person who would be "some person other than himself" had to be a specific person. However, that possible requirement was not put forward in the Respondent's Notice as an argument for dismissing the appeal.

The overall result

74. I have dealt with the single ground of appeal and the three remaining grounds in the Respondent's Notice. It was agreed that if I upheld the ground of appeal and did not uphold any of the grounds in the Respondent's Notice, then the question whether I should grant permission to amend was for me to decide. However, as the only objections to the grant of permission to amend were the grounds raised in the Respondent's Notice, which I have not accepted, it follows that there is no remaining objection to the grant of permission to amend.

75. At the hearing, other points were raised as to the possible application of section 164 to the alleged facts. I have not referred to all of the points that were raised. All that I am deciding at this stage is that Frasers has a real prospect of success in relation to the claims it wishes to make against Silver and GLAS. The parties are of course free at the trial to raise all relevant arguments subject of course to them being available on the pleadings and to any contrary direction of the trial judge.

76. I should note however that Frasers' pleading contends that GLAS and Silver committed an offence under section 164 of the 1986 Act both directly (by their own actions) and also indirectly. In this judgment I have considered the direct claim but not the indirect claim. The indirect claim involves the contention that GLAS and Silver caused others to commit the *actus reus* of the offence at a time when GLAS and Silver had the necessary *mens rea*. Mr Beltrami referred me to what was said about "innocent agency" in *R v Varley* [2019] EWCA Crim 1074 at [87]-[88]. In view of my conclusions as to the direct claim, I need not consider the indirect claim. GLAS and Silver did not submit that I should refuse permission to amend in relation to the indirect claim if I were to grant permission to amend in relation to the direct claim.

77. I will therefore allow the appeal and grant permission to amend accordingly.