FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2024] CSIH 13
CA29/21

Lord President
Lord Tyre
Lord Boyd of Duncansby

OPINION OF THE COURT

delivered by LORD TYRE

in the cause

CENTENARY 6 LIMITED

Pursuer and Respondent

against

TLT LLP

Defenders and Reclaimers

_____

Pursuer and Respondent: Smith KC, G Reid; Harper Macleod LLP
Defenders and Reclaimers: McBrearty KC, Paterson KC, Deacon; Clyde & Co LLP

4 June 2024

Introduction

[1] This reclaiming motion (appeal) arises from the negligence of the defenders ("TLT"), a firm of solicitors, in failing properly to advise the pursuer ("C6") in relation to the requirements for lodging caution in proceedings brought by C6 against the joint liquidators of Centenary Holdings III Limited ("CH III") of which it was the sole shareholder. That

failure resulted in the court refusing a claim by C6 for payment of £22.325 million under section 212(3) of the Insolvency Act 1986. TLT admit negligence, but deny that C6 sustained any loss. In this reclaiming motion they seek a wholesale review of the decision of the commercial judge, who found them liable to pay damages to C6 of almost £10 million plus interest. There is a cross-appeal by C6 in relation to the commercial judge's quantification of damages.

Background to the section 212 application

[2] CH III was a drinks and entertainment company previously called Seagram Distillers Limited which was acquired in 2000 by a multi-national group ("Vivendi") whose parent company was Vivendi Universal SA. In December 2001, CH III's drinks business was sold and it ceased to trade. CH III retained substantial assets valued in excess of £1 billion. It also had liabilities, including two 25 year full repairing and insurance leases of the Ark office building in Hammersmith, London which had been Seagram's UK head office. The landlord of the Ark was Deka Immobilien Investment GmbH. CH III's annual rent was about £5 million.

[3] In 2003, Vivendi came under financial pressure from their bankers and wished to rid themselves of the liabilities under the Ark leases. They attempted to surrender the leases but Deka declined their offer of £20 million. They were unable to find a new tenant for the Ark which had an unusual open plan design. Vivendi did not have the funds to undertake the work required to subdivide the building.

[4] At that time, Mr Peter Harrod was the financial controller of CH III's immediate parent company, Centenary Holdings Limited. In October 2003 he sought advice from PricewaterhouseCoopers ("PwC") who proposed a number of options including a scheme

that, in essence, stripped most of the valuable assets out of CH III, leaving it with some residual assets together with its liabilities, including the leases.

[5] Mr Harrod introduced his brother, Mr Murray Richards, to Vivendi. Mr Richards, who died in 2020, said that he was interested in obtaining possession of and renovating the Ark. Deka were not willing to assign the leases to any organisation with less than a triple A rating, and would not therefore assign it to any of Mr Richards' companies. PwC suggested that Vivendi sell the shares in CH III to one of Mr Richards' companies in order to avoid the need for an assignation of the leases. In pursuance of PwC's scheme, CH III was sold twice within the Vivendi group: first from Centenary Holdings Limited to a company called Centenary 4 Limited ("C4") and then by C4 to C6, the pursuer in this action. In the course of this process, most of CH III's assets were distributed by a dividend *in specie* to C4, leaving CH III with £15 million in cash. The purchase price of £77.7 million payable by C6 to C4 for CH III was left unpaid as a debt on the intercompany ledger. In 2004, C6 and its now subsidiary CH III were sold together for a price of £1 by the Vivendi group to a company in the P4 property group, whose ultimate owner was Mr Richards.

[6] C6 funded its purchase of CH III from C4 by borrowing £77.7 million from CH III. It is unlawful for a company to provide a third party with financial assistance to enable that party to buy the company's own shares, unless certain requirements are met. Those requirements, which at the material time were contained in sections 151 to 158 of the Companies Act 1985, include a "whitewash declaration" by the directors of the acquired company that if the company provides such assistance, it will still be able to meet its debts as they fall due in the 12 months following the provision of the assistance. The declaration must be audited, and a special resolution in favour of the assistance must be passed. Prior to 22 January 2004, the head of Vivendi's legal division was the sole director of CH III.

Under the restructuring scheme, he was to cease to be a director. He was not willing to sign the whitewash declaration because he would have no control or influence over the company after its sale by Vivendi. The declaration was instead signed by Mr Stephen Bloch, an associate of Mr Richards with no previous knowledge of CH III who was appointed as its sole director on 22 January 2004. The audit was carried out by PwC, who confirmed that the declaration was reasonable, having regard to Mr Richards' plans for the Ark. These included buying it from Deka, and refurbishing and subdividing it for onward let. In the end, no effort was ever made to refurbish the Ark as proposed. CH III entered into various unsuccessful transactions and, in 2005, went into liquidation.

[7] Deka submitted a claim in CH III's liquidation for £38,286,271 consisting of rent arrears, future rent, and other charges in terms of the leases. In about November 2005, the joint liquidators, Robert Caven and Kevin Mawer, entered into a compromise agreement with Deka in terms of which Deka's claim in the liquidation was agreed at £28 million. The agreement did not contain an anti-embarrassment clause, whereby the claim would be reduced in the event that, upon obtaining vacant possession of the Ark, Deka managed to mitigate their losses by selling or re-letting the Ark. In March 2006 Deka sold the Ark for £47 million.

[8] The joint liquidators were advised that the financial assistance to C6 had been unlawful because Mr Bloch's declaration had been dated two days after the date of the loan, contrary to section 155(6) of the 1985 Act. The joint liquidators commenced proceedings, funded by Deka, in the High Court of England and Wales against PwC, Mr Bloch and Vivendi for repayment of £77.7 million. Vivendi counterclaimed against PwC and C6 on the basis that C6 still owed £77.7 million to C4. On 30 September 2010 the proceedings were settled by Vivendi paying £47 million to the joint liquidators. As part of the settlement, CH

III assigned to Vivendi all of its rights and interests relating to proceedings against, *inter alia*, Mr Bloch and Mr Richards, and Vivendi agreed to indemnify the joint liquidators in respect of claims by contributories.

[9] Vivendi then commenced proceedings in the High Court of England and Wales against Mr Bloch and Mr Richards (as a shadow director) for breaches of their directors' duties to CH III by causing payments amounting to more than £10 million to be made by the company. In a judgment dated 9 October 2013 ([2013] EWHC 3006 (Ch)), Newey J found in favour of Vivendi. In the course of his judgment he stated (paragraph 113) that he could not regard either of Messrs Bloch and Richards as a reliable witness. As regards Mr Harrod, Newey J observed (paragraph 114):

> "As for Mr Harrod, his written evidence in particular was careful and, I am sure, largely accurate. At times, however, his desire to help his brother was apparent… I treat Mr Harrod's evidence with a degree of caution."

The section 212 note

[10] Section 212 of the Insolvency Act 1986 provides a right of action based on any delinquency by the directors or liquidators of a company in the course of the company's winding up. Section 212(1) applies when:

> "… a person who …
>
> (b) has acted as liquidator. . .
>
> 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."

Section 212(3) states that in that event:

> "The court may, on the application 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."

[11] C6, as a contributory of CH III, lodged a note in the liquidation under section 212 seeking a contribution of about £22.325 million to the assets of CH III by the joint liquidators. C6 averred that the joint liquidators, in entering into the agreement with Deka, had failed to exercise the skill and care reasonably expected of ordinarily competent liquidators. Deka's claim had only been worth £4.5m and Deka had secured a windfall upon their sale of the Ark. No ordinarily competent liquidator exercising reasonable skill and care would have entered into such an agreement without ensuring that it included an "anti-embarrassment" clause.

[12] TLT were C6's solicitors in the section 212 proceedings. The court ordered C6 to lodge caution. TLT failed to lodge caution on C6's behalf despite multiple extensions to the deadline. As a result, the section 212 note was refused on 5 May 2017. That refusal was upheld on 10 April 2018 by the Second Division ([2018] CSIH 27). In this action, C6 seeks damages arising from TLT's failure to lodge caution on its behalf. TLT admit that the failure amounted to a breach of contract and professional negligence. They contend however that their negligence did not cause C6 any loss because, for a number of reasons, C6 had a nil or negligible chance of achieving any success in the section 212 proceedings.

The commercial judge's opinion

Issues for determination

[13] Before the commercial judge, C6 submitted that the loss to CH III was measured by the financial consequences of the joint liquidators entering into the agreement with Deka

without an anti-embarrassment provision. The chances of success in the section 212 proceedings had been high. Because the outcome depended on how a third party would have acted but for the breach of duty, the court in the present case required to value the loss of C6's chance of success in the note. TLT agreed that the court should approach the matter as the loss of a chance, but submitted that where there were a number of contingencies the court should multiply together the percentage chances in relation to each contingency. Where, as here, the percentage chance attributable to one or more of the contingencies was nil, the overall result was also nil. The factors relevant to C6's prospects of success were:

- whether the claim against the joint liquidators had prescribed;
- whether C6 could have secured funding or, alternatively, funded itself to pursue the claim to a conclusion;
- whether C6 could have established breach of duty on the part of the joint liquidators;
- whether the joint liquidators would have reached an agreement with Deka limiting its claim to less than £28 million;
- if so, whether there would have been a surplus available to C6 after payment in full of CH III's creditors.

Prescription

[14] The commercial judge held that C6's action had not prescribed prior to the commencement of the section 212 note. On either party's hypothesis of fact, more than five years had elapsed between concurrence of *injuria* and *damnum* and the lodging of the section 212 note. The question was whether prescription had been suspended or extended by sections 11(3) or 6(4) of the Prescription and Limitation (Scotland) Act 1973. The creditor in an obligation of a liquidator to make reparation to a company under his control was the

company. A shareholder did not become the creditor by lodging a section 212 note. It was the awareness of the company, CH III, which mattered for the purposes of section 11(3). Similarly, for the purposes of an extension under section 6(4), it was the company's awareness which mattered. Section 6(4) provided that the prescriptive period could be extended in certain circumstances including fraud, which had a broad meaning and could include a breach of duty by a liquidator to a company under his control. Whilst the liquidator was in office, the company could not act independently of him, and therefore could not discover any fraud by him. A liquidator's knowledge as to his own wrongdoing should not be attributed to the company (*Julien* v *Evolving Tecknologies and Enterprise Development* [2018] BCC 376 (PC)). Whether the action had prescribed was a matter of law, and the court did not need to assess the loss of a chance suffered by C6 in relation to the prescription issue. If however the court had required to assess the extent of the chance lost, it would have assessed the chances of the judge in the section 212 proceedings reaching a different conclusion on the question of prescription as nil or negligible. C6 had a 100% chance of succeeding on the matter of prescription at preliminary proof.

[15] If, contrary to the commercial judge's analysis, it was the knowledge of C6 and not CH III which was relevant for the purposes of prescription, the joint liquidators' prospects of succeeding at a preliminary proof on prescription would still have been nil or negligible. Mr Harrod's evidence before the commercial judge was that he became aware of Deka's claim having been agreed at such a high figure when he read an article in Property Week on 15 April 2011, but he was not a director of C6. Mr Richards referred in an email dated 27 February 2011 to one of CH III's rented properties having been sold at an extraordinarily high price, but the email did not mention the Ark and could have been referring to another property. The email was ambiguous and did not fix the controlling minds of C6 with actual

or constructive awareness of the joint liquidators' fraud more than five years before the presentation of the note.

Funding

[16] On the balance of probabilities, C6 would have been able to self-fund the section 212 proceedings until the resolution of the preliminary proof on prescription. Thereafter, there was a very high chance, amounting to a virtual certainty, that Woodsford Group Limited, litigation funders, would have provided funding. The evidence of Mr Charles Morris, chief investment officer and director of Woodsford, confirmed this. The theoretical evidence of Neil Purslow, the chief investment officer of another litigation funder, Therium Capital Management Ltd, to the effect that a prudent litigation funder, having had sight of Newey J's judgment in the action by Vivendi against Messrs Richards and Bloch, would have regarded the proceedings as speculative and unmeritorious and would not have funded them, was of no assistance where there was evidence that in reality Woodsford would have provided funding. Mr Morris's point that Woodsford would not have agreed to fund the present proceedings against TLT unless they would also have funded the section 212 proceedings was particularly compelling. In these circumstances the commercial judge considered that it was unnecessary for him to consider whether, had no litigation funding been obtained, C6 would have been able to self-fund the note after resolution of the prescription issue.

Breach of duty

[17] The issue of breach of duty could be dealt with shortly, as TLT had accepted in their submissions that there was a real and substantial chance that C6 would have established

breach of duty by the liquidator in the section 212 proceedings. The only matter in dispute was what the chance was.

Prospects of limiting Deka's claim

[18] C6 had reasonable prospects of establishing in the section 212 proceedings that the joint liquidators would have reached a compromise agreement with Deka for a sum less than £28 million. On the facts averred by C6, it would have been reasonable to draw the inference that, had the joint liquidators not entered into a compromise agreement, Deka would have terminated the leases themselves in order to sell the Ark with vacant possession or let it to new tenants. The joint liquidators would have required to demonstrate that that inference should not be drawn, but they had made no averments which did so. Whilst it was possible that Deka would not have agreed to an anti-embarrassment clause, there was again a lack of pleading, or evidence led, by the joint liquidators in the section 212 proceedings to that effect.

Surplus

[19] C6 had reasonable prospects of establishing that, had the Deka settlement been lower, there would have been a surplus in CH III's assets available to C6 as a result of the settlement that the joint liquidators reached with Vivendi. TLT's contention that there would have been no surplus because in that eventuality Vivendi would have offered, and the joint liquidators would have settled at, a correspondingly lower amount had two difficulties. The first was that such a defence was not pled by the joint liquidators in the section 212 proceedings. The evidence of Mr Nicholas Pike, Vivendi's solicitor in the proceedings brought against them by the joint liquidators, and whose idea it had been for the joint liquidators to seek caution, was that the defence had not occurred to him. The

second was that the evidence relied upon by TLT in support of the contention was weak. No evidence was led from anyone from Vivendi about their attitude to settlement of the proceedings brought against them by the joint liquidators. Hearsay evidence of their attitude was led from Mr Pike and from Mr Caven, one of the joint liquidators. Mr Caven's evidence was that Vivendi had requested details of the creditors' claims before they would agree settlement. They had been willing to recompense the creditors for their losses, but it was clear that they had no intention of offering a settlement which would have left any surplus for distribution to C6 as shareholder. Mr Pike gave evidence that Vivendi considered they had been deceived into the sale of CH III by Messrs Richards, Bloch and Harrod and were furious with them. They had instructed him not to settle at a sum which exceeded the creditors' claims. However, in the absence of evidence from Vivendi personnel, the evidence of Messrs Pike and Craven as to their negotiating position was inconclusive. It did not establish that they would not have departed from that position if it had been necessary to do so in order to achieve settlement.

Court discretion

[20] Section 212(3) gave the court discretion to refuse to make an order compelling a delinquent liquidator to make a compensatory payment to the company in liquidation. There were however no circumstances in the present case which would have justified such a refusal. Where a company under a liquidator's control had suffered loss as a result of his breach of duty, the liquidator should not be absolved from his liability to make good the loss on a discretionary basis. Vivendi's feeling that it would be unjust for Messrs Harrod and Richards to benefit from their blameworthy actions would not be an adequate reason to refuse to compensate the company for its loss. The situation required to be looked at in the

round; Vivendi had been a party to the scheme to dispose of CH III and it was of direct benefit to them, as they had been desperate to rid themselves of the Ark lease whilst stripping out CH III's assets. Any blame for the scheme did not rest solely with Messrs Richards and Harrod. It would be inequitable to punish C6 for the scheme in those circumstances. The chances of a judge exercising the discretion to refuse to make an order were nil.

Loss of chance percentage

[21] There were obvious difficulties for a firm of solicitors who, having advised a client to proceed with a litigation, attempted to defend an action for professional negligence on the basis that the litigation would not have succeeded (cf *Mount* v *Barker Austin* [1998] PNLR 493). C6 had proceeded with the section 212 proceedings on legal advice from senior counsel that there were reasonable prospects of success. Leaving aside the prescription and funding points on which the commercial judge had held that C6 would have had a 100% chance of succeeding, there remained the prospects of establishing breach of duty, the prospects of the joint liquidators reaching an agreement with Deka to settle at the lower level, and the likelihood of there being a surplus available for C6 as contributory. The commercial judge declined to adopt the mathematical approach of multiplying percentages, because he regarded the questions as facets of the same contingency, namely whether C6 would have succeeded on the merits of the section 212 note. Taking all of the matters raised together, he assessed their chances of success at 65%. That was a broad brush assessment. It was in line with the legal advice tendered by TLT to C6: senior counsel had advised that prospects of success were 60% or more, and TLT had not disagreed. The amount payable to C6 accordingly fell to be reduced to 65% of its full value.

Quantification of loss

[22] C6's first conclusion was for payment of the amount of surplus that would have been distributed to it had it been successful in the section 212 note. The liquidation had been an unusual one in that there had been sufficient assets in CH III for the creditors to be paid in full. If C6 had been successful in the section 212 proceedings, Deka's claim would have been reduced by £22,324.980.56 to £6,670,312.47, thereby reducing the total creditors' claims (£40,480,471.94) to £18,155.491. The reduction in Deka's claim included the deduction of a dilapidations claim (of £1,198,166) as there was no evidence before the court that Deka had had a valid dilapidations claim. However, not all of the sum of £22,324,980.56 would have flowed through to C6 as a surplus. The creditors of CH III were entitled to statutory interest from the date of liquidation until distribution. That would have totalled £14,978,280. There were costs of the liquidation of £2,673,757 which would have had to be met. The surplus due to C6 as contributory would therefore have been £11,192,472. Interest at the rate of 4% was payable on that figure from 31 December 2010 until the date of refusal of the section 212 note (5 May 2017). On a broad brush basis, the interest amounted to £2,840,000. Applying the loss of a chance percentage of 65% to the total of £14,032,472 produced a figure of £9,121,106, which the commercial judge rounded to £9,122,000.

[23] The second conclusion was for payment of the expenses as taxed which had been awarded against C6 in relation to the appeal to the Inner House against the refusal of the section 212 note. Those amounted to £228,435.31 plus interest of 8% from the date of citation. TLT's contention that that expense was not recoverable as it had not yet been paid fell to be rejected; C6 was under a legal obligation to pay the sum. Sixty five per cent of £228,435.31 was £148,482.95, rounded to £148,500.

[24] The third conclusion was for recovery of the costs incurred by C6 in the section 212 proceedings. The amount claimed was £253,358.47. Three items which did not relate, or did not wholly relate, to those proceedings required to be deducted. That left £174,158.47 plus interest at 4% from 5 May 2017 to the date of citation, and 8% thereafter. Sixty five percent of that sum was £113,203, rounded to £113,200.

Reclaiming motion: arguments and decision

[25] TLT challenge the commercial judge's decision on almost all of the issues for determination. C6 contends that the commercial judge reached the correct decision on those issues but erred in three respects in his quantification of damages. It is convenient to set out the arguments and state our decision in relation to each of the various issues in turn.

Prescription

Argument for TLT

[26] The commercial judge erred in holding that the joint liquidators had a nil or negligible chance of success in proving that the obligation to make reparation had prescribed by the time the section 212 proceedings were raised. It was acknowledged that although the proof had proceeded on the basis that the key date for prescription was 1 April 2016, when the note was served, it was now accepted that the key date was 25 February 2016, when the note was lodged. The note was a derivative claim. There were two issues of law: first, whether the creditor for the purposes of such a claim was the person bringing the claim or the company whose patrimony would benefit if the claim were successful and, secondly, if the creditor was the company, whether actual or constructive awareness of the person bringing the claim was attributable to it. The commercial judge's decision that the company was the creditor and that the claimant's awareness was not attributable to it gave

rise to an odd outcome. C6 was the only person who would realistically claim, and it had all of the requisite knowledge to enable it do so, yet its claim against the joint liquidators could not prescribe whilst the latter were in office. On that hypothesis, C6 would still be in time to bring proceedings today, notwithstanding its admitted knowledge since at least 2012. The commercial judge had erred in finding that the creditor was CH III and not C6, and that it was CH III's awareness that was relevant. It was the power, entitlement or right of action to compel performance or fulfilment of an obligation by the debtor that conferred on a person the status of a creditor. The obligation arising from the joint liquidators' liability to make reparation to CH III was correlative to the personal right of C6, conferred upon it by section 212(3)(b), to compel reparation to be made. It made no difference that C6 was seeking to compel payment to another party, namely CH III. Such an interpretation accorded with the definitions of claimant and plaintiff used in English and Northern Irish limitation legislation. It would be surprising if different results were reached in different parts of the UK in respect of a UK-wide statutory insolvency regime.

[27] *Esto* the commercial judge was correct that CH III was the creditor, C6's awareness was attributable to CH III. The person pursuing a derivative claim was the agent of the company for that claim and their knowledge was, in most circumstances, attributable to the company. In the present circumstances, the awareness of C6 as agent was attributable to CH III as principal, the critical feature being C6's control over the claim against the joint liquidators. Alternatively, if C6 was not CH III's agent, a special rule of attribution, in place of the primary rules of attribution or the general principles of agency, should operate to attribute its knowledge to CH III. A person in C6's position had express statutory authority in section 212 to enforce the note obligation and thereby interrupt the prescriptive period. Sections 6(4) and 11(3) of the 1973 Act ought to be construed so as to permit the attribution

of the awareness of a person claiming on the creditor's behalf to that creditor. This was what the Scottish Law Commission had contemplated relative to what became the proviso to section 6(4) (see *Report on Reform of the Law Relating to Prescription and Limitation of Actions* (1970) (Scot Law Com No 15) at paragraph 93).

[28] On either of the foregoing bases it was necessary to consider whether, as a matter of fact, C6 had had actual or constructive awareness of CH III's loss more than five years before the note was lodged. Mr Richards had indicated in emails that, by 21 December 2010, he had decided to sue the joint liquidators. Mr Richards' email dated 27 February 2011 and Mr Harrod's evidence in cross examination on the terms of that email made it plain that Mr Richards had been aware of the loss. Though the email came after 25 February 2011, ie less than five years prior to the lodging of the note, there was no suggestion that the awareness had been acquired in the two intervening days. C6 was aware of the sale of the Ark by Deka and the payment of a portion of the Vivendi settlement to CH III's creditors. That ought to have triggered the taking of steps that the ordinarily prudent contributory would have taken. The judge had given no reasons for his finding that the pursuer could not with reasonable diligence have become aware of the loss more than five years before the lodging of the note. Moreover he had erred in law in reversing the onus of proof by proceeding on the basis that it would have been for the joint liquidators to prove that C6 was aware of the loss. C6 had led no evidence relating to the lack of awareness of Mr Bloch, who was sole director of CH III when the loss occurred.

[29] *Esto* CH III was the creditor and the C6's awareness could not be attributed to it, the commercial judge had failed to consider whether CH III had been induced to refrain from making a claim by the liquidators' fraud or their own error. There was no evidence to support such a finding. The error required to be the sole cause of the creditor's failure to

claim. That was not the case here; C6's neglect was a separate cause. On the judge's hypothesis, the fraud or error subsisted by reason of the liquidators remaining in office until the bringing of proceedings. Self-evidently, the fraud or error did not induce the failure to make a claim sooner.

Argument for C6

[30] The commercial judge did not err in finding that the prescription plea in the note was bound to fail. Section 212 provided a procedural mechanism. It did not create any substantive rights or obligations. The creditor in the obligation being enforced through the section 212 note was the company, CH III, not its shareholder. The decision of the court in *Dryburgh* v *Scotts Media Tax Ltd* 2014 SC 651 was indistinguishable from the present circumstances. *Esto* C6's knowledge was relevant, the judge was not plainly wrong to conclude that C6 did not have knowledge until publication of a press article concerning CH III's liquidation on 15 April 2011. He had not placed the onus of proof on the joint liquidators. There was no need for the judge to address the steps that a person of ordinary prudence would have taken for the purposes of section 11(3) of the 1973 Act.

Decision

[31] The commercial judge was correct to hold that the creditor, for the purposes of section 6 of the 1973 Act, was CH III. The creditor is the person to whom the obligation which is sought to be enforced is owed. The relevant obligation was the obligation to make reparation for loss caused by the joint liquidators' breach of duty. That obligation was owed to the company whose assets they were alleged to have misapplied: that is, it was owed to CH III and not to its shareholder. If that obligation existed for more than five years without a relevant claim or relevant acknowledgment, it was extinguished at the expiration of the

period. However, in terms of section 6(4), any period during which the *creditor* (ie CH III) was induced to refrain from making a claim by fraud or error induced by the debtor is not reckoned as part of the five years. Where the person whose state of mind is in issue is a company, it is necessary to identify one or more individuals in whom the requisite state of mind can be attributed to the company: *Dryburgh* v *Scotts Media Tax Ltd* (above) at paragraph 21. In that case the state of mind of a director during the relevant period was attributed to the company. In the present case CH III was under the direction of the joint liquidators throughout the period from the commission of the alleged breach of duty until the lodging of the section 212 note, which was a relevant claim for the purposes of section 6(4) by CH III (not C6). It follows that no part of the time that elapsed after the obligation arose is reckoned as part of the prescriptive period.

[32] TLT's argument that the obligation arising from the joint liquidators' liability to make reparation to CH III was correlative to the right conferred on C6 by section 212(3)(b) to compel reparation to be made is misconceived. The right correlative to the obligation is the underlying right of the company to receive reparation for the breach of duty. Section 212 simply affords a mechanism for a variety of persons to enable the company to enforce the obligation owed to it. If it be the case that English law would produce a different result (a matter on which we express no view) then that would be the consequence of differences between the respective laws of prescription and limitation, which would not occasion surprise or concern.

[33] TLT's alternative argument was that if the commercial judge was correct that CH III was the creditor, C6's awareness was attributable to CH III. This argument falls to be rejected. In the first place, TLT's description of section 212 proceedings as a "derivative action" is not well founded. That expression refers to actions by minority shareholders on

behalf of a company to seek redress for wrongs committed by those whose majority control prevents the institution of proceedings at the instance of the company. Such actions, which developed as an exception to the rule in *Foss* v *Harbottle* (1843) 2 Hare 461, were competent in Scotland at common law (see *Wishart* v *Castlecroft Securities Ltd* 2010 SC 16, Lord Reed at paragraph 2) and are now provided for by sections 265 - 269 of the Companies Act 2006, superseding the common law. The remedy is a substantive one, not restricted to companies in the course of winding-up. It proceeds on an entirely different basis from section 212, a procedural section which does not create a cause of action in itself but provides a method of litigating particular claims during a winding-up (*Stone & Rolls* v *Moore Stephens* [2009] 1 AC 1391, Lord Scott of Foscote at para 110; *In re B Johnson & Co (Builders) Ltd* [1955] Ch 634, Lord Evershed MR at 647). Cases such as *Wallersteiner v Moir (No 2)* [1975] QB 373 using the terminology of agency in derivative actions under English common law are therefore of no assistance.

[34] Secondly, there is nothing in section 6(4) that provides for awareness of fraud or error by a person other than the creditor to be attributed to the creditor. TLT's contention that the court ought to apply a "special rule of attribution", attributing the knowledge of C6 or its director or shareholder to CH III, is founded upon a dictum of Lord Hoffmann in *Meridian Global Funds Management Asia Ltd* v *Securities Commission* [1995] 2 AC 500 (PC). That case examined the circumstances in which liability for the knowledge or actings of individuals could be attributed to a company. At page 507 Lord Hoffmann observed:

> "… (T)here will be many cases in which … the court considers that the law was intended to apply to companies and that, although it excludes ordinary vicarious liability, insistence on the primary rules of attribution would in practice defeat that intention. In such a case, the court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was *for this purpose* intended to count as the act etc of

> the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy."

[35] TLT contend that for the purpose of enforcement of the note obligation, the directing mind and will of CH III was C6, having regard to the language, content and policy of the 1973 Act, and negative prescription in general. They found upon the reference in the definition of a relevant claim in section 9(1) to a claim made "by or on behalf of" the creditor. This provides no basis for the application of a special rule of attribution in the interpretation of section 6(4). It is not the point that Lord Hoffmann was addressing when dealing with the attribution to a company of liability for the actings of natural persons. Nor is it the point that the Scottish Law Commission were contemplating in the passage cited, which refers to the actions of any person through whom the creditor derived right being regarded as the actions of the creditor. CH III's right was not derived through C6.

[36] The *obiter* observations of the Privy Council in *Julien* v *Evolving Tecknologies and Enterprise Development* (above), in the context of a statute mirroring the English law of limitation of actions, provide some policy support for this conclusion. At paragraph 61 the Board observed, in the context of breach of duty by the directors of a company:

> "… (T)here is no obvious reason why time should run in favour of the directors of a company who have committed a deliberate breach of duty, or deliberately concealed a breach of duty, for as long as they choose to retain control of the company as its Board. There is much to be said for adhering to the simple rule, based upon the separate personality of the company from even a sole shareholder, that shareholder knowledge of a breach of duty owed to the company by its directors, or the ability to discover the facts, is simply not to be attributed to the company at all, at least for as long as the allegedly delinquent directors retain control of it."

Those observations are equally applicable to breach of duty by liquidators so long as they remain in control of the company.

[37] It follows from the foregoing analysis that any awareness of the controlling minds of C6 was not relevant to the question whether the joint liquidators' obligation to make reparation to CH III had prescribed. For the sake of completeness, there is no reason to interfere with the commercial judge's finding that *esto* the knowledge of C6 was relevant, the joint liquidators' prospects of succeeding at a preliminary proof would still have been nil or negligible. Between 2005, when the Deka deal was agreed, and November 2010 Mr Bloch was sole director of C6; he was then replaced as sole director by Mr Richards. The contention that the commercial judge reversed the onus of proof falls to be rejected. Both parties had founded on evidence led: TLT founded upon the terms of Mr Richards' two emails. The commercial judge's view was that at a preliminary proof the email of 27 February 2011 would have been unlikely to carry any weight in fixing CH III with awareness. He was entitled so to conclude. There was no need for him to refer to the email of 21 December 2010: it is far from clear that the reference to suing the joint liquidators relates to what became the subject matter of the section 212 note. He accepted Mr Harrod's evidence that he was not aware of the loss until the publication of an article on 15 April 2011 stating that Vivendi had settled with the joint liquidators, but (contrary to C6's submission) did not base his decision on this because Mr Harrod was not a director of C6. He noted that Mr Richards' evidence was not available and that the evidence of the recipient of the email of 27 February 2011 was of no assistance. In the absence of any evidence consistent with actual or constructive knowledge on the part of Mr Richards or his predecessor as director, the commercial judge was entitled to reach the conclusion that he did.

Funding

Argument for TLT

[38] The commercial judge erred in finding that there was a very high chance, amounting to virtual certainty, that Woodsford would have funded the section 212 proceedings had they survived a preliminary proof on prescription. He was wrong simply to accept the evidence of Mr Morris and to treat Mr Purslow's expert evidence as theoretical. Mr Morris's evidence in his witness statement that Woodsford would have funded the note was qualified in his answers to cross examination. He acknowledged that Woodsford had not been provided with an explanation of either the background transaction by which C6 came to own CH III or the events leading to its liquidation. He had not known that C6 did not repay the loan, or that the effect of its claim against the joint liquidators was for part of the value of that same loan. He did not know that the principals of C6 and CH III had dishonestly paid away over £10 million prior to CH III's liquidation, at a time when Mr Harrod was CH III's financial controller. He conceded that those matters would have been material to Woodsford's decision-making. He accepted that the assignment of claims taken by Vivendi and its threat to wind up C6 would have been highly material to Woodsford's decision making, and that these matters had not been disclosed to Woodsford. He was reluctant to speculate about what the investment advisory panel or Woodsford's board would have done had they seen Newey J's judgment, either in relation to the previous litigation or in deciding to fund this litigation, though he did acknowledge that the information contained within it would have impacted on their decision. It was fanciful to suppose that Woodsford's advisory panel, armed with Newey J's judgment, and with knowledge of Vivendi's hostility towards C6, would have recommended to the board that the claim should be funded, or that the board would have agreed to fund the claim, had C6 obtempered its obligations to Woodsford and disclosed relevant and material information to

it. The contention that weight could be attached to the panel's decision to fund the present case was also undermined.

[39] Mr Morris's evidence having been thus neutralised, the commercial judge misdirected himself by failing to take into account Mr Purslow's evidence that a funder which had had sight of Newey J's judgment would have been highly unlikely to fund the section 212 proceedings. Properly analysed, the evidence demonstrated that the prospects of C6 securing funding for the remainder of the litigation were nil or negligible.

[40] Having so erred, the commercial judge further erred in deciding that he did not need to make a finding as to whether C6 could have self-funded the remainder of the litigation after the determination of the prescription issue at preliminary proof. The issue was therefore live for the court to determine. The court ought to find that C6 could not have funded the litigation itself. Mr Harrod stated that Woodsford were not approached in 2015 because at that stage funding was desirable but not essential; by implication, that meant that it was essential by 2017, when Woodsford were approached. Mr Harrod's evidence that C6 could have self-funded the litigation was no more than an assertion. He had accepted that C6 could not afford to meet the award of caution of £100,000 as at December 2016, and that by August 2017 they had fallen into £43,000 of arrears in payment of their legal fees. They could not afford to pay two awards of expenses made against them in relation to their attempts to appeal the refusal of the section 212 note to the Inner House and the UK Supreme Court. Mr Harrod was evasive and inconsistent in his evidence. The court should prefer the evidence of Mr Jim Diamond, a Jersey-based costs lawyer who acted as a broker to source litigation funding, and whose evidence contradicted Mr Harrod's assertion that C6 could have self-funded. Mr Diamond had been retained for the purpose of securing funding once after the event insurance had been obtained. He confirmed that C6 needed funding.

Argument for C6

[41] The commercial judge's finding that C6 would have obtained funding for the section 212 note was unassailable. It was a primary finding of fact founded, among other things, on an assessment of Mr Morris's evidence, which the judge accepted. It was not a finding which could not be reasonably explained or justified. TLT's criticisms proceeded on an inaccurate summary of Mr Morris's evidence as a whole and placed excessive weight on what could reasonably be taken from the observations in Newey J's judgment.

Decision

[42] The circumstances in which the court will interfere with the findings of fact made by a Lord Ordinary (including a commercial judge) are well recognised. These were recently set out by this court in *Woodhouse* v *Lochs and Glens (Transport) Ltd* 2020 SLT 1203 (LP (Carloway), delivering the opinion of the court at para [31]). The court must be satisfied that the decision was "plainly wrong" meaning that it was one which no reasonable judge could have reached, in the sense of being one that cannot reasonably be explained or justified (*Henderson* v *Foxworth Investments Ltd* 2014 SC (UKSC) 203, Lord Reed at paragraphs 62 and 67). Plainly wrong is not the only ground for a successful review. The Lord Ordinary may have made:

> "'… 'some other identifiable error' including: 'a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence'" (Lord Reed at para 67); see also *Grier* v *Lord Advocate* 2023 SC 116, LP (Carloway), delivering the opinion of the court at para [109]).

The fact that this court might have reached a different decision is not sufficient to interfere with the finding of the commercial judge.

[43] Applying that guidance, TLT's primary argument raises the question whether there has been a demonstrable failure by the commercial judge to consider relevant evidence, so that his decision cannot reasonably be explained or justified. That test has not been met. The commercial judge narrated TLT's submission at paragraphs 69 and 70. He has clearly had regard to the evidence elicited from Mr Morris in cross examination; he referred to it expressly at paragraph 76 of his opinion on the related matter of a reputational question. Although his reasoning could have been more detailed, his finding that Woodsford would have funded the section 212 proceedings must be assumed to have been made with all of the evidence, including Mr Morris's response to questions put to him in cross examination, in mind. Considering matters as a whole there is no reason to interfere with that finding. TLT's argument based on Woodsford's absence of knowledge of the background to the liquidation of CH III places excessive weight on Newey J's finding in relation to credibility; it is important to recall that although he found Messrs Richards and Bloch to be unreliable witnesses, Newey J did not extend the same assessment to Mr Harrod, observing only that he treated his evidence "with a degree of caution" where his desire to assist his brother was apparent. TLT cannot at this late stage present an argument which assumes dishonesty on the part of Mr Harrod. It is therefore speculative to consider what Woodsford would have made of Newey J's judgment, had it come to their attention either when considering whether to fund the note or when considering whether to fund the present litigation. The commercial judge accepted Mr Morris's evidence that the issue for Woodsford was the strength of the claim against the joint liquidators, and was entitled to place greater weight on this than on the evidence of Mr Purslow as to what other funders might have decided. It is not the case that the commercial judge's finding on this point cannot reasonably be explained or justified.

[44] The commercial judge did not consider it necessary to express a view as to whether, if it had failed to obtain litigation funding, C6 would have been able to self-fund the note after resolution of the prescription issue. It would have been preferable if the commercial judge had addressed that hypothesis. It is appropriate to do so.

[45] In his witness statement Mr Harrod acknowledged that C6 could not rely on the availability of litigation funding and had to budget to self-fund should that prove necessary. He obtained from Mr Diamond an estimate of £353,000 for the cost through to and including a proof. Mr Harrod was confident that he could have funded the claim from his own resources, including savings, lines of credit, and primarily from his canal boat business called Jason's Trips which had a surplus cash flow in excess of £100,000 per year for each of the years 2016 – 2019. In cross examination, it was put to Mr Harrod that Jason's Trips was a seasonal business which during low periods did not have sufficient cash to make loans to C6. Mr Harrod accepted that it had not, for example, had sufficient cash to lend £100,000 to C6 at the critical time when the lodging of caution would have prevented dismissal of the note. He disagreed, however, that in late 2016 through to 2017 there was no possibility of C6 meeting the order for caution by way of cash consignment. He had not been prioritising the cash flow for caution because TLT had advised that after the event insurance was an acceptable alternative. He maintained that if neither of the litigation funders that were lined up had agreed to fund, C6 could have funded the note to conclusion.

[46] It is not for this court to make a general assessment of the credibility or reliability of Mr Harrod as a witness. We have not had the benefit of seeing and hearing him and must be guided by the view of the judge who had those benefits. The commercial judge made no express finding regarding Mr Harrod's credibility or reliability, but there is no indication in his opinion that he rejected any evidence given by Mr Harrod on either of those grounds.

On the contrary, on the related matter of C6's ability to fund the note up to the stage of a preliminary proof on prescription, it is clear (paragraph 80 of the commercial judge's opinion) that Mr Harrod's evidence was accepted in the face of challenge. If this court were minded to reject Mr Harrod's assertion that C6 could have funded the note to conclusion, it could only do so on the basis of contradictory evidence on that particular matter.

[47] Having considered the matters founded upon by TLT, the court finds nothing to persuade us to reject Mr Harrod's assertion. The terms of his witness statement do not support the inference that external funding was essential by 2017. Mr Diamond's evidence was concerned with the obtaining of external funding; he was not in a position to express a view on C6's ability to self-fund using Mr Harrod's resources. The inability of C6 to find caution or to pay legal expenses at a particular time could be explained by the seasonal nature of the cash flow from the canal boat business. Having regard to the relevant evidence, on the balance of probabilities, if commercial funding had not been obtained, C6 could have funded itself to conclusion of the note proceedings.

Prospects of limiting Deka's claim

Argument for TLT

[48] The commercial judge found that C6 would have had reasonable prospects of establishing that the joint liquidators would have reached an agreement with Deka limiting its claim to a sum less than £28 million. However, the question he ought to have asked was what were the prospects of the joint liquidators agreeing Deka's claim at £6.67 million? The evidence did not support the inference that such an agreement would have been reached. Mr Harrod conceded that it was no more than an assumption that Deka would have opted to terminate the leases in the absence of settlement. A chartered surveyor who had

produced a report for the purposes of the section 212 proceedings gave evidence that what an individual landlord would do in such circumstances would depend upon a variety of circumstances, including how much it stood to gain in the liquidation if the leases were to continue. In CH III's liquidation, there was a prospect of a substantial dividend. That may well have informed Deka's view in the event that settlement with the joint liquidators was not agreed.

[49] There was no evidence to demonstrate whether Deka had secured a windfall as a result of the compromise agreement. The absence of any evidence regarding the value of the Ark represented a significant lacuna in C6's case. It meant that there was a lack of evidence to suggest what Deka's attitude might have been to settlement had the joint liquidators taken the desiderated steps. There was no clear evidence from which it could be inferred that, in the absence of a compromise agreement, Deka would have sold the property when it did for £47 million. The building was in a state of disrepair. The dilapidations claim amounted to £1.2 million and it was unclear why the commercial judge had discounted that claim entirely. Nor was there any clear evidence from which it could be inferred that Deka would have agreed to a non-embarrassment clause; it was entirely possible that they would not have done so. It was not within the joint liquidators' gift to insert such a clause into the compromise agreement: it would have required negotiation. The commercial judge ought to have determined that C6 had led no evidence demonstrating that there was a real and substantial chance of Deka's claim being agreed at £6.67 million. The commercial judge erred in failing to make a specific stand-alone loss of a chance assessment in relation to this issue. The prospects of success had not been 100%.

Argument for C6

[50] TLT's arguments regarding the Deka settlement obfuscated a straightforward issue: Deka's claim was settled for approximately £23 million more than it was worth, irrespective of the actual sums due or any actual loss, and without provision for the obvious opportunity for mitigation of future losses. Had the agreement not been entered into, Deka would have faced the choice of either obtaining vacant possession by terminating the leases, or allowing the Ark to remain unoccupied for five years until the break option could be exercised. It was likely that Deka would have terminated the leases. It was a matter of agreement that the amount due to Deka under the leases at the point of sale of the Ark was £6,670,312.47. Over 80% of Deka's claim of £38,276,271 comprised a future debt in the form of rent. Evidence about the market value of the Ark was unnecessary and irrelevant for C6's claim. It might have been open to the joint liquidators to put the valuation versus the sale price in issue in the section 212 proceedings, but they had not done so. There was no onus on C6 to disprove that possibility in the section 212 note, let alone in this action. As regards dilapidations, Mr Harrod stated that no work was performed. There was no evidence led to support a contractual or damages claim in relation to dilapidations.

Decision

[51] The commercial judge observed (at paragraph 91) that in their answers to the section 212 note, the joint liquidators did not aver that Deka would not have entered into the compromise agreement; nor did they offer to prove what Deka would have done if the agreement had not been entered into. They limited themselves to disputing the financial position of CH III at the time of the agreement. There were no pleadings by the joint liquidators in the section 212 proceedings that Deka would not have agreed to an anti-

embarrassment clause. In the proof in the present action TLT led no evidence to seek to displace the inference drawn by C6 that Deka would have terminated the leases of the Ark in order to sell with vacant possession or re-let to new tenants. The commercial judge found C6's inference to be a reasonable one on the facts which it averred. The valuation of the Ark was not put in issue in the note or in the present action. There was no evidence to establish that Deka would have had a valid dilapidations claim.

[52] In these circumstances there was a sufficient basis for the commercial judge's conclusion that C6 had had reasonable prospects of success on this point. He did not disregard the issue of the percentage chance of success, but addressed it as one of the facets of his overall assessment of loss of a chance. For the reasons below there was no need for him to deal with this as a separate and stand-alone loss of a chance.

Surplus

Argument for TLT

[53] It was virtually certain that had Deka's claim in the liquidation been lower, Vivendi would have offered a correspondingly lower figure in settlement of the proceedings against them, and that that offer would have been accepted by the joint liquidators. The commercial judge had made contradictory findings that the joint liquidators had had a nil or negligible chance of resisting a finding that there would have been a surplus, and that C6 had only reasonable prospects of success on this issue. He ought to have determined whether C6 had a real and substantial chance and then, if so, evaluated that chance. As to the judge's point that there were no pleadings about surplus, adjustment by the joint liquidators would have been inevitable had the action not stalled at an early stage. Mr Pike's evidence was that Vivendi were indemnifying the joint liquidators in the section 212 proceedings (in

pursuance of the obligation undertaken by them when settling the action against them) and would have become more involved in the defence had the note not been dismissed. It was overwhelmingly likely that the surplus argument would have been raised. The judge's finding that the defence had not occurred to Mr Pike was not supported by the evidence.

[54] The commercial judge was wrong to determine that he did not know what evidence would have been given by Vivendi's representatives at a proof in the section 212 proceedings. The evidence of Messrs Caven and Pike respectively was unequivocal. What was important was Vivendi's attitude towards C6. Vivendi believed that Messrs Harrod and Richards had perpetrated a deceit upon them. Mr Pike's instructions were that under no circumstances were Vivendi willing to pay more than the value of the creditors' claims. Steps were taken to investigate the value of those claims and an offer was made to the joint liquidators which represented the value of those claims together with costs. He had no doubt that if Deka's claim had been agreed at a lower figure, Vivendi would have offered correspondingly less. Although Mr Caven did not offer a definitive view as to whether he would have accepted a lower offer, he acknowledged that a reduced offer in the region of £25 million would have been a significant sum to risk on litigation, and that there would have been difficulties with funding if the creditors had not wished to proceed. It would have been impossible to ignore that the sum on offer would have been sufficient to meet creditors' claims, although that would not have been the determining factor. Had he taken account of all the relevant evidence, the commercial judge ought to have concluded that there was no, or at best a negligible, chance of C6 establishing that if Deka's claim had been settled at a lower amount, there would have been a surplus available to it.

Argument for C6

[55] TLT's complex counterfactual argument had not featured in the section 212 note despite extensive pre-action correspondence, detailed pleading, and obvious consideration of the background by the joint liquidators' legal advisers. The commercial judge had been correct to conclude that there was not a high prospect that such a line of defence would have been added by adjustment, and to find that it had not occurred to Mr Pike. The argument depended on proving how Vivendi and the joint liquidators would have approached settlement had it not been achieved at the level ultimately agreed, but TLT had led no evidence from Vivendi or the legal advisers directly involved, or as regards what the outcome of the Vivendi proceedings would have been if they had not been settled. It assumed that a lower settlement would have been driven entirely by the level of creditor claims rather than reparation for the actions of Vivendi when stripping assets from CH III. Such a settlement would have been a breach of duty to CH III's contributories. Mr Pike stated that he had told Vivendi that they were very likely to lose the proceedings and should therefore settle at the best level they could. The notion that they would have refused to settle at the level at which they agreed to settle, based on their dislike of Mr Harrod, was unrealistic. The judge had been entitled to find that the chances of the success of this line of defence to the section 212 note were nil or negligible.

Decision

[56] This chapter of the reclaiming motion raises once again the question whether there has been a demonstrable failure by the commercial judge to consider relevant evidence such that his decision cannot reasonably be explained or justified. In our opinion there has not. He has given careful consideration to the evidence of Mr Pike and Mr Caven and found it to

be inconclusive. At paragraph 115 he noted that in the absence of evidence from Vivendi personnel, the testimony of Mr Pike established no more than the negotiating position that Vivendi were putting forward to their solicitor and to the joint liquidators, and did not establish that Vivendi would not have departed from that position if it had been necessary in order to achieve a settlement. The judge's finding that pleading this as a defence to the section 212 note had not occurred to Mr Pike was based on evidence given by Mr Pike under cross examination; when the matter was revisited in re-examination, all that he could say was that if the note had not been dismissed he would have sought to involve Vivendi more in the litigation and that he would have raised the point.

[57] The commercial judge addressed the eventuality that the defence would have occurred to Mr Pike and been incorporated into the joint liquidators' defence to the note. He observed that no-one from Vivendi had given evidence in the proof before him and that there was no reason to believe that it would have been any different in the section 212 note proof. It was submitted on behalf of TLT that there was a distinction in that Vivendi were funding the defence to the section 212 note, whereas they had no interest in the TLT proof. That distinction is unconvincing. The unlawful financial assistance scheme had been devised and implemented by Vivendi and their professional advisers PwC, and it is not difficult to envisage a reluctance on the part of those directly involved to subject themselves to examination in court. As the commercial judge pointed out, Vivendi had a direct interest in the failure of the section 212 note, and a judge hearing a proof in those proceedings might well have approached the evidence of Vivendi witnesses with caution. It may well be that there were individuals within Vivendi who felt strongly that C6 should receive nothing from any settlement, but the court agrees with the commercial judge's view that the Vivendi personnel conducting the settlement negotiations would have required to consider the

strength of Vivendi's case, the costs of continuing with the litigation and the potential downside if they lost, rather than proceeding on the basis of a personal grudge that some may have held against Messrs Richards and Harrod.

[58] As regards Mr Caven, the commercial judge narrated his evidence as being that a lower settlement offer would still have been attractive if it enabled the joint liquidators to pay all of the creditors in full, but he did not settle the Vivendi proceedings solely with reference to creditor claims. Mr Caven had not, of course, had to address a situation in which the Deka claim was settled for £6 million instead of £28 million. Had he had to do so, his attitude to a settlement offer from Vivendi would, or at least ought, not to have been driven by the personal feelings of Vivendi personnel. A liquidator in a winding up by the court is an officer of the court (*Millar* (1890) 18R 179 LP (Inglis) at 180). In terms of section 130(4) of the Insolvency Act 1986, an order for winding up a company operates in favour of all the creditors and of all contributories of the company as if made on the joint petition of a creditor and of a contributory. Section 143(1) provides that

> "The functions of the liquidator of a company which is being wound up by the court are to secure that the assets of the company are got in, realised and distributed to the company's creditors and, if there is a surplus, to the persons entitled to it."

Against that statutory background, contributories have been described (St. Clair and Drummond Young, *The Law of Corporate Insolvency in Scotland* (4th ed, 2011), para 4-46) as "also being creditors (although subordinated creditors) of the company".

[59] The argument presented appeared to assume that when considering settlement of the Vivendi action, the joint liquidators had no obligation to consider the interests of anyone other than the creditors. In the somewhat unusual situation here, where there was the prospect of a surplus after the creditors had been paid in full, their duty as officers of the court would have required them also to have regard to the interests of the company's

shareholder, C6. It follows that Vivendi could not have assumed that a settlement offer which satisfied the creditors but not the contributories would have been sufficient to dispose of the claim against them. For this reason too, the commercial judge was entitled to conclude that the joint liquidators would have faced an uphill struggle in persuading the judge in the section 212 note to refuse it on the ground that Vivendi would not have entered into a settlement agreement which resulted in a surplus being available to C6.

[60] TLT's argument in essence amounts to inviting this court to make its own assessment of the evidence considered by the commercial judge. Grounds for so doing have not been made out.

Court discretion not to make an order

Argument for TLT

[61] The commercial judge erred in failing to consider the blameworthy actions of C6 and Mr Harrod separately from the issue of Vivendi's conduct. C6 had lost nothing, and had received £10 million from CH III. Having regard to those actions, it was entirely possible, if not likely, that a judge in the section 212 proceedings would have declined to make an order which benefited C6. It would have accorded with justice for the judge in those proceedings to make an order which fully satisfied the creditors' statutory entitlement to interest on their claims, but which left nothing for C6.

Argument for C6

[62] The prospects of a court relieving an office holder of liability under section 212 are always remote because *ex hypothesi* the office holder's conduct will have been unreasonable. In any event, the commercial judge did not accept or make any findings that there was any

blameworthy conduct by either C6 or Mr Harrod such that C6 should be deprived of a distribution.

Decision

[63] The power conferred on the court by section 212(3) to require a person who has been guilty of misfeasance or breach of fiduciary duty to contribute a sum to the company by way of compensation has a long history, having been first enacted in similar terms as section 165 of the Companies Act 1862. Its purpose, as explained by Selwyn LJ in *In re Mercantile Trading Company (Stringer's Case)* (1868-69) LR 4 Ch App 475 at 484-7, was to affirm the wide power of the court, within winding up proceedings and without the need to raise separate proceedings, to compel the repayment of moneys misapplied or the contribution of compensation. In *Revenue & Customs Commissioners* v *Holland* [2011] Bus LR 111 (UK Supreme Court), Lord Hope of Craighead (at paragraph 51) described the discretion conferred on the court by section 212(3) as a discretion as to how much the person in question should be ordered to pay, so as to do what is just in all the circumstances of the case; it was not, however, so wide as to allow the court to decline to make any order at all. In *Liquidator of West Mercia Safetywear Ltd* v *Dodd* (1988) 4 BCC 30, Dillon LJ observed, *obiter*, at page 33 that it would be permissible for a delinquent director to submit that an order should be tempered where, for example, full repayment would produce a windfall to third parties, or where it would involve money going round in a circle or passing through the hands of someone else whose position was equally tainted.

[64] The court agrees with the commercial judge's conclusion that the circumstances would not have justified the making of an order which excluded or restricted any benefit to C6. TLT's argument depends once again upon an exaggeration of the blameworthiness of

C6 and its shareholder Mr Harrod, as opposed to Mr Richards. In so far as it is suggested that C6 lost nothing, that would depend upon the manner in which the inter-company indebtedness of C6 was ultimately resolved within the Vivendi group, which is too remote a matter to affect the exercise of the court's discretion under section 212(3). There is no reason why it would not have been just in all the circumstances for the judge in the section 212 proceedings to have ordered the joint liquidators to compensate CH III in full for their breach of duty.

Loss of a chance percentage

Argument for TLT

[65] There were six contingencies bearing upon the lost chance: (i) prescription; (ii) funding; (iii) breach of duty; (iv) surplus; (v) prospects of limiting Deka's claim; and (vi) court discretion. A principled approach required the commercial judge to assess the value of the note claim (ie point (v)) before applying the percentage chances relative to the other discrete contingencies. He failed to do so. He ought then to have treated the contingencies as discrete and applied a mathematical approach to them. He erred in determining that the issues which he did not assess as having a 100% chance of success, or thereby, were facets of the same contingency. In relation to prescription, breach of duty and surplus, C6 had a nil or negligible chance of success. If any of the contingencies had a nil or negligible chance, as a matter of arithmetic, the overall lost chance was nil. Even if none of them had a nil chance of success, a principled approach to evaluation of the chance would have produced an overall loss of chance percentage much lower than 65%.

[66] TLT and their senior counsel had been unaware of the problems which C6 faced in proving their case against the joint liquidators. They were unaware in particular of Newey

J's judgment, or of the Vivendi surplus issue. They did not have Mr Richards' emails relative to the prescription issue. Had the judge had regard to that evidence, it would have been obvious that senior counsel's advice as to prospects of success in the section 212 proceedings was not a logical or useful cross-check. The observations of Simon Brown LJ in *Mount v Barker Austin* (above) at 510 were not in point.

Argument for C6

[67] TLT's criticisms were without substance. There was no rule of Scots law requiring a judge to take the so-called mathematical approach of multiplying the chances of all the issues together. Scots law avoided adopting such rigid rules of law in the assessment of damages. There was no need for the judge to give elaborate reasons in reaching a percentage; on the contrary his brevity in dealing with the issue was commendable.

Decision

[68] The principle of awarding damages for loss of a chance in litigation was recognised in *Kyle* v *P&J Stormonth Darling WS* 1993 SC 57, where the court held that the pursuer's claim for damages consisting of the value of a lost right to proceed with an appeal was relevant for proof. Since then, the courts in England and Wales have developed "a clear and common-sense dividing line" between those matters which must be proved on balance of probabilities and those which may be better assessed as the loss of a chance. The distinction, enunciated in *Allied Maples Group Ltd* v *Simmons & Simmons* [1995] 1 WLR 1602 and approved by the UK Supreme Court in *Perry* v *Raleys Solicitors* [2020] AC 352, Lord Briggs at paragraph 20, is as follows:

> "To the extent (if at all) that the question whether the client would have been better off depends upon what the client would have done upon receipt of competent advice, this must be proved by the claimant upon the balance of probabilities. To the

> extent that the supposed beneficial outcome depends upon what others would have done, this depends upon a loss of chance evaluation."

This approach has been adopted in Scotland (*McCrindle Group Ltd* v *Maclay Murray & Spens* [2013] CSOH 72, Lord Hodge at paragraph 156), and was applied by the commercial judge in the present case.

[69] Where the lost chance includes more than one hurdle for the claimant to surmount, the English courts have, in certain cases, regarded it as appropriate to adopt a "mathematical" (or, as some might prefer, an arithmetical) approach, multiplying the percentage prospects of each uncertain outcome to produce an overall loss of a chance percentage. In *Harrison* v *Bloom Camillin* (Chancery Division [2001] PNLR 7 (or [2000] Lloyd's Rep PN 89), an action for damages against a firm of solicitors who had failed to serve a writ timeously, Neuberger J held that there were two uncertainties and that the value of the claim should be reduced by 35% in respect of the first uncertainty, with the remaining 65% being reduced by a further 20% for the second uncertainty. In *Joyce* v *Bowman Law Ltd* [2010] PNLR 413, a case concerning negligent conveyancing, Vos J identified four hurdles that the claimant would have had to surmount, for which he applied percentages of 85%, 100%, 40% and 85% respectively, resulting in an overall assessment of a loss of a 29% chance. Vos J did however recognise (at paragraph 55) that there would be cases where a less than entirely mathematical approach would be appropriate, where the factors affecting the cumulative future events were not truly independent of one another. An example of the latter type of case is *Hanif* v *Middleweeks* [2000] Lloyd's Rep PN 920, in which each of the uncertainties had the common factor of the claimant's credibility, and the Court of Appeal rejected an argument that the judge had erred by failing to multiply percentages together.

[70] In the present case, the commercial judge assessed C6's chances of success as 100% on three of the alleged uncertainties, namely prescription, litigation funding, and the risk of the court exercising its discretion by making no award. That left three issues relevant to assessment of the loss of a chance percentage, namely C6's prospects of establishing the joint liquidators' breach of duty, the likelihood of the joint liquidators reaching a settlement with Deka at a lower figure, and the availability of a surplus for contributories. The commercial judge rejected the application of a mathematical approach on the ground that these were not independent contingencies but rather facets of the same contingency, ie whether C6 would have succeeded on the substance of the section 212 note. The court is not persuaded that he erred in doing so. Although there may be circumstances in which it would be appropriate to adopt a mathematical approach to the loss of a chance, it is less obviously attractive in the context of litigation risks. It is not, for example, the approach that would be adopted by experienced counsel when advising a client on prospects of success or on the level at which a settlement offer ought to be made or accepted. As the commercial judge observed, the uncertainties in the present case would in practical terms have been regarded by the parties to the section 212 note as facets of one question, namely whether C6 were likely to succeed. The commercial judge has given reasons for selecting a broad brush figure of 65% and there is no reason to disturb that assessment.

[71] The commercial judge's use of the advice on prospects of success given to C6 at the time of the section 212 note as a cross-check was criticised on the ground that neither senior counsel nor TLT had been aware of the difficulties faced by C6 in proving its case against the joint liquidators. This argument places undue weight on the terms of Newey J's judgment, and assumes that (contrary to the commercial judge's assessment) senior counsel would have advised that the surplus point was a major difficulty for C6. It was pointed out that

Mr Harrod had made TLT aware of the action by Vivendi against Messrs Bloch and Richards in which Newey J's judgment had been delivered. In these circumstances the commercial judge's use of the advice given to C6 as a cross-check was unexceptionable.

Quantum

Argument for TLT

[72] The commercial judge erred in awarding interest from the date of citation on the sum sued for in the second conclusion, being the taxed expenses awarded against C6 relative to the Outer and Inner House proceedings. Though C6 was liable to pay that amount, it was a matter of agreement in a joint minute that it had not paid it. Interest should not therefore have been applied to that award.

Argument for C6

[73] This was a new point which should not be entertained by the court. In any event there was nothing unfair about the award. C6 was liable to pay interest on the taxed amount from the date of decerniture against it until payment.

Decision

[74] An award of expenses normally bears interest from the date of the Auditor's report on taxation. There is nothing to suggest that that practice will be departed from here. The Auditor's reports for Outer and Inner House expenses pre-date the date of citation. C6 will be liable to pay interest to the joint liquidators when it pays the taxed expenses of the section 212 note, including those of the unsuccessful reclaiming motion, and is entitled to recover such interest from the date of citation in this action.

C6's cross appeal

[75] C6's cross appeal raises three discrete issues in relation to the commercial judge's calculation of the sums due by TLT in terms of the conclusions in the summons. As with the principal action it is convenient to address these individually in turn.

(i) Conclusion 1: Sum on which interest due

[76] The commercial judge held (paragraph 139) that if the section 212 note had been successful, the assets of CH III would have been increased by around £22.3 million. Not all of that sum would, however, have flowed through to C6. The creditors would have been entitled to statutory interest, leaving a balance of £13.9 million. That sum would have been reduced by costs of the liquidation, and the sum distributed to C6 would have been £11,192,472. The commercial judge held that the judge in the section 212 note would have awarded interest on the sum due to C6 at the rate of 4% per annum, amounting to around £2,840,000. The sum to which the loss of a chance percentage was to be applied was therefore £14,032,472.

[77] On behalf of C6, it was submitted that the commercial judge erred in applying judicial interest to the principal sum after the deductions for notional payments to other creditors. On the hypothesis upon which he proceeded, any payments to other creditors would have been made from the proceeds of the section 212 note. He ought logically to have applied judicial interest to the full sum of £22.3 million due to CH III before making the deduction in respect of payments to creditors.

[78] In response, TLT submitted that the commercial judge had made no error. The sum sought in the section 212 proceedings would have been paid by the joint liquidators to CH III. It would have been apparent to the judge to whom the sum would then be distributed.

He would have been aware that the part payable to CH III's creditors would attract statutory interest. If he had awarded interest on the whole £22.3 million he would have been ordering payment of interest on interest. But since the creditors' entitlement was limited to the statutory interest, the benefit of the interest on interest would have flowed through as a windfall to C6. The section 212 judge would have wished to avoid such a result, and the commercial judge was correct to apply judicial interest only to the sum reaching C6.

[79] The argument for TLT is to be preferred. The awarding of interest on any principal sum is a matter for the discretion of the court. It is likely that the judge in the section 212 proceedings would have had regard to the fact that the creditors' entitlement to interest was fixed and would not be further enhanced by an award of judicial interest on the sum being paid to CH III. The judge would be likely to have concluded that C6 was appropriately and adequately compensated for delay in payment by an award of interest at 4% per annum only on that part of the sum payable to CH III which was flowing through to C6.

(ii) Conclusion 1: Deduction of statutory interest from sum due to C6

[80] Section 189(2) of the Insolvency Act 1986 provides that

> "Any surplus remaining after the payment of the debts proved in a winding up shall, before being applied for any other purpose, be applied in paying interest on those debts in respect of the periods during which they have been outstanding since the company went into liquidation."

The commercial judge accordingly considered it necessary to deduct the full amount of statutory interest that would have been due on creditors' claims before determining the sum that would have flowed through to C6. He noted at paragraph 139 of his opinion that the creditors would have been entitled to statutory interest from the date of liquidation in June 2005 until distribution in December 2010, ie a period of 5.5 years. He accepted TLT's

calculation of the total amount of creditors' claims (on the hypothesis of reduction of Deka's claim to £6.6 million) as £18,155,491, and their calculation of statutory interest at 15% (the rate specified by rule 4.66 of the Insolvency (Scotland) Rules 1986, which were then applicable) for 5.5 years as £14,978,280.

[81] On behalf of C6 it was submitted that the commercial judge ought not to have made any deduction in respect of statutory interest. There had been no evidence as to the composition of the creditors' claims that had been accepted by the joint liquidators. It was a matter of agreement that claims amounting to around £3.8 million had already been paid. It was possible that those payments had been made in full and final settlement. By assuming without a proper evidential basis that there was a deficit in the statutory interest paid to creditors, the commercial judge had wrongfully reduced the amount payable to C6. He ought at least to have reduced the amount to reflect uncertainty as to the amount due. An argument that the largest debts ought not to have attracted statutory interest because they were future debts was not insisted upon.

[82] On behalf of TLT it was submitted that the commercial judge's approach had been correct. The creditors had a statutory right to interest. Thereafter it was simply a question of arithmetic. The ingredients of the calculation (duration of the period and total amount of the claims) were uncontroversial. The total amount of creditors' claims and the amount of statutory interest paid in December 2010 were contained in a report by the joint liquidators incorporated into TLT's pleadings, and spoken to in evidence by Mr Caven. There was no basis for the contention that there was insufficient evidence.

[83] There was an evidential basis both for the fact that statutory interest over and above the amount paid to creditors in December 2010 remained due, and also that the amount remaining due, on the hypothesis that Deka's claim was reduced to £6.6 million, was in

accordance with the calculation adopted by the commercial judge in his opinion. C6's submission that he erred in making this deduction when calculating the sum to which the loss of a chance percentage was to be applied falls to be rejected.

(iii) ***Conclusions 2 and 3: Application of loss of a chance percentage***

[84] The second and third conclusions were respectively for expenditure incurred on meeting the expenses of the joint liquidators in the section 212 proceedings, and the expenditure incurred by C6 on solicitors' and counsel's fees in the proceedings at first instance and on appeal against the joint liquidators. At paragraphs 149 and 150 of his opinion, the commercial judge applied the 65% loss of a chance percentage to each of these sums and, with some rounding, granted decree for payment of £148,500 and £113,200 respectively.

[85] It was submitted on behalf of C6 that the percentage reduction ought not to have been applied to these sums, which were costs actually incurred and did not relate to the loss of a chance. No distinction ought to be drawn between proceedings at first instance and on appeal: the entire cost resulted from TLT's negligence.

[86] On behalf of TLT it was conceded that the sums awarded in respect of C6's liability for expenses (both their own and those of the joint liquidators) in the Inner House and in an unsuccessful application for leave to appeal to the UK Supreme Court ought not to have been reduced by the loss of a chance percentage. It was however maintained that the expenses incurred at first instance had been correctly reduced, as they would have been incurred in any event and should be treated as part of the lost chance.

[87] There is no basis for distinguishing between first instance and appellate expenses. Neither depends upon any uncertainty as to what others would have done; both are part of

the consequential loss flowing from TLT's negligence. The commercial judge erred in applying the loss of a chance percentage to the sums that he would otherwise have held to be payable. The sums for which decree ought to have been granted in terms of the second and third conclusions were accordingly £228,435.31 and £174,158.47 respectively.

Disposal

[88] The reclaiming motion is refused. The cross appeal is allowed to the extent of finding the reclaimers liable to pay the respondent the sum of £228,435.31 in terms of the second conclusion, and the sum of £174,158.47 in terms of the third conclusion, with interest on each of the said sums as specified in the commercial judge's interlocutor dated 5 May 2023. *Quoad ultra* the cross appeal is refused.