OUTER HOUSE, COURT OF SESSION

[2023] CSOH 28

CA29/21

OPINION OF LORD ERICHT

In the cause

CENTENARY 6 LIMITED

Pursuer

against

TLT LLP

Defender

Pursuer: Smith KC, T Young; Harper Macleod LLP
Defender: McBrearty KC, Paterson; DAC Beachcroft Scotland LLP

5 May 2023

Introduction

[1] In 2016 the pursuer raised proceedings (the "section 212 Note") in the Court of Session against the Joint Liquidators of Centenary Holdings III Ltd ("CHIII") seeking damages under section 212 of the Insolvency Act 1986 for breach of duty in connection with the joint liquidators' decision to enter into a compromise agreement with Deka Immobilien Investment GmbH ("Deka") settling Deka's claim as creditor in the liquidation. The defender acted as the pursuer's solicitors. The section 212 Note was refused as the consequence of the pursuers' failure to lodge caution (*Centenary 6 Ltd* v *Caven and Mawer* [2017] CSOH 95, [2018] CSIH 27). In this action, the pursuer sues its former solicitors

for breach of contract and professional negligence in respect of the failure to timeously lodge caution in the section 212 Note. Liability is admitted.

[2] In this action, the pursuer seeks payment of three sums of money. In the first conclusion, it seeks £35,169,133.90 being the amount which the pursuer sought from the Joint Liquidators in the section 212 Note plus interest. The second conclusion is for £228,435.31, being the costs incurred in the reclaiming motion in respect of the refusal of the section 212 Note and in seeking permission to appeal to the Supreme Court on the section 212 Note. The third conclusion is for £253,358.47, being the expenditure incurred by the pursuer for solicitors and counsels fees in connection with the section 212 Note.

[3] In this action the pursuer sues for loss of a chance of securing a favourable outcome in the section 212 Note. As all those who are accustomed to advise clients on the prospects of success in litigation know, it is very difficult to predict the outcome of a case with any certainty. The outcome of a case will depend not only on the strength of the legal arguments, but also on practical matters such as the parties' willingness to settle, the strength of their bargaining positions in any settlement negotiations, and their ability to fund the case to its conclusion. Further layers of complexity were added in that the alleged breach of duty by the Joint Liquidators was itself a settlement agreement compromising a claim in the liquidation, and that there had been an agreed settlement of previous separate legal proceedings in England. The evidence in this case was extensive. It covered events from 2003 onwards. There was detailed evidence about previous litigations in England and their settlement or other resolution, including the pleadings and also witness statements and productions relating to the substantive issues in these cases. The proof lasted for 12 days. There were over 500 pages of witness statements and expert reports, and around

10,000 pages of productions. In this opinion I shall not narrate all that evidence at length, but will focus on the issues identified by the parties in their submissions.

The proof

[4] The pursuer led evidence as to fact from Mr Peter Harrod (sole shareholder in the pursuer and director), Charlie Morris (an English qualified solicitor and director of Woodsford Group Ltd, litigation funders), Philip Bardon (English solicitor acting for the pursuer in relation to previous litigation, ie the Vivendi Proceedings and Part 20 Claim referred to below), Jim Diamond (an introducer to litigation funding), and Bob Knock (an insurance underwriter involved in obtaining litigation insurance for the pursuer in the section 212 Note). The pursuer also lodged a witness statement, which stood as evidence in chief, from Jeunesse Mensier (litigation funder with August Ventures Limited) who did not give oral evidence and was not cross-examined. The defender led evidence from Nicholas Pike (an English solicitor who acted for Vivendi in previous litigation), Alan Munro (a partner in the defender) and Robert Caven (one of the joint liquidators of CHIII). Expert evidence on English law was led from Steven Davies KC for the pursuer and Mathew Collings KC for the defender. Expert evidence on the duties of a liquidator was led from David Ruben on behalf of the pursuer and Anthony Batty on behalf of the defender. Evidence on property matters was led by the pursuer from Roland Cramp, a chartered surveyor. Expert evidence on litigation funding was led by the defender from Neil Purslow (an English solicitor who had founded a litigation funding company and had experience of the litigation funding market).

Background

[5] The background is relatively uncontroversial and is apparent from the evidence in this case and the opinions of Newey J in *Vivendi* SA v *Richards* [2013] EWHC 3006 (CH) and Lord Woolman in *Her Majesty's Secretary of State for Business Innovation and Skills* v *Bloch* [2013] CSOH 57.

[6] CHIII is a Scottish alcoholic beverages company which became part of the Seagram Group and changed its name to Seagram Distillers Ltd. In December 2000, the Seagram group merged with another multi-national group whose parent company was Vivendi Universal SA. In December 2001, Vivendi arranged for CHIII to sell its drinks business to Diageo Plc and Pernod Ricard SA. CHIII became a non-trading company and all its shares were held by Vivendi.

[7] The Ark is a prestigious headquarters office building in Hammersmith, London. It was of an unusual and prestigious design and while it was well suited as a prestigious headquarters, it was not easily convertible to other uses such as general offices or shopping. The Ark had been Seagram's head office in the United Kingdom. On the sale of the drinks businesses, CHIII no longer required the headquarters building. The Ark became a white elephant. CHIII was the tenant of the Ark under two full repairing and insuring leases of 25 years duration, dated respectively 19 December 1995 and 8 February 1996. The rent service charges and rates totalled about £5 million each year. The landlord was Deka.

[8] By the middle of 2003, Vivendi was under severe financial pressure. It was desperate to reduce the liabilities under the Ark leases. In June 2003, Deka declined a cash offer of £20 million from Vivendi to surrender the leases.

[9] Mr Alexis Kyprianou of Vivendi had been asked to make arrangements for the disposal of the leases of the Ark and was assisted in this task by Mr Peter Harrod, who had

been contracted as financial controller of CHIII's parent group, Centenary Holdings Ltd ("CHL"). Mr Harrod drew the Ark to the attention of his brother, Murray Richards. In 1978, Mr Richards had been convicted in Australia of conspiring to cheat and defraud a company and its creditors and given a sentence of some 10 years imprisonment. He subsequently changed his name from "Murray Richard Harrod" to "Murray Richards". CHIII was not in a position to assign its leases of the Ark to one of Mr Richards' companies because Deka was unwilling to grant an assignment to an organisation that did not have a triple A rating. In accordance with advice received from PricewaterhouseCoopers ("PWC"), CHIII's auditors, Vivendi put the following scheme into operation. CHIII was transferred to a company beneficially owned by Mr Richards by means of the following steps:

(i) CHIII's shares were first transferred from CHL to Centenary 4 Ltd ("C4"), another company in the Vivendi group;

(ii) most of CHIII's assets were distributed *in specie* by way of dividend;

(iii) CHIII retained cash of around £15.1 million, which represented a reverse premium in return for CHIIIs lease obligations;

(iv) C4 sold CHIII to the pursuer, a subsidiary of C4, for £77.7 million;

(v) CHIII lent £77.7 million to the pursuer;

(vi) the pursuer used the £77.7 million to discharge its debts to C4;

(vii) the £77.7 million was not paid in cash but remained open on the intercompany ledger as a debt;

(viii) Centenary 7 Ltd ("C7") a company owned by a Jersey company P4 Property Investments Ltd ("P4 Investments"), beneficially owned by Mr Richards, bought the pursuer from C4 for £1.

[10] The end result was that CHIII became a subsidiary of the pursuer, which was itself a subsidiary of C7 and indirectly of P4 Investments, of which Mr Richards was the ultimate beneficial owner. CHIII was left with the obligations under its leases, cash of £15.1 million and the benefit of the £77.7 million loan to the pursuer.

[11] CHIII's £77.7 million loan to the pursuer constituted CHIII giving financial assistance for the purpose of an acquisition of shares in a company, which would be unlawful unless legitimised by the statutory "whitewash" procedure under sections 155-8 of the Companies Act 1985. On the day of completion, 22 January 2004, a Vivendi employee was replaced as the sole director by Mr Bloch, an associate of Mr Richards, and Mr Bloch made the appropriate statutory declaration for the whitewash procedure. PWC provided the auditors' report for the whitewash procedure. The declaration and auditors' report were premised on Mr Richard's plans for CHIII following completion. These plans included purchasing the Ark from Deka, and using CHIII for other projects. While the £15.1 million left in CHIII was sufficient to allow CHIII to meet its lease obligations for a period following completion, the ability of the pursuer to repay the loan was dependent on CHIII being successful and paying dividends to the pursuer.

[12] CHIII then entered into various transactions which were not financially successful and in 2005 CHIII went into liquidation. The Joint Liquidators were Mr Caven and Mr Mawer.

[13] In January 2009, CHIII, acting by its Joint Liquidators, brought proceedings against Mr Bloch, Vivendi and PWC and another in relation to CHIII's £77.7 million loan to the pursuer (the "Vivendi Proceedings"). They sought to recover the £77.7 million on the grounds *inter alia* that the financial assistance had been unlawful.

[14] Vivendi counterclaimed against PCW and the pursuer under Part 20 of the English Civil Procedure Rules (the "Part 20 Claim). Vivendi sought a declaration to the effect that the pursuer continued to owe £77.7 million to C4 and that C4 had an unpaid vendor's lien of that amount over the shares in CHIII registered in the name of the pursuer. The basis for the orders sought was that the loan was unlawful financial assistance. In the current action, both sides led expert evidence as to certain issues in the Part 20 Claim. Mr Davies KC and Mr Collings KC agreed that if the loan amounted to unlawful financial assistance, the loan would be impeached but the pursuer's status as the CHIII's shareholder would not have been undermined.

[15] On 30 September 2010, the Vivendi Proceedings were settled by Vivendi making a payment of £47 million to the liquidators of CHIII and agreeing to a "drop hands" resolution of the Part 20 Claim (the "Vivendi Settlement"). As part of the settlement, CHIII assigned to Vivendi all its rights and interests relating to the Vivendi Proceedings against various persons including Mr Bloch and Mr Richards and indemnified Vivendi in respect of claims by contributories.

[16] Further to the assignment, Vivendi brought an action against Mr Richards and Mr Bloch for breach of director's duties in respect of causing CHIII to make payments totalling more than £10 million in breach of their duties to creditors (*Vivendi* v *Richards*). The court held that payments were not made in the interests of CHIII or its creditors, and that Mr Richards and Mr Bloch were seeking to extract CHIIIs remaining cash from the company before it failed (paragraph [165]). In his judgment, Newey J commented on certain witnesses. In respect of Mr Richards and Mr Bloch, he stated "I am afraid that I cannot regard either of them as a reliable witness" (paragraph 113). He found Mr Harrod's written

evidence was largely accurate but his desire to help his brother was apparent, and treated Mr Harrod's evidence with a degree of caution (paragraph 114).

[17] Meanwhile, the Secretary of State for Business Innovation and Skills had brought director's disqualification proceedings against Mr Bloch as sole director of CHIII. When he took office, CHIII had cash assets of £50 million. Within a year, it went into liquidation with a few thousand pounds in its bank account. The Secretary of State's position was that Mr Bloch had managed CHIII in a manner which made him unfit to act as a director. Lord Woolman agreed and disqualified Mr Bloch for a period of eight years. He found both Mr Bloch and Mr Richards to be unsatisfactory witnesses: they were evasive and their answers were lengthy and opaque and neither was able to offer cogent or convincing explanations for certain important matters (paragraph [34]).

The section 212 Note

[18] The section 212 Note was a note in the liquidation of CHIII. The pursuer as noter (the "Noter") sought an order in terms of section 212(3) of the Insolvency Act 1986 against Mr Caven and Mr Mawer, the joint liquidators of CHIII (the "Joint Liquidators") for payment by the Joint Liquidators of £22,324,980.56 (with interest) as a contribution to the assets of CHIII. The Noter brought the note as sole shareholder, and accordingly contributory, of CHIII.

[19] Section 212 provides:

> "**212. - Summary remedy against delinquent directors, liquidators, etc.**
>
> (1) This section applies if in the course of the winding up of a company it appears that a person who –
>
> > ….
> > (b) has acted as liquidator … of the company, or

has misapplied or retained, or become accountable for, any money or other property of the company, or been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company.

(2) The reference in subsection (1) to any misfeasance or breach of any fiduciary or other duty in relation to the company includes, in the case of a person who has acted as liquidator … of the company, any misfeasance or breach of any fiduciary or other duty in connection with the carrying out of his functions as liquidator ... of the company.

(3) The court may, on the application of … any … 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.

…

(5) The power of a contributory to make an application under subsection (3) is not exercisable except with the leave of the court, but is exercisable notwithstanding that he will not benefit from any order the court may make on the application."

[20] As the current action seeks damages for loss of a chance of success in the section 212 Note it is necessary to understand what the issues in the section 212 Note were.

[21] The case against the Joint Liquidators set in the Note can be summarised as follows. Deka, as landlord of the Ark, submitted a claim in the liquidation of CHIII in the sum of £38,286,271. That sum comprised (a) arrears of rent and service charges with interest (£3,116,511) (b) dilapidations (£1,407,845) and (c) future rent service charges and interest for the periods until the break options in the leases of the Ark could be exercised in 2010 and 2011 (£33,761,914). In or around November 2005, the Joint Liquidators agreed with Deka that in consideration for Deka accepting a renunciation of the leases of the Ark, Deka would be entitled to rank in the liquidation on the basis that the value of their claim against CHIII would not amount to less than £28,000,000 (the precise figure being dependent on the

determination of the costs and expenses Deka claimed to have incurred as a result of CHIIIs breach of contract) (the "Deka Compromise Agreement"). In compromising Deka's claim in the sum of around £28,000,000, the Joint Liquidators acted in breach of their duties to CHIII. The sums due to Deka amounted to around £4,500,000 only. Further, the compromise made no provision for an "anti-embarrassment" clause in terms of which Deka's claim in the liquidation would be reduced if their potential losses under the leases were to be extinguished or mitigated in the event that Deka was to sell the Ark as a result of having obtained vacant possession in consequence of the surrender of the leases. Shortly after the agreed surrender of the leases and having obtained vacant possession of the Ark, Deka in March 2006 sold the Ark for around £47,000,000. In so doing after having their claim in the liquidation agreed at the sum of around £28,000,000 regardless of the period for which the Ark might actually remain unsold or unoccupied, they secured a sizeable windfall. In entering into a compromise agreement with Deka in these terms, and in failing to include an "anti-embarrassment" clause the Joint Liquidators failed to exercise the skill and care reasonably to be expected of ordinary competent liquidators. No ordinary competent liquidator exercising reasonable skill and care would have entered into a compromise agreement with Deka in terms of which the leases were surrendered and possession of the Ark returned to Deka but at the same time Deka were to be entitled to rank in the liquidation as if their claim amounted to around £25,000,000 more than the sums actually due to them and irrespective of whether or not they were able to sell the Ark or find a replacement tenant. *Separatim*, no ordinary competent liquidator exercising reasonable skill and care would have entered into such an agreement without ensuring that such an agreement included an "anti-embarrassment" clause. The company had no assets. Had the Joint Liquidators not agreed to the surrender of the leases of the Ark, Deka would have been

faced with the choice between (i) terminating the leases to obtain vacant possession or (ii) allowing the Ark to remain unoccupied for five years until CHIII exercised its break option. In circumstances where rent would remain unpaid through the period and the company had no assets from which any rent could be recovered, it was believed and averred that Deka would itself have terminated the leases in these circumstances. The Vivendi Proceedings were settled in September 2010 on Vivendi making payment to the company of around £47,000,000. Creditors were paid in full around December 2010. The dividend paid to Deka amounted to £28,995,293.03. But for the Vivendi Settlement agreement reached by the Joint Liquidators the dividend due to Deka would have amounted to £6,670,312.47 exclusive of interest. But for the actings of the Joint Liquidators in breach of their duties, the assets of CHIII would have been increased to the extent of £22,324,980.56 and the funds would be available in the liquidation for distribution to the contributories of CHIII including the Noter.

[22] The Joint Liquidator's defence to the Note as set out in the Answers can be summarised as follows. The Joint Liquidators stated a plea on prescription, and averred that as the Note proceeded on the basis that the loss and damage to CHIII had occurred in 2006 when Deka enjoyed the "windfall", any obligation to contribute to CHIII's assets on account of breach of duty had been extinguished by operation of the short negative prescription. They also stated a defence on the merits. At the time at which the leases were terminated the sums due to by CHIII to Deka in respect of rent were approximately £7.5 million and CHIII was also liable to Deka in respect of dilapidations. The Joint Liquidators' decision to enter into the Deka Compromise Agreement was taken in the light of the whole circumstances as they stood at the time. The company had made provision in its books of £35.4 million in respect of the leases of the Ark and other onerous leases of other properties

giving a total provision of £41,809,000. That sum represented CHIII's best estimate of the pre-tax expenditure to settle assisting obligations in respect of all owners leases as at 31 December 2002. Vivendi had since 2001 been attempting to dispose of its interests in the Ark but was unable to do so. In that state of affairs, Vivendi had attempted to negotiate the surrender of the leases with Deka, who indicated that it would only be prepared to release CHIII from the leases in exchange for £30 million to £35 million, and rejected an offer from Vivendi for £20 million. Instead, Vivendi embarked upon the restructuring exercise which resulted in the Noter becoming the sole member of CHIII. At the time the Joint Liquidators entered into the Deka Compromise Agreement, there was no reason to think that a sale of the Ark was likely to happen. It was a large building designed for the needs of a single occupier with no soundproofing and no separation of space and the floors were all open to the central atrium. It had been vacant for around six months. Substantial works would require to be carried out to subdivide it, in the order of £10 million to £20 million. It was likely that such works would take a minimum of six months to carry out and a further 18 months to find a tenant, who would likely demand an initial rent-free period of 18-24 months. Property consultants had been appointed to market the Ark but no interest in the building was received from single occupiers. With regard to multiple occupancy, the indications were that parties would only be interested if the buildings were completely refurbished. Overall, the Joint Liquidators' decision to enter into agreement with Deka was reasonable. The Joint Liquidators also took into account that Deka's claim of £38 million did not reflect the proper approach to be taken to quantification. In relation to loss of future rent, Deka's claim did not allow for accelerated receipt of sums not fallen due nor that Deka was obliged to mitigate its losses. The Joint Liquidators assessed the true value of Deka's claim as being up to £30 million and reasonably decided to compromise it at around

£28 million. The Joint Liquidators called on the Noter to specify the "windfall" which it claimed was enjoyed by Deka, and to specify what the position would have been but for the Joint Liquidator's alleged breach of duty, and to specify what Deka would have done had the Joint Liquidators acted in accordance with their duties. Anti-embarrassment clauses do not come in a standard form, are not invariably agreed upon, and in any event would be subject to negotiation both in principle and as regards their detailed terms. At the time of the Deka Compromise Agreement CHIII was already in breach of the leases of the Ark and was liable to Deka for substantial amounts of damages. At the time of the Deka Compromise Agreement it was not the case that CHIII had no assets: a Statement of Affairs prepared by Mr Bloch in August 2005 listed assets of almost £90 million of which some £84 million was due to CHIII by the Noter. Moreover, at that time it was anticipated that CHIII had a valuable asset in the claim against Vivendi in the Vivendi Proceedings. CHIII also made additional recoveries of around £2.5 million.

[23] The section 212 Note was proceeding towards a two day preliminary proof on prescription but it did not get that far. The court ordered caution for expenses and, after various extensions to the deadline, refused the prayer of the Note on 5 May 2017 as caution had not been lodged *Centenary 6 Ltd* v *Joint Liquidators of Centenary Holdings III Ltd* ([2017] CSOH 95). The refusal was upheld on appeal to the Inner House ([2018] CSIH 27). By the time the reclaiming motion had been heard, the Joint Liquidators had produced a deed of indemnity granted by insurers in favour of the Joint Liquidators and signed on 14 and 22 June 2017. Lord Glennie observed that that deed would in fact probably provide adequate security in a form which could be approved by the court as meeting the requirements of a bond of caution (paragraph [116]). In the current case, the defender accepted that, but for the admitted negligence, the pursuer would have satisfied the order

for caution by lodging a deed of indemnity in the same form as the deed dated 14 and 22 June 2017.

Submissions for the pursuer

[24] Senior counsel for the pursuer invited me to sustain the pursuer's first to third pleas-in-law and grant decree as concluded for. He submitted that the pursuer lost the chance of obtaining damages in the section 212 Note. The Joint Liquidators were negligent in binding themselves to the Deka Compromise Agreement. Proper practice would have been to ingather the funds before adjudicating on the claim. The loss to CHIII was measured by what was caused by the Joint Liquidators entering into the agreement with Deka without a "clawback" provision (ie "anti-embarrassment" provision). Had there been such a clawback, Deka would have been required to prove their losses following sale of their property. Their claims were lower than what they were paid and the loss was caused by the Joint Liquidators' negligence. The chances of success in the section 212 Note were high: the deed of indemnity was either a bond of caution or was acceptable as alternative security, the pursuer would have been able to fund the section 212 Note, the Joint Liquidators' prescription defence was weak and irrelevant and the pursuer had a compelling case on negligence.

[25] Counsel further submitted that normally causation is all or nothing (*Gregg* v *Scott* [2005] 2 AC 176, para 10). However, where (1) the thing lost is itself no more than a chance or (2) the thing lost depends on how a third party would hypothetically have acted but for the breach of duty, ie loss of a chance claims, the court approaches causation differently (*Joint Liquidators of RFC 2012 Plc* v *Whitehouse & Clark* [2021] CSOH 99 paras 43-45, *Perry* v *Raleys Solicitors* [2020] AC 352 paras 18-21, *Assetco Plc* v *Grant Thornton*

UK LLP [2019] Bus LR 2291 para 363). In loss of chance claims the pursuer will establish causation if it establishes that it had a real and substantial chance, which is a low bar and is equated with the chances of success being more than just speculative or negligible. The evidential burden lies on the defender to show that despite having acted for the pursuer and charged for their services, litigation was of no value, which will be particularly difficult where solicitors have failed to advise the client of the hopelessness of the situation (*Mount* v *Barker Austin* [1998] PNLR 493 p510-511). If the low bar is crossed, the court assesses the likely quantum and then applies an appropriate percentage to reflect the element of chance. In assessing damages, the court forms a broad view and is not trying to work out the actual value (*Sharif* v *Garret & Co* [2002] 1 WLR 3118, para 22; *Edwards* v *Simey* [2018] PNLR 30 para 67). As it was the defender's negligence that cost the opportunity to be lost, the court should tend towards a generous assessment of the uncertainties (*Mount*). The court should not seek to conduct a trial within a trial because there was inevitable loss of evidence over time, witnesses who might have given evidence in the underlying process may not do so in the negligence process and the claim might have settled (*Hanif* v *Middleweeks* [2000] Lloyds rep PN 920 paras 11-18, *Perry*, para 18, 31-38). The court should have regard to all the relevant material up to the time when the original claim was lost (*Sharif*, para 22). The court should not have regard to evidence generated after the notional date of trial in the underlying claim, for example expert evidence (*Edwards* v *Simey*, para 69-73). Witnesses speculating on what they would or would not have done is not useful or reliable evidence (*Moda International Brands Ltd* v *Gateley LLP* [2019] PNLR 27, para 180-182). It was unfair, and a one-way bet, for defender to both engage in a trial within a trial and if they failed in that, take the benefit of only paying a percentage of the full loss (*Hanif*, para 17).

Submissions for the defender

[26] Senior counsel for the defender invited the court to sustain the defender's second and third pleas-in-law and grant decree of absolvitor in favour of the defender. The pursuer had sustained no loss occasioned by the admitted negligence as the lost chance was either nil or negligible.

[27] The essence of a breach of duty in a loss of chance claim was depriving the claimant of the chance or opportunity of securing a favourable outcome (*McGregor on Damages*, para 10-49). Where there was uncertainty as to what the claimant would have done, the test is balance of probabilities; if the uncertainty is as to what the third party would have done, damages are assessed proportionally according to the chances (*Perry* v *Raleys*, *Palliser Ltd* v *Fate Ltd [2019] EWHC 43* (QB) at para [27]). In this case the issues for determination by the court were to be determined on a loss of a chance basis other than whether the pursuer would have funded the actions itself, which fell to be determined on the balance of probabilities, and prescription which was a matter of law for determination by the court (*Law Debenture Trust Corporation Plc* v *Elektrim SA*, *Concord Trust* [2010] EWCA Civ 1142 at para [44], *Altus Group (UK) Ltd* v *Baker Tilly Tax and Advisory Services LLP* [2015] EWHC 12 (CH) para 62.)

[28] Where a loss of a chance evaluation applies, the pursuer bears the onus of proving that the chance had a real and substantial rather than merely negligible prospectus of success (*Mount Barker* v *Austin* [1998] PRNL 493 at p510-511; Allied *Maples* at p161D, *Kingsley Napley LLP* v *Harris* [2021] EWHC 901). Causation is still proved on a loss of chance basis even if the third party gives evidence (*Moda; McGregor on Damages* para 10-68). The court requires to evaluate the chance of success (*Jackson & Powell Professional Liability* paras 11-277-278, *Perry* v *Raleys* paras [18], [21], [34] and [37]). It is the prospects of success

and not the hypothetical decision of the previous action which must be determined (*Dixon* v *Clement Jones Solicitors* [2005] PNLR 6 at para [27]).

[29] Where a number of contingencies exist the court should address the probability of each and take an arithmetical approach of multiplying together the loss percentage chance in relation to each contingency (eg *Chweidan* v *Mischon de Reya* [2004] EWHC 2685 (QB)). The arithmetical approach was appropriate where the contingencies were truly independent (*Tom Hoskins Plc* v *EMW Law (a firm)* [2010] ECC 20 at para [133]; *Joyce* v *Bowman Law* [2010] PNLR 22). The extent to which the court takes a broad brush approach depends on the circumstances (*Harrison* v *Bloom Camillin* [2000] Lloyds Rep PN 89). Ten percent was the threshold for a substantial prospect of success (*Jackson & Powell on Professional Liability*, para 11-280, *McGregor* para 10-52, *Thomas* v *Albutt* [2015] PNLR 29, *PCP Capital Partners LLP* v *Barclays Bank Plc* [2021] EWHC 307 (Comm) at paras [559]-[561]).

[30] The issue for the court was whether the factors which would have had a bearing on the prospects of success were truly independent as opposed to being different issues bearing on the same factor. In this case, there were six independent factors which had a bearing on the pursuers' loss of a chance. The pursuer had a nil or at best negligible chance in relation to number of those factors, with the result that the pursuer suffered no loss. The issues were:

a. What were the prospects of the pursuer succeeding at preliminary proof on the issue of prescription?

b. On the balance of probabilities (as this is a matter within the knowledge and control of the pursuer alone), could the pursuer have self-funded the remainder of the litigation beyond resolution of the prescription issue?

c. What were the prospects of the pursuer securing funding for the remainder of the litigation?

d. What were the prospects of the pursuer establishing a breach of duty against the joint liquidators in respect of the agreement of Deka's claim in the liquidation?

e. What were the prospects of the Joint Liquidators reaching an agreement with Deka limiting the latter's claim in the liquidation to a sum less than £28 million?

f. What were the prospects of the pursuer establishing that had the claim by Deka in the liquidation been limited, then there would have been a surplus available to the pursuer as a result of the settlement of the Vivendi proceedings?"

Assessment of loss of a chance

[31] In this case liability has been admitted. However it remains necessary to assess the loss of a chance of success in the section 212 Note.

[32] The circumstances in which the law departs from the ordinary burden on a pursuer to prove facts on the balance of probabilities and instead makes an evaluation on the basis of loss of a chance are set out in by Briggs JSC (with whom the other Justices agreed) in *Perry* v *Raleys* :

> "[21] For present purposes the courts have developed a clear and common-sense dividing line between those matters which the client must prove, and those which may better be assessed upon the basis of the evaluation of a lost chance. 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.
>
> [21] This sensible, fair and practicable dividing line was laid down by the Court of Appeal in *Allied Maples Group Ltd* v *Simmons & Simmons* [1995] 1 WLR 1602 …"

[33] In my opinion, the issues raised in this case, with two exceptions, fall to be resolved on a loss of a chance evaluation.

[34] The first exception is the issue of prescription. That is a matter of law which can be determined by this court.

[35] The second exception is the issue of whether the pursuer would have funded the section 212 Note out of its own funds up until the court ruled on the question of prescription. That is an issue which depends on what the pursuer would have done, and falls to be assessed on the balance of probabilities.

[36] With that in mind, I now turn to the questions raised in the defender's submissions. In doing so, it will be convenient to deal with the defender's two questions on funding under the same heading.

What were the prospects of the pursuer succeeding at preliminary proof on the issue of prescription?

Submissions for the pursuer

[37] Senior counsel submitted that the Joint Liquidators' plea of prescription in the section 212 Note was bound to fail. Section 212 is not a cause of action but a procedural provision enabling a claim, which could otherwise have been brought by the company, to be brought by those with an interest such as liquidator, creditor or contributory (*French & Anor* v *Cipolletta* [2009] EWHC 223 para [9]; in re: *B Johnson & Co (Builders) Ltd* [1955] Ch 634, p 647-8). The focus for the plea of prescription would have been on whether CHIII's cause of action against the Joint Liquidators had prescribed: the answer to that issue would be the same irrespective of the party applying under section 212. The Joint Liquidators were the controlling mind of CHIII from 2005 to 2016. If they were negligent, the Joint Liquidators never considered that and had always been in error about CHIII's cause of action against themselves (*Dryburgh* v *Scotts Media Tax Ltd* 2014 SC 651, paras 21-26). The injustice of a director or office holder benefiting from their own inaction and pursuing a cause of action was plain. Unless and until CHIII was capable of forming its own judgment

on the merits of pursuing a claim against the Joint Liquidators there could be no commencement of the quinquennium. That meant that the pursuer's knowledge was irrelevant. The pursuer's knowledge could not be attributed to CHIII. Even if the pursuers' knowledge were relevant, the evidence was that Mr Harrod had no knowledge that Deka's claim had been agreed at such a high rate until around April 2011.

Submissions for the defender

[38] Senior counsel for the defender submitted that the pursuer had no more than a negligible or speculative chance of persuading the court that the plea of prescription should be repelled. Prescription was a matter of law which should be determined by this court. If the Joint Liquidators' actions in entering into the compromise agreement with Deka were negligent in 2005, a concurrence of *injuria* and *damnum* existed then and had prescribed before the proceedings had been brought against the pursuer on 1 April 2016.

[39] Counsel submitted that the Deka Compromise Agreement was materially detrimental to CHIII and in turn the pursuer. Its terms precluded any reduction in Deka's claim in the event that Deka was able to extinguish or mitigate its losses. The conclusion of a contract directly disadvantageous to a party produces immediate loss (*Kennedy* v *Royal Bank of Scotland Plc* 2019 SC 168 at para [36], *Jackson* v *Clydesdale Bank* 2003 SLT 273, *Gordon's Trustees* v *Campbell Riddell Breeze Paterson LLP* 2017 SLT 1287 at para [19]). It matters not that the loss was difficult to quantify. It was not the case that any loss was contingent upon a positive outcome from the Vivendi Proceedings: the claim against Vivendi was capable of quantification. It mattered not that the analysis involved a degree of hindsight (*Gordon's Trustees* at paras [19], [22] and [24]). Further, the pursuer averred that there was no actual

loss until the payment by Vivendi SA on 30 September 2010, and on that basis proceedings were not raised until more than five years after actual loss incurred.

[40] In respect of section 11(3) of the Prescription and Limitation Act 1973 counsel submitted that the evidence demonstrated clearly that the pursuer, in the person of Mr Richards, had actual knowledge of its loss prior to April 2011 or, at the very least could with reasonable diligence have become aware of the loss over five years prior to the raising of the proceedings against the Joint Liquidators.

[41] In relation to section 6(4) of the 1973 Act, counsel submitted that the evidence showed that the pursuer was not in error and knew it had suffered loss or could have so discovered with reasonable diligence.

[42] Counsel sought to distinguish *Dryburgh* v *Scotts Media Tax Ltd* 2014 SC 651 from the current case. The creditor in relation to the obligation which was to be enforced by way of the section 212 Note was the pursuer not CHIII. The pursuer had title and interest to bring the section 212 Note (*Royal Insurance UK Ltd* v *Amec Construction (Scotland) Ltd (No 2)* 2008 SLT 825, Johnston *Prescription and Limitation* paras 2-02 and 2-03, *Stair* I i 22). If the pursuer did not have right, title and interest it had not suffered loss. Were the pursuer not the creditor that would be a surprising result for the UK wide statutory insolvency scheme. Section 212 provides for derivative claims (McPherson & Keay, *The Law of Company Liquidations* para 8-041) and for the purposes of the English Limitation Act 1980, the derivative claimant was the claimant against whom the applicable limitation period runs (*Julien* v *Evolving Tecknologies and Enterprise Development Co Ltd* [2018] BCC 376, at para [58]). On the pursuer's approach, the pursuer would not have been subject to the prescriptive period, irrespective of what knowledge the pursuer, as opposed to CHIII, had of the loss. There was no evidence that CHIII intended to raise proceedings, as opposed to the pursuer.

The actions of any person such as the pursuer through whom the creditor claims should be regarded as actions of the creditor (Scottish Law Commission, *Reform of the Law Relating to Prescription and Limitation of Actions* (1970) (*Scot Law Com* No 15) para 93, *BP Exploration Operating Co Ltd* v *Chevron Transport (Scotland)* 2002 SC (HL) 19 at para [28]). Accordingly, from the point of time that the pursuer was aware of the loss, that knowledge was to be attributed to CHIII and CHIII's error no longer induced it not to claim and the prescriptive period was not suspended for the purposes of section 6(4)(a)(ii).

Analysis

[43] The key to resolving the dispute between the parties on prescription is to be found by going back to the basic principles of Scots law on prescription. In Scots law, prescription is a substantive matter which operates by extinguishing an obligation. That can be contrasted with the position in other legal systems, such as England, where time bar is a procedural matter which operates to bar the bringing of an action.

[44] Section 6(1) of the Prescription and Limitation (Scotland) Act 1973 provides:

> "If, after the appropriate date, an obligation to which this section applies has subsisted for a continuous period of five years—
>
> > (a) without any relevant claim having been made in relation to the obligation, and
> >
> > (b) without the subsistence of the obligation having been relevantly acknowledged,
>
> then as from the expiration of that period the obligation shall be extinguished"

[45] The obligations to which section 6 applies are set out in Schedule 1 and the relevant obligation for present purposes is that set out in paragraph 1(b) of that Schedule: "any obligation arising from any liability (whether arising from any enactment or from any rule of law) to make reparation.

[46] The obligation which the pursuer as Noter sought to enforce in the section 212 Note was an obligation of the Joint Liquidators to make reparation to the company of which they were the liquidators. The order sought in the prayer of the section 212 Note was:

> "to grant an order, in terms of Section 212(3) of the Insolvency Act 1986 ('the 1986 Act'), ordaining [the Joint Liquidators] jointly and severally, to contribute the sum of … £22,324,980.56 … to the assets of Centenary Holdings III Limited (in liquidation)"

The legal basis of the Note was set out in the Note as:

> "The respondents, as joint liquidators of the Company [i.e. CHIII] at all material times, owed a duty to the Company to take reasonable care not to diminish the assets of the Company or otherwise to cause loss to the Company by their actings. In the circumstances, the actings of the respondents constitute breaches of duty in relation to the Company, … By their actings, the respondents have diminished the assets of the Company *et separatim* have caused the Company to suffer loss and damage."

Accordingly, the obligation which was sought to be enforced in the section 212 Note was an obligation on the Joint Liquidators to make reparation to CHIII. The creditor in that obligation was CHIII. The debtor in that obligation was the Joint Liquidators.

[47] As a matter of practicality, CHIII was not in a position to enforce that obligation itself. CHIII was in liquidation and under the control of the Joint Liquidators, and was therefore not in a position to raise an action against the Joint Liquidators. The law provides a solution to that practical difficulty. Where an action is to be raised against those in control of a company, the law in certain situations provides a procedural mechanism whereby the action can be raised by a shareholder. That mechanism is provided by section 212 of the Insolvency Act 1986, which is set out at paragraph [19] above.

[48] The wording of section 212 makes clear that the section does no more than provide a mechanism by which the shareholder, as a contributory, can enforce an obligation on a liquidator to make reparation to the company under his control. It does not change the nature of the obligation so that the obligation ceases to be an obligation due by the

liquidator to the company and becomes instead an obligation due by the liquidator to the contributory. Reparation is to be made to the company, not the shareholder (section 212(3)). Any benefit to the shareholder arises only indirectly, as the ultimate owner of the company entitled to a share of any surplus assets once the company's creditors have been paid in full. It is the company who is to benefit from the reparation, not the shareholder: the mechanism can be used even if the reparation is of no benefit to the shareholder (section 212(5)). Accordingly, there is nothing in section 212 which changes the identity of the creditor for the purposes of the law of prescription: the creditor in the obligation to make reparation for breach of duty by the liquidator remains the company, and the debtor remains the liquidator.

[49] Normally an obligation can be enforced only by the creditor. However section 212 proceedings are an example of the rare situation where an obligation can be enforced by a person who is not the creditor (cf *Royal Insurance (UK) Ltd* v *Amec Construction (Scotland) Ltd* at para [21]-[24]). There are obvious risks and difficulties in allowing a person who is not the creditor to enforce an obligation. Section 212 builds in a safeguard against these risks by providing that the power of a shareholder to make an application under section 212 is not exercisable without leave of the court (section 212(5)).

[50] Against that background, I now turn to the question of whether the claim for reparation in respect of breach of duty by the joint liquidators made in the section 212 Note had prescribed. If it had prescribed, then that would provide a complete defence to the current action, as the defender's alleged negligence would have caused no loss to the pursuer: the section 212 Note would have been refused even if caution had been timeously lodged.

[51] The prescription issues which would have required to be determined by the court in the section 212 Note would have been:

(1) When the prescriptive period started to run;

(2) Whether the starting date for prescription had been postponed under section 11(3) of the 1973 Act; and

(3) Whether the prescriptive period had been extended under section 6(4) of the 1973 Act.

I take these issues in turn.

(1) <u>When did the prescriptive period start to run?</u>

[52] Section 11(1) of the 1973 Act provides:

> "(1)…., any obligation… to make reparation for loss, injury or damage caused by an act, neglect or default shall be regarded for the purposes of section 6 of this Act as having become enforceable on the date when the loss, injury or damage occurred"

The section 212 Note sought reparation to CHIII for breach of duty by the Joint Liquidators. The alleged negligent act is the entering into of the Deka Compromise Agreement. When does the loss arise? The pursuer's position is that there was no concurrence of *injuria* and *damnum* until around 30 September 2010. It pleads in the current action that:

> "there was no certainty that either CHIII or the pursuer, as contributory of CH3, would suffer any losses or at least any such loss would be *de minimis*, unless and until there were substantial assets to distribute to creditors. As such, no actual loss occurred until the payment by Vivendi to the then joint liquidators of CH3 on or around 30 September 2010" (art 29 of condescendence).

The defender's position on the other hand is that the concurrence occurred when the Deka Compromise Agreement was entered into in around November 2005. However, it is not necessary for me, nor would it have been necessary for the judge hearing the preliminary proof on prescription in the section 212 Note, to determine which of these positions is correct. The section 212 Note was not raised until 1 April 2016. Even on the pursuer's

position that the concurrence was in September 2010, the proceedings were raised more than five years after the date when loss, injury or damage occurred. Accordingly, unless section 11(3) or section 6(4) applied, the obligation to make reparation had prescribed prior to the raising of the section 212 Note.

(2) Whether the starting date for prescription had been postponed under section 11(3) of the 1973 Act

[53] The starting date for prescription of an obligation can be postponed due to lack of awareness. Section 11(1) of the 1973 Act is subject to section 11(3) which states:

> "In relation to a case where on the date referred to in subsection (1) above … the creditor was not aware, and could not with reasonable diligence have been aware, that loss, injury or damage caused as aforesaid had occurred, the said subsection (1) shall have effect as if for the reference therein to that date there were substituted a reference to the date when the creditor first became, or could with reasonable diligence have become, so aware"

[54] There was a dispute between the parties as to whether what mattered was lack of awareness on the part of CHIII, or lack of awareness on the part of CHIII's shareholder (who was the noter in the section 212 Note and the pursuer in the current case). The answer to that is straightforward and is to be found in the wording of the 1973 Act. Section 11(3) applies when "the creditor" is not aware. The creditor is the creditor in the obligation to make reparation. The creditor in an obligation of a liquidator to make reparation to a company under his control is the company. A shareholder does not become the creditor by bringing a section 212 Note. Accordingly, it is the awareness of the creditor in the obligation which matters. That makes sense in the context of a legal system in which prescription operates by extinguishing the obligation. There might be various shareholders who have the right to bring a section 212 Note. Some of these shareholders might have awareness, and some might not. The question of whether the obligation is extinguished should not depend

on the rather random factor of which of the possible noters happens to bring the proceedings.

(3) Whether the prescriptive period had been extended under section 6(4) of the 1973 Act

[55] The prescriptive period can be extended in the circumstances provided for under section 6(4) of the 1973 Act, which provides:

> "(4) In the computation of a prescriptive period in relation to any obligation for the purposes of this section—
>
> (a) any period during which by reason of—
>
> (i) fraud on the part of the debtor or any person acting on his behalf, or
>
> (ii) error induced by words or conduct of the debtor or any person acting on his behalf,
>
> the creditor was induced to refrain from making a relevant claim in relation to the obligation, and
>
> (b) any period during which the original creditor (while he is the creditor) was under legal disability, shall not be reckoned as, or as part of, the prescriptive period;
>
> Provided that any period such as is mentioned in paragraph (a) of this subsection shall not include any time occurring after the creditor could with reasonable diligence have discovered the fraud or error, as the case may be, referred to in that paragraph."

[56] The defender's position was that, on the evidence, the pursuer had actual knowledge of its loss prior to April 2011, or at least, could with reasonable diligence, have become aware of the loss over five years before the raising of the section 212 notice. That position is misconceived. The knowledge of the pursuer is irrelevant. Section 6(4), just like section 11(1), refers to the "creditor." That is a reference to the creditor in the obligation to make reparation, not the person who happens to make a section 212 application.

[57] "Fraud" in section 6(4) has a broad meaning (*Dryburgh* v *Scotts Media Tax Ltd* at para [30]) and in my view can include breach of duty by a liquidator to the company under his control. While the liquidator is in office, the company is not in a position to act independently of the liquidator and therefore cannot discover the fraud. The company cannot make its own independent decisions. In policy terms, there is nothing inappropriate in suspending the running of prescription during that time. Prescription is suspended in the analogous situation where the creditor is an individual who cannot make decisions because he or she is under a legal disability of unsoundness of mind (section 6(4), 15(1) of the 1973 Act). Further, if prescription were not suspended, that could lead to the unjust result that a liquidator could escape liability for wrongdoing by contriving to remain in office for the five year prescriptive period. Moreover, it would be inequitable to attribute the knowledge of a liquidator as to his wrongdoing to the company so as to prevent the company from obtaining redress from the liquidator. In circumstances where the wrongdoing is perpetrated by those in control of the company, such as directors or liquidators, the knowledge of the shareholders is not attributed to the company (*Julien* para [56]).

[58] Counsel for the defender submitted that if it were the case that the company was the creditor, then the section 212 Note could not have interrupted the running of the prescriptive period. That is of no practical relevance in the current case, as the prescriptive period was suspended for so long as the liquidator was in office, and the section 212 Note was brought during his time in office. In any event, the bringing of a section 212 Note would have interrupted the prescriptive period. An obligation is extinguished if it has subsisted for five years without a relevant claim having been made "in relation to" the obligation (section 6(1)). "'Relevant claim' in relation to an obligation means a claim made

by or on behalf of the creditor for implement of the obligation" (section 9 of the 1973 Act). The section 212 Note was a claim made on the debtor (ie the joint liquidators) for implement of the obligation to the creditor (ie CHIII) to make reparation for breach of duty. The claim was made on behalf of the creditor in the sense that the section 212 Note sought payment of the reparation to the creditor. However, that is not to say that the Noter was acting as the agent of CHIII: section 212 is merely a procedural mechanism to allow a company's rights to be vindicated against the liquidator who controls it.

[59] In *BP Exploration Operating Co Ltd* v *Chevron Transport (Scotland) Limited* Lord Hope said:

> "27. The purpose of section 6(4) is to address the injustice which would otherwise arise if the circumstances which led to the delay were brought about by fraud on the debtor's part or by error induced by the debtor's words or conduct. The fact that injustice can arise in cases of this kind was recognised in the old law of prescription which the 1973 Act replaced. …
>
> 28. The Scottish Law Commission observed in its report on Reform of the Law Relating to Prescription and Limitation of Actions (1970) (Scot Law Com No 15), paragraph 93 that it was a defence to the existing triennial prescription that the creditor had been induced by the action of the debtor to refrain from pursuing the claim within the prescriptive period:
>
>> 'We consider that on equitable grounds a defence against the suggested new short negative prescription should similarly be available to the creditor if he has been deterred from taking action within the prescriptive period by fraud or concealment by the debtor or by error on the part of the creditor, but only where the error has been induced by the words or conduct of the debtor. **For the purposes of such a defence the actions of any person through whom the creditor** or debtor **claimed** or from whom the creditor or debtor derived right **should be regarded as actions of the creditor** or debtor respectively and the actions of an agent for either party should be regarded as the actions of his principal. The effect of such fraud, concealment or error should be to defer the commencement of the prescription until the date when the fraud, concealment or error was discovered by the creditor or could, with reasonable diligence on his part, have been discovered.'
>
> 29. The wording of section 6(4) of the 1973 Act reflects this approach. It applies only where there has been fraud on the part of the debtor or where the creditor's error was induced by the debtor's words or conduct. The actions of any person

acting on the debtor's behalf in this respect are treated as those of his principal." (emphasis added)

[60] The defender founds on the words emphasised in bold in that passage for its proposition that the actions of any person through whom the creditor claimed (in this case the pursuer as Noter in the section 212 Note) should be regarded as actions of the creditor. In my opinion that proposition cannot be derived from that passage. The defender places too much emphasis on the wording used by the Scottish Law Commission, which does not form part of the 1973 Act and should not be construed like a statutory provision. The Commission does not address its mind to the unusual situation where an obligation to make reparation owed to a company by a wrongdoer who is in control of the company is being enforced by a shareholder in the company in terms of section 212. In such a situation the company is not claiming "through" the shareholder: it is the company who is claiming and section 212 provides a procedural mechanism for it to do so. As Lord Hope says, the purpose of section 6(4) is to address injustice: it would be unjust if a company, which had no awareness of the wrong which had been done against it, were to be denied redress depending on the random factor of the awareness of the particular shareholder who happened to bring section 212 proceedings.

[61] The pursuer drew my attention to the Privy Council case of *Julien* v *Evolving Tecknologies and Enterprise Development Co*. I did not find that case to be of assistance in considering section 6(4). It concerned the Trinidad and Tobago equivalent of section 6(4), which was in materially identical terms to the English Limitation Act 1980 section 14(1) which provides:

> … where in the case of any action for which a period of limitation is prescribed in this Act, either-
>
> (a) The action is based on the fraud of the defendant;

> (b) Any fact relevant to the plaintiff's right of action was deliberately concealed form the defendant; or…
>
> The period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake or could with reasonable diligence have discovered it"

[62] At paragraph [58] of *Julien* Lord Briggs stated:

> "In a derivative action the company is not the claimant for the purposes of s.14 …, even though the action is brought for the company's benefit"

That proposition about a claimant under English law cannot be transposed to a noter bringing a section 212 claim in Scotland. The crucial difference between section 14 of the English 1980 Act and section 6(4) of the Scottish 1973 Act is that where the English act refers to "plaintiff", section 6(4) of the 1973 Act refers to "creditor". That difference flows from the fundamental difference between the two legal systems: Scots law operates by extinguishing obligations and English law by imposing a procedural bar on litigation. In England limitation operates to prevent the shareholder from being the plaintiff/claimant making a section 212 claim. In Scotland prescription operates not to prevent the shareholder from making a section 212 claim, but to extinguish the liquidator's obligation to make reparation to the company: it is the company and not the shareholder who is the creditor in that obligation.

Conclusion on prescription

[63] For the reasons set out above, in my opinion the obligation on the Joint Liquidators had not prescribed prior to the commencement of the section 212 Note. That conclusion is a matter of law and so it is not necessary for me to assess the loss of a chance on the prescription issue.

[64] However, in case I am wrong in that, and the correct way for me proceed in relation to the prescription issue would have been to assess the loss of a chance, in my view the loss

of a chance is nil or negligible as the prospects of a judge in the section 212 Note having come to a different conclusion on the law are nil or negligible.

[65] If I am wrong on my analysis of the law, and it is the knowledge of the pursuer and not the CHIII which is relevant for the purposes of prescription, then such knowledge would have been a matter of fact to have been examined at the preliminary proof in the section 212 Note. My views on that matter of fact can be briefly set out as follows.

Mr Harrod's evidence before me was that he had no knowledge that Deka's claim had been agreed at such a high rate until around April 2011. There was evidence before me that the Joint Liquidators had concealed the loss from the pursuer by repeatedly stating in their reports to creditors that no claims had been adjudicated. According to an opinion from the senior counsel then acting for the Noter dated 23 November 2015, at the preliminary proof the Noter would have argued that the claim had not prescribed because any loss to CHIII was contingent until the sums had actually been paid, and that in any event, even with the exercise of reasonable diligence, the pursuer was excusably unaware that payment had been received by Vivendi. Mr Harrod's evidence before me was that he was not aware of the loss until publication on 15 April 2011 of an article in Property Week which stated that a spokesman for Vivendi said that they had "settled with the liquidator". That was more than five years before the bringing of the note, but would not have been relevant as at that time Mr Harrod was not a director of the pursuer. However, on 27 February 2011 the sole director of the pursuer, Mr Richards, wrote an email to the pursuer's lawyer Mr Barden saying:

> "It is apparent that the Liquidator paid sums out on Rent Claims for the period after one of the Properties was sold. The Landlord cannot claim loss, as the building was sold at an extraordinary high price, returning the Landlord a massive profit".

The pursuer's position is that that email fixes the pursuer's director and accordingly the pursuer with knowledge of the loss at that date, or at the least he could have with reasonable diligence discovered the loss. However, in my view the references in the email did not specifically mention the Ark and could have referred to another of the pursuer's properties. Mr Barden's evidence before me did not cast any light on the matter as he did not have any recollection of this due to the passage of time. The obvious person who could cast light on Mr Richard's awareness was of course Mr Richards, but he is now deceased. At the preliminary proof the Joint Liquidators would have had great difficulty in fixing CHIII with awareness based on Mr Richards' email dated 27 February 2011. The email was ambiguous and its meaning could not have been clarified by Mr Richards or Mr Barden. In all these circumstances, in my view the prospects of the Joint Liquidators succeeding at the preliminary proof on prescription are nil or negligible.

Conclusion on prescription

[66] I find as a matter of law that the obligation on the Joint Liquidators to make reparation to CHIII had not prescribed by the time that the section 212 Note proceedings were brought. *Esto* this is not to be decided by me as a matter of law, then I find that the Noter had a 100% chance of succeeding on the prescription issue at the preliminary proof in the section 212 proceedings.

What were the prospects of the pursuer securing funding for the remainder of the litigation?

Submissions for the pursuer

[67] Counsel for the pursuer submitted that the evidence established that it was a virtual certainty that the pursuer could have funded the section 212 Note through to a proof on prescription and afterwards. The fact the pursuer had managed to fund this case revealed that the fact that it could have funded the section 212 Note. There was evidence that the pursuer would have been able to fund its own costs for the section 212 Note. If outside financing had been required, Mr Morris gave clear evidence that there was a good chance that Woodsford would have exercised their option to finance the section 212 Note after prescription had been successfully overcome. The judgment of Newey J in the *Vivendi* case had not impugned Mr Harrod.

[68] Counsel submitted that if the correct advice had been given by the defender, the pursuer would have taken alternative steps to obtain cash, a bond of caution or at the very least would have a deed of indemnity in the same or similar terms as the one produced in the Inner House. This was a matter of agreement between the parties in the joint minute in respect of the deed of indemnity. There was no definition of "bond of caution" in the rules of court but the deed of indemnity satisfied the requirements (*Bell's Dictionary and Digest of the Law of Scotland*, p128; Keith and Burns *Encyclopaedia of Scottish Legal Styles - Volume 2* (1935) pp 305-6,312; *Centenary 6* v *Caven and Mawer* paras [67], [115-116]). There was a real and substantial chance that the court would have approved the deed of indemnity and that seems almost certain to have been the outcome.

Submissions for the defender

[69] Counsel submitted that had litigation funders been approached and been made aware of the information contained within Newey J's judgment in the *Vivendi* case, they would have been aware that it would have been possible for the Joint Liquidators to draw out a very unattractive narrative in the action brought against them: Mr Richards purchased CHIII for the sum of £1.00, £10 million was thereafter spent by CHIII on investments which Newey J categorised as dishonest, including a £5.3 million dividend paid to the pursuer and that had the pursuer been entitled to any surplus from the Vivendi settlement it would have been gaining from the proceeds of the loan, notwithstanding that it was the party required to repay it.

[70] Counsel submitted that there was a contradiction in the evidence between the pursuer's witnesses Mr Diamond and Mr Harrod and the court should accept Mr Diamond's evidence and reject as improbable Mr Harrod's contention that the pursuer could have funded the litigation itself in the event that it could not have secured litigation funding.

Analysis

[71] Two issues arise on the evidence. The first is whether the pursuer had external litigation funding in place for the section 212 Note. The second is whether knowledge by the funder of the circumstances of the acquisition of CHIII by the pursuer, and of the judgment of Newey J in the Vivendi case, would have affected that funding.

[72] A Litigation Funding Agreement (the "Litigation Funding Agreement") was entered into between Woodsford Litigation Funding Limited ("Woodsford"), the pursuer and Elite Insurance Company Limited ("Elite") dated 20, 21 and 22 June 2017. Clause 2 provided that

Woodsford would pay to Elite the premium for the Deed of Indemnity which was to be offered in respect of caution at the Inner House hearing. Clause 3 provided that the pursuer agreed to self-fund the prosecution of the section 212 Note until final resolution of the preliminary issue of prescription. In terms of clause 4 the pursuer granted Woodsford an exclusive option to fund the section 212 Note in the event that the preliminary prescription issue was resolved in the pursuer's favour, on agreed Funding Terms. Under the Funding Terms, Woodsford would provide funding for the pursuer's own side costs up to a maximum of £320,000. There were various conditions precedent which included:

- the pursuer to hold and maintain a valid ATE insurance policy against the risk of adverse costs with a minimum level of cover of £303,000;
- completion of Woodsford's due diligence into the claim;
- approval by Woodsford of the budget for the pursuer's legal costs;
- approval of the investment by Woodsford's Investment Advisory Panel and by Woodsford's Board.

[73] The negotiations between the pursuer and Woodsford which led up to the Litigation Funding Agreement were conducted on behalf of Woodsford by Charles Morris, an English qualified solicitor who is Chief Investment Officer and director of Woodsford Group Limited. Mr Morris gave evidence that Woodsford had agreed to fund this current action. Before doing so it had gone through its procedures for due diligence and Investment Advisory Panel and Board approval. He was emphatic that Woodsford would not have funded this current action if it had not also been willing to fund the section 212 Note, and that Woodsford would have exercised its option to fund the section 212 Note had the Noter prevailed on prescription.

[74] I accept the evidence of Mr Morris that Woodsford would have funded the section 212 Note if it had survived the preliminary proof on prescription. He was a qualified solicitor who gave his evidence in a professional, straightforward and balanced manner. In cross-examination he recognised that Woodsford had an interest in the success of the current litigation, but stated that he was an officer of the court and understood his obligations when he gives evidence under oath, and the fact that Woodsford might stand to earn a success fee from him giving evidence was something which he tried not to impact the answers that he gave. I found him to be a credible and reliable witness. His point that Woodsford would not have funded the current action unless it would have also funded the section 212 Note was in my view particularly compelling.

[75] The defender led expert evidence on the second question from Neil Purslow. Mr Purslow is an English qualified solicitor who is co-founder and Chief Investment Officer of a litigation funder, Therium Capital Management Limited. His conclusion was that litigation funders who had conducted reasonable diligence into the claim would have been very unlikely to fund the section 212 Note. He expressed surprise that under the Litigation Funding Agreement Woodsford had agreed that the pursuer would self-fund the section 212 Note to determination of the preliminary prescription issue, but considered that that would have been looked on positively by the litigation funding market and would have mitigated any concerns as to prescription. He placed particular emphasis on the issue of perception. Litigation funders would be sceptical of claims that are perceived to be speculative or unmeritorious (for example when a pursuer has voluntarily stepped into a distressed situation in an attempt to make a profit and may not have suffered any loss itself), and would be wary of funding such claims. A funder conducting reasonable diligence could be expected to have identified the risk of the court constructing the following narrative. Prior

to restructuring CHIII had substantial assets of around £1 billion from which it could meet its full liabilities under its leases to Deka. Vivendi had in June 2003 sought to release CHIII from liabilities under the leases in return for payment of £20 million and Deka had refused, seeking £30-35 million. In light of Vivendi's inability to agree a surrender of the Leases with Deka, Vivendi stripped out all but £92 million of assets from CHIII and then entered into an allegedly unlawful financial assistance transaction with the pursuer to extract an additional £77 million, leaving just £15 million in CHIII. Mr Richards and Mr Harrod had put no real money into the transaction. The £15 million left in CHIII was sufficient for it to meet its rental obligations to Deka for only a year or so and when it transpired that Mr Richards and Mr Harrod were unable to deal with CHIIIs assets as hoped, CH3 went into liquidation. Mr Harrod and Mr Richards had invested nothing and lost nothing and Vivendi had been able to take around £1 billion plus £77 million out of CHIII. In suing the Joint Liquidators the pursuer (and indirectly Mr Harrod/Richards) were attempting to blame the liquidators for the fact that they had not been able to make a profit at the expense of Deka, and to hold the liquidators liable to contribute pure profit to Mr Harrod/Richards for their part in the allegedly unlawful financial assistance transaction. Litigation funders would have considered there to be a material prospect that the claim would fail as being speculative or unmeritorious and would have been unlikely to fund the section 212 Note. In addition, even if the pursuer and Mr Harrod had omitted to disclose the *Vivendi* judgment to prospective funders, as it was in the public domain it could readily have been identified by litigation funders. If an English litigation funder suspected that there was litigation relevant to a claim that they were considering, they would check for any related judgment if answers to due diligence questions were not satisfactory. Had litigation funders had sight of the judgment they would have been aware of various factors including Mr Richards' fraud

conviction and change of name and Newey J's comments about the credibility of Mr Richards, Mr Bloch and Mr Harrod, and would have been very unlikely to fund the Note.

[76] I did not find the evidence of Mr Purslow to be of much assistance. Theoretical expert evidence that funders would not agree to fund the section 212 Note is of little assistance when there is evidence that in reality one such funder, Woodsford, would have funded the Note. Similarly, theoretical evidence that the Note would not have been funded because of a perception issue is of little assistance when there is evidence that in reality it would have been funded by Woodsford: when it was put to Mr Morris in cross-examination that there might be a reputational question Mr Morris explained that the issue for Woodsford was the strength of the claim against the joint liquidators.

[77] As I accept the evidence of Mr Morris, I find that there is a very high chance, amounting to a virtual certainty, that Woodsford would have funded the section 212 Note from resolution of the preliminary prescription issue and accordingly that the pursuer would have secured litigation funding for the remainder of the proceedings.

[78] It follows from that finding that I do not need to consider the question raised by the defender as to whether, if there was no such litigation funding, the pursuer would have been able to self-fund the Note from the time of resolution of the prescription issue. However, I do need to consider whether the pursuer would have been able to self-fund the section 212 Note up until resolution of the preliminary prescription issue, at which point the litigation funding would have kicked in.

[79] As any adverse award of costs would have been covered by Elite, the amount which the Noter would require to be funded to cover its own costs until resolution of the prescription issue would have been in the region of £50,000 to £75,000. The defender is not

in a position to dispute that figure as it was agreed by it at the time of the section 212 Note. Mr Harrod worked with Mr Diamond, an experienced cost accountant, and Mr Munro, the partner in the defender acting for the pursuer, to produce budgets for the litigation. In an email to Mr Munro, copied to Mr Harrod, dated 1 March 2017 Mr Diamond enclosed an amended budget and stated that:

> "In relation to the time bar application counsel has suggested £50k, but as discussed there could be discovery issues (i.e. the other side suggested £10k for a statement re our discovery) I believe £75k is the top end of the budget for this work".

Mr Munro replied on 8 March stating "These figures look about right to me …"

[80] I am satisfied on the balance of probabilities that the pursuer would have been able to find £75,000 to self-fund the litigation until final resolution of the preliminary prescription issue. Mr Harrod was prepared to, and indeed had, provided funding to the pursuer from his own resources. From 2014 to May 2017 he had provided the pursuer with funds to cover fees from David Rubin & Co, Brown Rudnick solicitors, Elite Insurance and the defender totalling around £250,000. It can be seen from vouching lodged as productions in this case that Mr Harrod had this money available from his savings, lines of credit and predominantly from surplus cash flow from Jason's Trips Ltd, a summer seasonal canal boat trip company owned by him and his wife. There is no reason to doubt that Mr Harrod would have been able to provide a further £75,000 within the timescale required in 2017 particularly as the accounts for Jason's Trips Ltd for the year ended 31 December 2017, which would reflect income in the summer months of 2017, show a gross profit of £145,914.

Conclusion on funding

[81] I find on the balance of probabilities that the Noter would have been able to self-fund the section 212 Note until resolution of the preliminary proof on prescription. I find that

there was very high chance amounting to a virtual certainty that thereafter the Noter would have been funded by Woodsford for the remainder of the section 212 Note procedure.

What were the prospects of the pursuer establishing a breach of duty against the joint liquidators in respect of the agreement of Deka's claim in the liquidation?

Submissions for the pursuer

[82] Counsel for the pursuer submitted that there was a very high chance that the Joint Liquidators would have been found to be negligent in the section 212 Note. The general duties of a liquidator had been considered in so many cases that to some extent they have become matters of law (*Involnert Management Inc* v *Aprilgrange Ltd* [2015] 2 CLC 307 para 294). The core of the duty to take reasonable care was a duty to obtain the best prices circumstances permit in realising assets of the business (*Davey* v *Money* [2018] BUS LR 1903, para 387-388; *re Charnley Davies Ltd (No 2)* [1990] BCC 605 P775E-776A). The court expects a high standard of care and diligence from a liquidator (re *Home & Colonial Insurance Co Ltd* [1930] 1 CH 102 p124-125; *Macrae v Henderson* 1989 SLT 523 p525; r*e Mama Milla Ltd* [2016] BCC 1, para 29). It will usually be negligent for an insolvency practitioner to fail to take specialist advice as the absence of such advice often leads to flawed decision-making (joint liquidator *ARY Digital UK Ltd* v *Iqbal* [2019] BCC 746; American *Express International Banking Corps* v *Hurley* [1986] 2 BCC 9 8993; re *Mama Milla* para 31; *Joint Liquidators of RFC 2012 Plc* v *Whitehouse & Clark* [2021] CSOH 99, para [36]). The evidence established negligence. Standing back from the detailed experts and factual evidence, the agreement between the joint liquidators and Deka made neither commercial nor legal sense. In Scotland, liquidators have no power to disclaim onerous property under 178 of the Insolvency Act 1986 (*Joint Liquidators of Scottish Coal* v *Sepa* 2014 SC 372, paras 120-126). The

same general position as obtained in England prior to 1929 (*in re Park Air Services Plc* [2000] 2 AC 172 p 181A-C, p185, *Gooch* v *London Banking Association* [1886] 32 CH D 41) continues to exist in Scotland: a negotiated surrender would be necessary that would be expected to account for the scope for mitigation of any future losses.

Submissions for the defender

[83] Counsel for the defender acknowledged that the pursuer had overcome the hurdle of proving that there existed a real and substantial chance of the pursuer establishing a breach of duty. However, the defender submitted that the pursuer's prospects of establishing a breach of duty were little better than 50/50.

Analysis

[84] Although there was extensive evidence led on this issue, including expert evidence, this issue can be taken shortly as the defender in its submissions accepted that the pursuer had proved that there was a real and substantial chance of the Noter establishing breach of duty by the liquidator. The only matter in dispute between the parties was what that chance was. The pursuer submitted that the chance was a high one. The defender submitted that the chance was 50%. I have taken their submissions into account in my assessment of the percentage chance of success below.

What were the prospects of the joint liquidators reaching an agreement with Deka limiting the latter's claim in the liquidation to a sum less than £28 million?

Submissions for the defender

[85] Senior counsel for the defender submitted that the pleadings of the Noter in the section 212 Note and the pursuer in the present action lacked specification as to the averment that the combination of the sale of the Deka Compromise Agreement resulted in Deka securing a "very substantial windfall". Deka's view as to whether it was a windfall might be different. The £28 million paid as an unsecured claim was not necessarily a windfall, as the value of the Ark might have been higher than the sale price achieved.

[86] Whether Deka's claim could have been limited to less than £28 million would have depended upon whether Deka would have either (i) agreed to the surrender of the leases and proceeded with the sale of the Ark for £47 million, accepting that its claim in the liquidation would be limited to the lease liabilities only up to the date of sale; or (ii) agreed to an anti-embarrassment clause, which would have had the same effect. The court required to consider to what extent the combination of the sale price and the claim in the liquidation would have compensated Deka for the assets it relinquished: that would have been crucial to Deka's decision making but the court had heard no evidence on it. This was not a typical liquidation. There was a prospect of a substantial dividend. That might well have informed Deka's view in the event that its claim was not agreed; so too would its ability to sell the property for full value. It was unlikely that £47 million represented the true value of the property. There was no clear evidence from which it could be inferred that Deka would, absent an agreement of its claim, have sold the property when it did for £47 million, at the same time agreeing to a surrender of the lease with a limitation on what it could recover, nor any clear evidence from which it could be inferred that Deka would have accepted an anti-

embarrassment clause. There was a live question as to whether the pursuer had discharged the onus of showing there was a real and substantial chance of success on this issue and even if the pursuer had, the lack of evidence militated in favour of the low chance of success.

Submissions for the pursuer

[87] The pursuer submitted that its case in the section 212 Note was that Deka had sold the Ark for around £47,000,000 and so their future rental claim in the liquidation was overstated. Because of the negligence of the Joint Liquidators, CHIII was bound to make payment to Deka of a sum which in material respects was not a valid claim. The correct counterfactual was that the Joint Liquidators were not negligent. The evidential burden on the pursuer had been discharged and if the defender wished to challenge this it was up to them to lead evidence.

Analysis

[88] In the section 212 Note, the pursuer as Noter addressed the counterfactual of what would have happened had Deka not entered into the Deka Compromise Agreement. The Noter offered to prove the following averments:

> "Shortly after the agreed surrender of the Leases, and having obtained vacant possession of the Ark, Deka in March 2006 sold the Ark for around £47,000,000. In so doing, after having their claim in the liquidation agreed at the sum of around £28,000,000 regardless of the period for which the Ark might actually remain unsold or unoccupied, they secured a sizable windfall (paragraph 4.4.)
>
> At the time at which the respondents agreed to accept Deka's claim in the liquidation in the sum of around £28,000,000, the Company had no assets. Had the respondents not agreed to the surrender of the Leases on those terms, Deka would have been faced with a choice between (i) taking steps to terminate the Leases itself in order to obtain vacant possession of the Ark for the purposes of its sale or with a view to letting it to new tenants; or (ii) allowing the Ark to remain unoccupied for a period of five years until the Company exercised its break option, in circumstances where the rent would remain unpaid throughout that period and the Company had no

> assets from which any rent or other payments due under the Leases could be recovered. It is believed and averred that Deka would itself have terminated the Leases in those circumstances." (paragraph 4.5)

[89] In submissions counsel for the pursuer clarified that the windfall was an overstated claim for future rental.

[90] The Noter sets out factual averments from which it infers (" believes and avers") that had the Deka Compromise Agreement not been entered into, Deka would have terminated the leases of the Ark in order to sell with vacant possession or let to new tenants.

[91] In their Answers to the section 212 Note, the Joint Liquidators did not make any averments that Deka would not have entered into the Deka Compromise Agreement, nor as to what Deka would have done had the Deka Compromise Agreement not been entered into.

[92] No evidence was led before me by the defender from Deka to seek to displace the inference drawn by the Noter, and there was nothing to suggest that the Joint Liquidators would have led evidence from Deka personnel at a substantive proof in the section 212 Note, nor what any such evidence would have been.

[93] In my opinion the inference which the defender sought to draw in its averments in the section 212 Note was a reasonable one on the facts which it averred. It would then have been up to the Joint Liquidators to demonstrate that the inference should not be drawn and also that Deka would not have entered into the Deka Compromise Agreement. In their averments in their Answers to the section 212 Note the Joint Liquidators limited themselves to disputing the financial position of CHIII at the time of the entering in of the Deka Compromise Agreement. Counsel for the defender placed great emphasis on what was said to be a failure in the current case to prove the actual value of the Ark, but in my view that is neither here nor there as the issue for me is not what has been proved in the current case but

the loss of a chance in the section 212 Note. If the Joint Liquidators had focussed on the valuation point in their answers to the section 212 Note, or indeed had adjusted prior to proof in the section 212 Note to give notice that they were putting the valuation squarely in issue, then it would have been a relatively simple matter for both parties to obtain expert valuations of the Ark to enable the judge in the section 212 Note to resolve the valuation issue. Counsel for the defender made submissions as to what Deka's decision-making position would have been, but in the absence of evidence being led by the defender from Deka these submissions were at best an inference, and at worst speculation.

[94] In my opinion the Noter had reasonable prospects of establishing in the section 212 Note that the Joint Liquidators would have reached an agreement with Deka limiting the latter's claim in the liquidation to a sum less than £28 million. Counsel for the defender submitted that it was possible that Deka would not have sold for £47 million when it did had the Joint Liquidators not agreed to its claim in the liquidation. I acknowledge that is a possibility, but on balance in my view the Noter nonetheless had reasonable prospects of success on that point. Counsel for the defender also submitted that it was possible that Deka would not have agreed to an "anti-embarrassment clause" which had the effect of limiting the amount of Deka's claim to their actual loss. In my view this possibility would have to be taken into account by the judge in the section 212 Note, but given the lack of pleading by, or evidence from, the Joint Liquidators to that effect then the Noter would still have had reasonable prospects of success.

What were the prospects of the pursuer establishing that had the claim by Deka in the liquidation been limited, then there would have been a surplus available to the pursuer as a result of the settlement of the *Vivendi* proceedings?

Submissions for the pursuer

[95] Senior Counsel for the pursuer submitted that the various issues about unlawful financial assistance and the Vivendi proceedings were irrelevant, speculative and without merit. They were not raised at any time in the section 212 Note. They would never have featured in the section 212 Note. The evidence lacked all substance.

[96] The counterfactual as to a lower settlement by Vivendi was irrelevant. The purpose of counterfactuals in the law of damages is to help the court consider whether the "but for" test of causation is met (*McGregor* para 8-003). The problem with the lower settlement counterfactual was it proceeded on the hypothesis that the negligence in the section 212 Note never happened, but if that premise is assumed, then the section 212 Note itself would never had happened. The law places reasonable bounds on causation principles (*Liesbosch* v SS *Edison* [1933] AC 449 at p460). On the evidence, the counterfactual would never have happened. The whole line of argument was periled on Mr Pike's statement that under no circumstances was Vivendi agreeable to pay more than a sum equivalent to the value of the creditor's claims because the key players within Vivendi were furious with Messrs Richards Bloch and Harrod: Counsel invited the court to reject that evidence.

[97] Further, in relation to the counterfactual that there would have been no settlement of the Vivendi proceedings, the claims by CHIII against Vivendi in the Vivendi proceedings and the Part 20 claim against the pursuer were not identical, so the basic premise of the no settlement counterfactual was not self-evident. How the Vivendi proceedings would ultimately have resolved if they had proceeded was a matter of utter conjecture.

[98] The counterfactual that the Joint Liquidators would have challenged the pursuer's status as a contributor in collateral proceedings was irrelevant and illogical. It proceeded on the hypothesis that the pursuer succeeded in the section 212 Note and was set to receive a distribution. It raised matters *res inter alios acta* in any question between the pursuer and the defender. The usual situation in which collateral actions by third parties are relevant to an assessment of damages was where the party's loss had been avoided because of a third party's actions (*Swynson Ltd* v *Lowick Rose LLP* [2018] AC 313, *Linden Gardens Trust Ltd* v *Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, *Gardner* v *Marsh & Parsons* [1997] 1 WLR 489, p503). There was no authority for the argument being advanced here of a hypothetical (unlike an actual) collateral action by a third party that might hypothetically have affected the financial position of the pursuer such as to suggest there was no loss. In any event the financial assistance loan pre-dated the agreement with Deka, the Vivendi proceedings and the section 212 claim. The collateral counterfactual was also unlikely to have succeeded. The financial assistance loan did not bear to be repayable by the pursuer until 20 January 2019. There was a dispute as to who the correct party was who was entitled to the financial assistance loan. There were obvious and reasonable grounds for the pursuer to defend the proceedings and argue that the financial assistance loan was void due to illegality. The pursuer had a good defence that such a claim was barred as an abuse of process. There was no other meaningful action that might be brought against the pursuer.

Submissions for the defender

[99] Counsel for the defender submitted that even if the pursuer had been able to establish a breach of duty on the part of the joint liquidators in the section 212 Note, it would have been necessary for it to prove loss. There was no chance, or only a negligible chance, of

the pursuer so proving. The evidence demonstrated that 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 and such an offer would have been accepted by the joint liquidators. Consequently, there was no, or only a negligible chance, that a surplus in CHIII would have been available to the pursuer even if the claim by Deka had been agreed at a lower figure. Had a corresponding offer been made by Vivendi, it would have been virtually certain that the Joint Liquidators would have accepted that offer: the return to creditors would have been the same, Deka would not have continued to fund the litigation, there would have been no source of funding, the pursuer would not have benefitted from the litigation continuing, and a lower offer would still have been a very significant offer.

Analysis

[100] The defender founds on the following defence to the section 212 Note. Vivendi was of the view that a deceit had been perpetrated on them by Mr Richards and Mr Harrod and as a result Vivendi had no intention whatsoever of reaching a settlement of the Vivendi Proceedings with the Joint Liquidators that would result in any money making its way to Mr Richards or Mr Harrod or the shareholders of either CHIII or the pursuer. The circumstances of the purchase of CHIII, alongside the findings of Newey J, demonstrated that Vivendi had good objective reasons for concluding that the pursuer and those behind it had perpetrated a deceit. Accordingly, had Deka's claim in the liquidation been lower, that would not have resulted in a surplus in the liquidation as the Vivendi Proceedings would have been settled at a lower sum so that no such surplus existed.

[101] It is important to bear in mind that my role is to assess the loss of a chance of success in the section 212 Note. So in considering that defence, the question for me is whether, and to what extent, the defence would have affected the Noter's chances of success against the Joint Liquidators in the section 212 Note.

[102] There are two difficulties with the defence.

[103] The first difficulty is that the defence was not pled by the Joint Liquidators as a defence in the section 212 Note. There was no prospect of the section 212 Note being refused on the basis of a defence which was not pled.

[104] Having said that, there is a possibility that the Joint Liquidators might, with the permission of the court, have added the defence to its pleadings after the preliminary proof on prescription. That possibility is not a high one. The answers were not skeletal but set out a detailed and considered response which did not include this defence. The evidence of Mr Pike, who was acting for Vivendi (as indemnifier) in the background of the section 212 Note and whose idea it had been that the Joint Liquidators should seek caution, was that the defence had not occurred to him.

[105] The second difficulty would have arisen if the Joint Liquidators had been allowed to introduce that defence at a later stage. If so, the judge hearing a substantive proof in the section 212 Note would have required to consider as a matter of fact whether the Vivendi Proceedings would have been settled not on the basis on which they had been settled in the Vivendi Settlement, but on a different basis which would have meant that there would have been no surplus available after satisfaction of the creditors. The second difficulty is the weakness of the evidence which the pursuer relies on in relation to that matter of fact.

[106] In the proceedings before me, no evidence was led from anyone from Vivendi about their attitude to the settlement negotiations in the Vivendi Proceedings. There is no reason to

believe that any evidence from Vivendi personnel would have been led before the judge in the section 212 Note. Therefore, I, and the judge in the section 212 proceedings have to proceed, in the absence of direct evidence from Vivendi witnesses, on the basis of hearsay and inference as to their state of mind and what they would have done.

[107] Hearsay evidence about the attitude of Vivendi to the settlement negotiations was led before me from Mr Nicholas Pike. Mr Pike was the English solicitor acting for Vivendi in the Vivendi Proceedings.

[108] The pursuer objected to various passages of the witness statement of Mr Pike on the ground of solicitor-client privilege.

[109] Solicitor-client privilege is a fundamental aspect of our legal system. It enables clients to have full and frank discussions with their legal advisers. In view of the importance of privilege to the proper working of the legal system, the court should ensure that it is complied with, not only in cases where a solicitor or client is party to the proceedings, but also in cases, such as this one, where they are not.

[110] Solicitor-client privilege is owed by a solicitor to the client, and may be waived by the client. Before hearing the evidence of Mr Pike, I invited his client Vivendi to make representations to me in respect of professional privilege. Vivendi's current solicitors (not being Mr Pike or his firm) confirmed by email that Vivendi (1) waived privilege only to the extent of the specific statements in Mr Pike's witness statement and (2) did not agree to any wider waiving of privilege, including the proposed cross-examination of Mr Pike. That position concerned me as it seemed to be an attempt to partially waive privilege in a manner that amounted to cherry picking. My concerns were intimated to Vivendi's solicitors who confirmed by email that Vivendi did not wish to make any representations in relation to professional privilege and had nothing further to add. In the light of Vivendi's response, I

allowed the oral evidence of Mr Pike, including cross-examination, to proceed under reservation of competency and relevancy in relation to privilege, and directed Mr Pike to answer the questions put to him.

[111] A client may not waive privilege in such a partial and selective manner that unfairness or misunderstanding may result: in such circumstances the client is taken to have waived privilege (*Paragon Finance Plc & ors* v *Freshfields* [1999] 1 WLR 1183, p1188 (Lord Bingham of Cornhill); *Scottish Lion Insurance Co Limited* v *Goodrich Corporation* 2011 SC 534, paragraph 48 (Lord Reed, delivering Opinion of the Court). Vivendi seeks to waive privilege in relation to Mr Pike's examination in chief but not waive it in relation to his cross-examination. That is a clear example of an attempt to waive privilege in such a partial and selective manner that unfairness would result. There are few things that would be more unfair in a proof than for privilege to be waived so as to allow examination in chief but maintained so as to prevent cross-examination. The fairness of proofs and trials in our adversarial system depends on the right to cross-examine on the evidence. Vivendi must be taken to have waived privilege generally and not just in relation to examination in chief. The objection is repelled.

[112] Mr Pike's evidence was his best recollection of events that occurred some 12 or 13 years before the proof. He no longer worked for the same solicitors firm and did not have access to the file. His evidence was that reasonable steps were taken to investigate the true value of the creditor claims and then an offer was made to the Joint Liquidators to settle the proceedings at a sum equivalent to the creditors' claims plus costs. He agreed the deal in principle with the Joint Liquidators but was not directly involved in the negotiations of the final figure. Vivendi considered that they had been induced into the sale of CHIII to Mr Richards on the basis of a deceit perpetrated by Mr Harrod and Mr Richards. Their

belief that Mr Harrod and Mr Richards had colluded in a plan to syphon off the £15 million drove their entire attitude towards their dealing with the pursuer and Mr Harrod. Mr Pike's direct instructions were that under no circumstances was Vivendi agreeable to pay anything more than a sum equivalent to the value of the creditors' claims because the key players within Vivendi were simply furious with Messrs Richards, Bloch and Harrod. In relation to the section 212 Note, the Joint Liquidators sought to rely on the indemnity (granted as part of the Vivendi Settlement) which required Vivendi to pay the Joint Liquidators defence costs and any sum awarded to the Noter. In cross-examination Mr Pike accepted that the people in Vivendi and Vivendi as a corporate entity had a direct interest in blaming Mr Richards for the collapse of CHIII and an obvious motive for portraying a narrative that they felt that they had been deceived.

[113] Mr Caven's evidence was that before they reached the settlement agreement, Vivendi asked the Joint Liquidators to share details of the creditors' claims. There was a willingness on Vivendi's part to recompense the creditors for their losses, but it was clear that Vivendi had no intention of offering a settlement that would have left any surplus over for distribution to shareholders. Given the considerable costs and risks of litigation a lower settlement sum would still have represented an attractive offer if the result of it remained that it would have enabled the Joint Liquidators to settle all creditor claims at 100p in the £. He did not settle the Vivendi proceedings solely with reference to creditor claims, but also weighed up the £47 million offered against an uncertain sum, if anything from costly litigation: it was a question of risk versus reward and he decided to take the settlement offered. In relation to the section 212 Proceedings, Vivendi were clear that they did not want to give a penny to the Noter. There was absolutely no appetite to settle the section 212 Note on an economic basis.

[114] In my view the Joint Liquidators would have faced an uphill struggle in persuading the judge in the section 212 Note that, on the evidence, the Note should be refused on the ground of a defence that Vivendi would not have entered into a settlement agreement which resulted in a surplus being available to the shareholder once the creditors had been paid in full. No-one from Vivendi gave evidence in the proof before me, and I have no reason to believe that that would have been any different in the section 212 proof. If they had given evidence in the section 212 proof, I am not a position to assess that evidence as I do not know what it would have been. In assessing that evidence (whatever it may have been) the judge in the section 212 Note would have required to give careful consideration as to whether the evidence of the Vivendi personnel was self-serving in two respects. The first of these respects would have been that Vivendi had a direct interest in the failure of the section 212 Note, as Vivendi was potentially liable to indemnify the Joint Liquidators if the Note succeeded. The second of these respects would have been that the focussing of blame by Vivendi on Mr Richards and Mr Harrod deflects attention from Vivendi's own role in the disposal of the Ark. Vivendi had been in financial difficulty. It had been desperate to dispose of the Ark and the only practicable way of doing so was to Mr Richards. The scheme for disposing of the Ark was devised by Vivendi and their advisers PWC. The scheme involved Vivendi getting rid of a troublesome building and stripping cash amounting to almost £1 billion out of CHIII in the process. The scheme devised by Vivendi and PCW involved CHIII giving financial assistance for the purchase of shares. The accountants report in relation to the financial assistance was granted by Vivendi's advisers PCW. Given the close involvement of Vivendi in structuring the scheme and the financial assistance, and the benefits which Vivendi received from the scheme, a judge might well

have taken the view that it was too simplistic to ascribe the blame wholly on Mr Richards and Mr Harrod and not partly on Vivendi.

[115] In the absence of evidence from Vivendi personnel, the evidence from Mr Pike and Mr Craven as to the Vivendi negotiating position is not conclusive. All that that evidence establishes is that Vivendi were putting forward to their solicitor and to the other side in the Vivendi Proceedings a particular negotiating position. It does not establish that Vivendi would not have departed from that negotiating position if that had been necessary in order to achieve a settlement. In the settlement negotiations, the Vivendi personnel would require to act in the best interests of Vivendi and would require to consider the strength of their case, the costs of continuing with the Vivendi litigation and the potential downside if they lost. It would not have been appropriate for them to disregard all of that, and make a decision not to settle but to proceed with the action, because of a personal grudge against Mr Richards and Mr Harrod.

[116] For these reasons, in my opinion the chances of this defence being successful in the section 212 Note were nil or negligible. I find that the pursuer had reasonable prospects of establishing that had the claim by Deka been limited, there would have been a surplus available to the pursuer as a result of the Vivendi Settlement.

Discretion of the court not to make an order in section 212 proceedings

[117] There is one final matter to consider in considering the loss of a chance of success in the section 212 Note. Section 212(3) provides that the court "may" compel the liquidator to make a payment to the company by way of compensation. Counsel for the defender submitted that even if the court determined there had been a breach of duty, it had a discretion under section 212(3) as to whether to make any order at all. A situation where a

court might decline to make an order was where to do so would unjustly enrich the creditors (eg re *Derek Randall Enterprises Ltd* [1990] BCC 749). It was entirely possible, if not likely, that the court would have refrained making any order, or would have limited the amount of any compensation ordered for example by excluding interest.

[118] In my opinion there are no circumstances in respect of the section 212 Note which would have justified the court hearing the section 212 Note to exercise a discretion to refuse to make an order or exclude interest. The case of *Derek Randall* is of no assistance. It does not relate to a situation in which a court has exercised a discretion: the director had returned misappropriated money and the court found that the misfeasance claim failed because there was no loss sustained by reason of it (final paragraphs of opinions of Parker LJ and Stocker LJ). Where a company under the control of a liquidator suffers loss because of the liquidator's breach of duty or misfeasance, the liquidator should bear the cost of his wrongful actions and not be absolved on a discretionary basis from liability to make good that loss. What underlies the suggestion that the section 212 Note would have been refused on a discretionary basis is Vivendi's feeling that Mr Harrod and Mr Richards had acted in a blameworthy manner in respect of the acquisition of the pursuer from the Vivendi group, and that it would be unjust for the pursuer to benefit from their blameworthy actions. However that would not be an adequate reason for refusing to compensate the company for its loss. The situation would have to be looked at in the round. Vivendi itself was party to, and responsible for devising, the scheme to dispose to the pursuer. The scheme was of direct benefit to Vivendi as it enabled Vivendi to dispose of a troublesome building which it was desperate to get rid of while stripping out assets of almost £1 billion from CHIII in the process. If any blame is to be attached in relation to that scheme, then it does not fall only on

Mr Richards and Mr Harrod, and it would be inequitable for the pursuer to be punished for a scheme in which Vivendi was so heavily involved.

[119] Accordingly I find that the chances of a judge hearing the section 212 Note refusing on a discretionary equitable basis to compel payment by the Joint Liquidators to the Noter are nil. That applies to payment of both the sum sought by way of reparation and the sum sought by way of interest.

Assessment of the percentage

[120] For all the above reasons, I find that the Noter had reasonable prospects of succeeding in the section 212 Note. In assessing the loss of a chance, I now require to ascribe a percentage to that chance.

[121] In assessing the loss of a chance of succeeding in the section 212 Note, it must be borne in mind that the defender in this action is the solicitors firm which was acting for the pursuer in the section 212 Note. There are obvious difficulties for a solicitors firm if having advised a client to proceed with litigation, it then seeks to defend a negligence claim relating to its conduct of the litigation by saying that that litigation would not have succeeded. As Simon Brown LJ said in *Mount* v *Barker Austin*:

> "The evidential burden lies on the defendants to show that despite their having acted for the plaintiff in the litigation and charged for their services, that litigation was of no value to their client, so that he lost nothing by their negligence in causing it to be struck out. Plainly the burden is heavier in a case where the solicitors have failed to advise their client of the hopelessness of his position and heavier still where, as here, two firms of solicitors successively have failed to do so. If, of course, the solicitors have advised their client with regard to the merits of his claim (or defence) such advice is likely to be highly relevant."

If the prospects of success in the section 212 Note were as hopeless as the defender makes out in this action, then the defender should have advised the Noter not to proceed with the

note. That did not happen, and instead the Noter proceeded with the Note on legal advice from counsel that there was a reasonable prospect of success.

[122] The first question raised by the defender in submissions was prescription. If the pursuer's case had fallen at that hurdle, then this action would have failed, regardless of the strength of the substantive case in the section 212 Note. However, as I have found as a matter of law the obligation on the Joint Liquidators to make reparation to CHIII had not prescribed, the pursuer has overcome this hurdle.

[123] The next question was funding. Again, if the pursuer's case had fallen at that hurdle, then this action would have failed. However I have found the Noter would have been able to self-fund the section 212 Note until resolution of the preliminary proof on prescription, and that there was very high chance amounting to a virtual certainty that thereafter the Noter would have been funded by Woodsford. In my opinion the pursuer had a 100% chance of succeeding on the funding point.

[124] The remaining questions identified by the defender were the prospects of establishing breach of duty, the Joint Liquidators reaching an agreement with Deka and the availability of a surplus. In my opinion it is not appropriate to proceed by the mathematical approach of ascribing a percentage to each of these questions and then applying percentage upon percentage (*Tom Hoskins plc* v *EMW Law (AFirm)* [2010] ECC 20 at paragraph [133]; *Joyce* v *Bowman Law* [2010] PNLR 22, *Harrison* v *Bloom Camillin* [2000] Lloyds Rep PN 89). These questions are not independent contingencies but are all facets of the same contingency ie whether the Noter would have succeeded on the substance of the section 212 Note. Another facet of that same issue is the question of whether the Note would have been refused on a discretionary basis. Counsel for the pursuer submitted that there was a substantial chance of success in the section 212 Note, and put it at 66% or greater. Counsel

for the defender accepted that the pursuer had proved that there was a real and substantial chance of the pursuer establishing breach of duty by the Joint Liquidators and put the pursuer's chance of success on that point at 50%. I put it higher than that: the Joint Liquidators entered into an agreement which guaranteed Deka's future losses without making any provision for mitigation. I have assessed the chances of success in relation to the reaching of an agreement with Deka and the availability of a surplus as reasonable, but acknowledged the alternative possibilities. I have found that the chances of a judge refusing the section 212 Note on a discretionary equitable basis are nil. Taking all of that into account, and applying a broad brush, I find that the chances of the Noter being successful in the section 212 Note are 65%.

[125] By way of a cross check, I note that this percentage is broadly in line with the legal advice given to the Noter by the defender at the time of the section 212 Notice. In March 2016 the Noter's senior counsel advised that there was a reasonable prospect of success, which he defined as 60% or more, and the defender passed that advice on to the Noter without disagreeing with it.

Quantum

Submissions for the pursuer

[126] Counsel submitted that the amount sought in the 212 Note was £22,284,981.50 plus interest. That sum comprised £28,955,293.03 (the principal sum paid by the Joint Liquidators to Deka) minus £6,670,312.47 (the true amount of Deka's losses). Nothing should be allowed for dilapidations as the dilapidations were never undertaken (*Gatsby Retail Ltd* v *Edinburgh Woollen Mill Ltd* 2020 SLT 122, paragraph 35; *Grove Investments Ltd* v *Cape Building Projects Ltd* 2014 HOUS LR 35, para [18]). The notional date of any proof or resolution of the

section 212 claim was July 2018. Interest to that date at the rate of 8% per annum amounted to £13,519,961.87. This gave the total value of the section 212 Note as £35,804,942.37 (£22,284,980.50 for the principal sum, £13,519,961.87 for interest).

Submissions for the defender

[127] Counsel for the defender submitted that arithmetically interest at 8% per annum from 31 December 2010 to 5 May 2017 amounted to £11,323,230. More fundamentally, by 31 December 2010 statutory interest at 15% had accrued on the creditors' claims (section 189(2) of the *Insolvency Act 1986*). Even if Deka's claim had been limited to £6.67 million there would still have existed creditors' claims totalling £18,155,491, statutory interest on which from the date of liquidation until distribution would have amounted to around £14,978,280. That sum would fall to be paid prior to any distribution to the pursuer, leaving £13,866,229 available from the Vivendi settlement. The total distribution to creditors was £44,326,243.27, meaning £2,673,757 was otherwise spent and fell to be deducted also, leaving £11,192,427 available to the contributory ie the pursuer.

[128] Further, the pursuer's quantification of the loss took no account of Deka's claim for dilapidations which totalled £1,198,166. Dilapidations should have been taken into account considering the total creditors' claims, which would then total £19,353,657. Statutory interest on that is £15,966,757 leaving £12,877,742 payable from the Vivendi settlement. Deducting costs etc £2,673,757 would leave a potential of £10,203,985 available to contributory.

[129] A further reason for excluding interest was that the pursuer chose to wait until 2016 before raising proceedings. At the very least the court would have awarded interest not at 8% but at 4% (*Farstad Supply AS* v *Enviroco Ltd* 2013 SC 302).

[130] Counsel further submitted, in respect of the legal fees claimed, that the admitted breach did not cause the pursuer to incur certain of these fees. Certain work would always have been required to pursue the Joint Liquidators. That included work done on the advice of senior counsel relative to an attempt to revisit the award of caution which was not insisted in, and expenses conceded therefore. Certain invoices related to an entirely separate litigation. The fees claimed also include fees for the current litigation.

[131] The pursuer had failed to prove that it sustained loss as third concluded for. It also failed to prove its averred loss in respect of the sum second concluded for, and only £4,170.60 was actually paid.

Analysis

[132] In this action there were three separate monetary conclusions, and I deal with them in turn.

[133] In this section of my opinion, I consider the amounts to which the percentage is to be applied. In the next section I shall go on to apply the percentage to them and determine the sums to be awarded in this action.

First conclusion: £35,169,133.90 with interest at 8% from 5 May 2017

[134] The liquidation of CHIII was an unusual one in that there were sufficient assets for the creditors to be paid in full in respect of their claims, and in part in respect of statutory interest. If the Noter had succeeded in the section 212 Note, there would be a surplus to return to the pursuer as sole shareholder.

[135] In this conclusion the pursuer seeks to recover the amount of the surplus which would have been distributed to it, plus interest. It avers that as at 5 May 2017 (being the

date of refusal of the section 212 Note) that sum was £35,169,133.90. The figure of £35,169,133.90 which it seeks to recover comprises £22,324,980.56 in respect of principal and the remainder in respect of interest thereon at 8% from 31 December 2010 (the date of distribution of the assets of CHIII by the Joint Liquidators) to 5 May 2017. The pursuer then seeks interest at 8% on the £35,169,133.90 from 5 May 2017 until payment. In submissions the pursuer proceeded on the basis that the interest component of the £35,169,133.90 was to July 2018 (the likely date of resolution of the section 212 Note). However in my view the appropriate end date for the interest component is 5 May 2017. This is because, firstly, the pursuer's averments state that the end date is 5 May 2017: article 0 of condescendence states that as at 5 May 2017, the sum was £35,169,133.90 inclusive of interest. Secondly the conclusion seeks interest on the figure of £35,169,133.90 from 5 May 2017: if the interest component within the £35,169,133.90 is calculated to an end date of July 2018 rather than 5 May 2017 there would be double counting of interest for the period between these dates.

[136] In the section 212 Note the Noter sought an order for the Joint Liquidators to pay £22,324,980.56 to CHIII. However it must be borne in mind that it does not necessarily follow that payment of that sum to CHIII would have resulted in distribution of the whole of that sum to the Noter as shareholder. That sum would have been available to meet CHIII's liabilities to its creditors and would only be available for distribution to the shareholder to the extent that any of it was left over once the creditors were paid in full, both in respect of principal and statutory interest.

[137] Deka's claim in the liquidation included a dilapidations claim for £1,198,166. I accept Mr Harrod's evidence that dilapidations were never undertaken, no contrary evidence having been led. The question of whether a landlord is entitled to payment for dilapidations which are not carried out depends on the wording of the particular lease (*Drum Income Plus*

Ltd v *LS Buchanan Ltd* 2020 SLT 265 at para [14], @SIPP *Pension Trustees* v *Insight Travel Services Ltd* 2016 SC 243; *Tonsley (Strathclyde) Ltd* v *Scottish Enterprise* [2016] CSOH 138, *Grove Investments Ltd* v *Cape Building Projects Ltd; Gatsby Retail Ltd* v *Edinburgh Woollen Mill Ltd* at para [35]). In the current case the relevant lease was not put before me, and neither party made submissions on its wording as to dilapidations. Given that the lease was of premises in England, that might have involved leading evidence of the English law of leases and dilapidations. On the evidence before me, it cannot be said that Deka had a valid dilapidations claim which would have had to be satisfied prior to disbursement of surplus to the pursuer as contributory. In these circumstances, I find that the amount to be disbursed to the contributory would not have been reduced by the amount of the dilapidations claim.

[138] I do however find that the amount to be disbursed would have been reduced by the full amount of statutory interest due to the creditors. Creditors' claims and interest require to be met in full before any disbursement to contributories (section 189(2) of the Insolvency Act 1986).

[139] Applying the foregoing, the amount due in terms of the first conclusion can be calculated as follows. The assets of CHIII would have been increased by the sum of £22,324,980.56 paid to it by the Joint Liquidators under the section 212 Note. Deka's claim would have been reduced to £6,670,312.47 and the total creditors' claims to £18,155,491. However not all of the sum paid to CHIII by the Joint Liquidators would flow through to the pursuer. Firstly, the creditors would be entitled to statutory interest on their claims from the date of liquidation (June 2005) until distribution (December 2010). That would have amounted to £14,978,280, leaving £13,866,229 available. Secondly, the costs of the liquidation of £2,673,757 would have had to be met, so the sum distributed to the

contributory would have to be reduced by that amount. That leaves the principal sum due to the pursuer as contributory as being £11,192,472.

[140] In the section 212 Note interest was sought on the principal at a rate of 8% from 30 December 2010. The defender submits that the court would not have awarded interest because of the delay in raising proceedings. That submission was not developed in detail and I was not referred to any authority as to the circumstances in which the court would be justified in refusing interest on that ground. In my opinion it would not be appropriate for the recompense due to a company from a liquidator to be reduced because of the time which had elapsed between the misfeasance or breach of duty and the bringing of a section 212 Note. The company is entitled to be compensated for the wrong done to it, and the compensation should not be reduced by denying the company interest for part of the period when the liquidator is in control of the company.

[141] However, in my opinion there is a very high chance, amounting to virtual certainty, that the judge in the section 212 Note would have found that interest at 8% from 30 December 2010 would have substantially overcompensated CHIII for the damage suffered by it, due to the low interest rates which prevailed during that period (*Farstad*, *McMahon* v *Grant Thornton* UK LLP 2020 SLT 908 at para [134]), and accordingly would have awarded interest at the rate of 4%.

[142] Accordingly I find that the figure to which the percentage is to be applied in respect of the first conclusion is £14,032,472. That figure represents the principal sum of £11,192,472 plus a sum of £2,840,000 representing (on a broad brush basis) interest thereon at 4% on that sum from 30 December 2010 to 5 May 2017.

[143] Interest is sought on that sum from 5 May 2017 at 8%. The low interest financial landscape which influenced *Farstad* is no longer with us, and interest rates have increased

considerably in recent years. In recognition of that, I award interest at 4% from the 5 May 2017 to the date of citation, and at 8% from the date of citation.

Second conclusion: £228,435.31 with interest at 8% from the date of citation until payment

[144] The pursuer sought to mitigate its loss by appealing the dismissal of the section 212 Note to the Inner House and thereafter seeking leave to appeal to the Supreme Court. The expenses of these procedures were awarded against the pursuer and were taxed (ie assessed) by the Auditor of the Court of Session at £228,435.31 which is the amount sought in this conclusion. The defender's position is that that sum is not recoverable as the pursuer has not yet paid it. In my opinion that is no defence to payment by the defender in this action. Although the pursuer has not yet paid that sum, it is under a legal obligation to do so. The pursuer has suffered a loss in that it is liable to pay that amount, and whether it makes payment before or after the proof in this action is just a timing difference which does not affect its liability. Accordingly I find that the figure to which the percentage is to be applied in respect of the second conclusion is £228,435.31.

[145] Interest is sought from the date of citation. In view of the increase in interest rates since the decision in *Farstad*, I shall award that interest at 8%.

Third conclusion: £253,358.47 with interest at 8% from 5 May 2017 until payment

[146] The pursuer seeks to recover its costs incurred in the section 212 Note. A detailed calculation has been provided totalling £253,358.47. In principle the costs incurred in the failed section 212 Note are recoverable in this action. However, the defender takes issue with particular items in that calculation. Firstly the defender objects to the Noter's invoices for the section 212 Note for the period prior to the ordering of caution, on the ground that

that work was not caused by the breach of the defender's duty. They objected to work done relative to an attempt to revisit the award of caution and the expenses conceded therefor. In my opinion these items are recoverable in this litigation. The section 212 Note was refused as a result of the defender's admitted negligence in not timeously lodging caution. The loss arising out of that is the entire cost of the section 212 Note. Secondly, the defender objects to costs of £3,600 relating to defending a separate action by the current defender against the pursuer for its fees. In my opinion that objection is justified. It is a separate action. Thirdly the defender objects to costs incurred for expert reports in the current case totalling £3,600. That objection is justified. Costs incurred in the current action fall to be dealt with in an award of expenses in the current action, not as damages. Finally the defender objects to counsel's fees amounting to £72,000 in an invoice dated 26/10/20. Mr Harrod's evidence was that these fees were partly incurred in relation to the appeals in the section 212 Note and partly in relation to the current action. I am not aware of the breakdown in respect of the 26/1/20 invoice between the section 212 Note and the current action as the breakdown was not put to Mr Harrod in evidence. To the extent that the invoice applies to the current action, that will be dealt with as part of any award of expenses in this case and will not be recoverable. As there is no specification or vouching in this action of which particular elements of the invoice relate to the section 212 Note, that element is also not recoverable and the whole £72,000 falls to be deducted from the sum sought in this conclusion. Accordingly I will deduct £3,600, £3,600 and £72,000 from the amount concluded for of £253,358.47. That gives £174,158.47, which is the figure to which the percentage is to be applied.

[147] I shall award interest at 4% from 5 May 2017 to date of citation and 8% thereafter.

Application of the percentage chance of success to quantum.

First conclusion

[148] Applying the percentage of 65% to the figure of £14,032,472 gives a figure of £9,121,106. I will round that to £9,122,000. I shall grant decree in terms of the first conclusion for payment of £9,122,000 with interest at 4% from the 5 May 2017 to the date of citation, and at 8% from the date of citation.

Second conclusion

[149] Applying the percentage of 65% to the figure of £228,435.31 gives a figure of £148,482.95. I will round that to £148,500. I shall grant decree in terms of the second conclusion for payment of £148,500 with interest at 8% from the date of citation.

Third conclusion

[150] Applying the percentage of 65% to the figure of £174,158.47 gives a figure of £113,203. I will round that to £113,200. I shall grant decree in terms of the third conclusion for payment of £113,200 with interest at 4% from the 5 May 2017 to the date of citation, and at 8% from the date of citation.

Order

[151] I shall sustain the pursuer' first to third pleas-in-law, repel the defenders' second and third pleas-in-law and grant decree in the amounts referred to above. I reserve all question of expenses in the meantime.