



Neutral Citation Number: [2026] EWHC 1228 (Ch)

Case No: CR-2023-000648

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

IN THE MATTER OF THE FOOD RETAILER OPERATIONS LIMITED (IN
LIQUIDATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

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

Date: 21/05/2026

Before:

THE HONOURABLE MR JUSTICE CAWSON

Between:

(1) MALCOLM COHEN
(2) SHANE CROOKS
(As Joint Liquidators of The Food Retailer
Operations Limited)

Applicants

- and -

(1) CO-OPERATIVE GROUP LIMITED
(2) CO-OPERATIVE GROUP FOOD LIMITED
(3) CO-OPERATIVE FOODSTORES LIMITED
(4) ROCHPION PROPERTIES (4) LLP

Respondents

Tom Smith KC, Joseph Curl KC, Robert Amey and Imogen Beltrami (instructed by
Shoosmiths LLP) for the Applicants

James Potts KC, Andrew Short KC, Matthew Parfitt, Jack Rivett and Conor McLaughlin
(instructed by Addleshaw Goddard LLP) for the Respondents

Hearing dates: 16, 19-23, 26-28, 30 January, 2-6, 9-12, 24-27 February 2026

Approved Judgment

This judgment was handed down remotely at 10.30am on 21 May 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

The Hon. Mr Justice Cawson:

Contents

A.	<i>Introduction</i>	5
B.	<i>Legal Entities and Persons Involved</i>	6
C.	<i>Witnesses</i>	11
C.I	<i>Witnesses of fact</i>	11
C.II	<i>Expert Evidence</i>	14
D.	<i>Key factual background</i>	16
D.I	<i>History of Somerfield Stores Limited</i>	16
D.II	<i>History of tCG</i>	16
D.III	<i>Co-operative Group acquisition of SSL</i>	17
D.IV	<i>Co-op banking crisis and broader remedial steps</i>	18
D.V	<i>Conception of Project Chicago</i>	19
D.VI	<i>Engagement with the SSL Directors</i>	23
D.VII	<i>Negotiation and approval of Project Chicago proposal</i>	26
D.VIII	<i>Implementation of Project Chicago “Phase 1” restructure</i>	30
D.IX	<i>Completion of Chicago “Phase 2” – the sale of SSL</i>	38
D.X	<i>Post-sale events</i>	42
E.	<i>Relevant provisions of the IA 1986</i>	43
F.	<i>An outline of the Joint Liquidators’ case</i>	45
F.I	<i>“At a relevant time”</i>	45
F.II	<i>Transaction at an undervalue</i>	45
F.III	<i>Preference</i>	48
G.	<i>An outline of the Respondents’ case</i>	49
G.I	<i>Solvency</i>	49
G.II	<i>Transaction at an undervalue</i>	49
G.III	<i>Preference</i>	50
H.	<i>Issues to be decided</i>	51
I.	<i>The Transaction</i>	52
I.I	<i>Introduction</i>	52
I.II	<i>Joint Liquidators’ case as to the Transaction</i>	52
I.III	<i>The Respondents’ case as to the Transaction</i>	56
I.IV	<i>Determination of the scope of the “Transaction” issue</i>	61
J.	<i>Was there consideration for the Withdrawals of Share Capital?</i>	67
J.I	<i>Introduction</i>	67
J.II	<i>The respective parties’ positions</i>	68

<i>J.III Registered Societies</i>	70
<i>J.IV SSL's Rules</i>	75
<i>J.V Authorities</i>	76
<i>J.VI Determination</i>	81
K. Insolvency at the time of or in consequence of the transaction	86
<i>K.I Legal Principles</i>	86
<i>K.II The issues in relation to insolvency in the present case</i>	90
<i>K.III How prospective liabilities relating to the C Properties were accounted for</i>	94
<i>K.IV The correct approach to balance sheet insolvency in the present case</i>	98
<i>K.V Present asset/valid claim</i>	100
<i>K.VI Proper approach to the onerous lease liabilities</i>	103
<i>K. VII Conclusion on insolvency</i>	110
L. Whether the transaction was at an undervalue?	111
<i>L.I Introduction</i>	111
<i>L.II Principles to be applied regarding valuation of consideration</i>	114
<i>L.III Release of the SSL Pension Scheme and other contingent liabilities</i>	124
<i>L.IV Properties transferred by SSL</i>	136
<i>L.V Equipment transferred by SSL</i>	151
<i>L.VI Conclusion in respect of undervalue</i>	154
M Is the statutory defence under s. 238(5) IA 1986 made out?	156
<i>M.I Introduction</i>	156
<i>M.II Legal principles</i>	156
<i>M.III The Respondents' case</i>	159
<i>M.IV The Joint Liquidators' case</i>	161
<i>M.V The key issues</i>	164
<i>M.VI The Transaction Demand</i>	165
<i>M.VII Conclusion in respect of s. 238(5)(a)</i>	170
<i>M.VIII Conclusion in respect of s. 238(5)(b)</i>	171
N. Preference	177
<i>N.I Introduction</i>	177
<i>N.II Inability to pay debts</i>	179
<i>N.III Preference in fact</i>	180
<i>N.IV Desire to prefer</i>	182
O. Remedy	187
P. Overall conclusion	188

A. Introduction

1. These proceedings concern an application dated 3 February 2023 (“**the Application**”) whereby Malcolm Cohen and Shane Crooks (“**the Joint Liquidators**”), the joint liquidators of The Food Retailer Operations Limited, seek relief under s. 238, or alternatively s. 239 of the Insolvency Act 1986 (“**IA 1986**”), against the Respondents.
2. At all relevant times prior to 18 March 2016, Food Retailer Operations Limited was known as Somerfield Stores Limited (“**SSL**”). Further, at all times prior to 18 March 2016 and from shortly after its acquisition in 2009 by subsidiaries of Co-operative Group Limited (“**CGL**”), the holding company of the Co-operative group of companies (“**tCG**”), SSL had been a registered society (formerly known as an industrial and provident society).
3. The transaction or transactions sought to be impugned took place in November 2015 in giving effect to a restructuring exercise instigated by tCG known as “*Project Chicago*”. The first phase of the latter included the transfer by SSL to other tCG societies of freehold and leasehold properties and other assets with a stated value of c. £493 million, with such acquisition ultimately being funded by withdrawals of share capital from SSL totalling c. £478 million and a loan account set-off of, as initially intended, c. £15 million. The transfer of assets out of SSL left SSL with a number of onerous leases and other properties that did not fit tCG’s “*True North*” business model. Only 15 months later, on 10 February 2017, SSL entered into administration, and subsequently into liquidation, leaving unsecured creditors estimated by the Joint Liquidators to amount to £73,987,367.34 plus statutory interest, of which £37,126,811.60 comprises landlord claims as at 1 March 2026. The Joint Liquidators’ “best estimate”, as at 1 March 2026, of the deficiency in the liquidation of SSL, including costs and expenses of the liquidation is c. £205 million. The Joint Liquidators have now limited their claim to the amount of the deficiency.
4. The central allegation is that:
 - i) the withdrawals of share capital and/or the wider transaction giving effect to the first phase of Project Chicago involved a transaction at an undervalue (“**TUV**”) within the meaning of s. 238 IA 1986, because there was no consideration for it, and/or a preference in respect of the loan account set-off; or
 - ii) alternatively, the giving effect to the withdrawals of share capital and the loan account set-off amounted to preferences within the meaning of s. 239 IA 1986.
5. For the reasons set out in detail below I consider that the Application should be dismissed. I have ultimately concluded that:
 - i) The TUV claim must fail because I do not consider that the return of capital by SSL to CGL through the withdrawals of share capital was for no consideration within the meaning of s. 238(4)(a). Rather, in my judgment, there was consideration for the same in the monies originally subscribed for the shares in question.

- ii) However, should I be wrong on this latter point, then I consider that the TUV claim would otherwise have succeeded, and I would have awarded a sum representative of the deficiency in the liquidation of SSL pursuant to s. 238(3), the Joint Liquidators having limited their claim to the amount of that deficiency. The Joint Liquidators’ best estimate thereof is £205 million as at 1 March 2026. Absent agreement as to the amount of the deficiency, I will hear submissions at a consequential hearing with regard to the correct figure and/or as to how the same ought to be determined.
 - iii) As to the alternative preference claim that arises if I am wrong on the consideration question, I consider that whilst the other requirements for a preference are established in respect of the Withdrawals of Share Capital, the Respondents have succeeded in rebutting the presumption that SSL was, in respect thereof, influenced by a desire to improve the position of CGF in the event of an insolvent liquidation of SSL.
6. I am grateful to all Counsel concerned, both leading and junior, for their respective contributions to the written and oral advocacy involved. I am also grateful to the parties’ solicitors for the efficient way in which they dealt with the trial. The case has raised difficult points of law set against a complex factual background, and I have been greatly assisted by the cogency of the submissions, and more generally by the effective and co-operative way in which the case has been conducted by both sides.

B. Legal Entities and Persons Involved

7. The following are the key legal entities involved in the case:

Name	Description
Co-operative Foodstores Limited (“CFS”)	The Third Respondent. A registered society (formerly an industrial and provident society) registered on 17 July 2014 whose ultimate parent has, at all material times, been CGL. CFS acquired assets from SSL pursuant to a sale agreement dated 2 November 2015 (“ the Foodstores Sale Agreement ”) for a stated consideration of £496,334,262, reduced to £493,002,892 on completion.
Co-operative Group Food Limited (“CGF”)	The Second Respondent. A registered society (formerly an industrial and provident society) registered on 9 August 1989 whose ultimate parent has, at all material times, been CGL. Prior to the two withdrawals of share capital, the subject matter of the proceedings (“ the Withdrawals of Share Capital ”, and respectively “ the First Withdrawal of Share Capital ” and “ the Second Withdrawal of Share Capital ”), CGF held 1,125,618,743 of the 1,125,618,744 issued and allotted shares in SSL (>99.99%) and was the immediate parent of CFS. Following the Withdrawals of Share Capital and prior to the

	<p>sale of its shares in SSL to FRGL (“the Hilco Share Sale”), CGF held 647,907,354 shares in SSL, having acquired one share from Holdings on 16 February 2016.</p>
<p>Co-operative Group Holdings (2011) Limited (“Holdings”)</p>	<p>Prior to the Withdrawals of Share Capital, Holdings held one of the 1,125,618,744 issued and allotted shares in SSL (<0.01%).</p> <p>Following the Withdrawals of Share Capital and prior to the Hilco Share Sale, Holdings held one share in SSL until the share was acquired by CGF on 16 February 2016.</p> <p>Holdings is also the immediate parent of CGF.</p>
<p>Co-operative Group Limited (“CGL”)</p>	<p>The First Respondent. A registered society (formerly an industrial and provident society) registered on 11 August 1863.</p> <p>Ultimate parent of CGF, CFL and Rochpion (the Second, Third and Fourth Respondents) and of Holdings.</p>
<p>CWS (No. 1) Limited (“CWS”)</p>	<p>Corporate director of SSL from 2013 until 25 July 2016.</p> <p>Corporate director of CGF from 17 October 2013 until 2 July 2015.</p>
<p>Rochpion Properties (4) LLP (“Rochpion”)</p>	<p>The Fourth Respondent. A limited liability partnership incorporated on 20 June 2008 whose ultimate parent has, at all material times, been CGL.</p> <p>Rochpion acquired assets from SSL pursuant to a sale agreement dated 2 November 2015 (“the Rochpion Sale Agreement”) for a stated consideration of £5.</p>
<p>The Food Retailer Operations Limited, formerly Somerfield Stores Limited (“SSL”)</p>	<p>A registered society (formerly an industrial and provident society) and, from 18 March 2016, a limited company known as:</p> <ul style="list-style-type: none"> • Somerfield Stores Limited for the period prior to 18 March 2016; • S206374 Properties Limited between 18 March 2016 (following its conversion from a registered society to a limited company) and 26 July 2016; and • The Food Retailer Operations Limited (FROL) from 26 July 2016.
<p>The Food Retailer Group Limited (“FRGL”) / HUK 65 Limited</p>	<p>A Hilco Capital purchase vehicle which purchased 100% of the shares in SSL on 29 April 2016 pursuant to the Hilco Share Sale.</p> <p>FRGL was known as HUK 65 Limited until 3 May 2016.</p>

The Food Retailer Services Limited (“FRSL”) / HUK 67 Limited	<p>FROL’s sister company following the Hilco Share Sale.</p> <p>A dowry provided by CGF pursuant to a Deed of Contribution dated 26 April 2016 was structured as a capital contribution to FRSL.</p>
--	--

8. The principal individuals involved in the case are the following:

Name	Organisation	Description
Steven Bailey (“ Mr Bailey ”)	tCG / SSL	<p>Witness for the Respondents.</p> <p>Finance Director of tCG’s “<i>Food Division</i>” (“the Food Division”).</p> <p>Director of SSL from 22 July 2011 to 1 April 2016.</p> <p>Director of CGF from 22 July 2011 until 10 September 2015.</p> <p>Director of CFS from 17 July 2014 until 3 September 2015.</p>
Ged Barnes (“ Mr Barnes ”)	Addleshaw Goddard LLP (“ AG ”)	Partner in AG, Solicitors acting for tCG societies in respect of Project Chicago.
James Cameron (“ Mr Cameron ”)	Pinsent Masons (“ PM ”)	Partner in Pinsent Masons, Solicitors acting for the directors of SSL, if not also SSL itself, in relation to Project Chicago.
Malcolm Cohen	BDO	Joint Administrator of SSL from 7 June 2017 and Joint Liquidator of SSL from 9 February 2019.
Shane Crooks	BDO	Joint Liquidator of SSL from 14 October 2024.
Anthony Crossland (“ Mr Crossland ”)	tCG / SSL	<p>Head of Accounting in tCG Finance Department.</p> <p>Director of CWS (corporate director of SSL until 25 July 2015) from 25 October 2007 until 5 July 2019.</p> <p>Director of Holdings from 31 December 2014 until 5 July 2019.</p>

Name	Organisation	Description
Tim Cutting (“ Mr Cutting ”)	tCG	Witness for the Respondents. Joint Head of Corporate Development (with Mr Wormald) (now Director of Corporate Development). Responsible for coordinating Project Chicago between early 2014 and July 2015
Ian Ellis (“ Mr Ellis ”)	tCG	Chief Finance Officer of tCG.
Sarah Foster (“ Ms Foster ”)	AG	Managing Associate at AG. Acted for tCG societies in respect of Project Chicago.
Stuart Hookins (“ Mr Hookins ”)	tCG	Director of Property Portfolio and Development. “ <i>Project Sponsor</i> ” for Project Chicago.
Joe Hore (“ Mr Hore ”)	tCG	Witness for the Respondents. Member of tCG’s “ <i>Corporate Development</i> ” team (on secondment from Grant Thornton from summer 2015 to summer 2016 and employed by tCG thereafter).
Martyn Hulme (“ Mr Hulme ”)	tCG	Managing Director of tCG’s “ <i>Group Operations</i> ”.
Andrew Lang (“ Mr Lang ”)	tCG / SSL	Witness for the Respondents. Finance Director (Corporate) of tCG. Director of CWS (corporate director of SSL until 25 July 2015) from 30 June 2014 until 9 July 2019 (and from 12 January 2021 until 6 July 2022). Director of Holdings from 31 December 2014 until 9 August 2019.
Samantha Latham (“ Ms Latham ”)	PM	Managing Associate at PM.

Name	Organisation	Description
Steve Murrells (“ Mr Murrells ”)	tCG	Chief Executive of the Food Division.
Richard Pennycook (“ Mr Pennycook ”)	tCG	Witness for the Respondents. Chief Financial Officer of tCG from summer 2013 until March 2014. Chief Executive Officer of tCG from March 2014 until 2017.
Kevin Rowland (“ Mr Rowland ”)	tCG	Witness for the Respondents. Corporate Pensions Technical Specialist (now Corporate Head of Pensions).
Caroline Sellers (“ Ms Sellers ”)	tCG / SSL	Senior Assistant Secretary in tCG Secretariat. Society Secretary of SSL.
Mark Shaw	BDO	Joint Administrator of SSL from 7 June 2017 and Joint Liquidator of SSL between 9 February 2019 and 14 October 2024.
Kevin Sobers (“ Mr Sobers ”)	tCG	Project Manager – Strategic Change in Estates Services.
Pippa Wicks (“ Ms Wicks ”)	tCG / AlixPartners UK LLP (“ AP ”)	Managing Director at AlixPartners UK LLP (formerly known as Zolfo Cooper), providers of restructuring and insolvency advice to tCG societies. Chief Operating Officer of tCG from April 2016 and Deputy Chief Executive Officer from March 2017.
Jon Wormald (“ Mr Wormald ”)	tCG	Witness for the Respondents. Joint Head of Corporate Development (with Mr Cutting). Responsible for coordinating Project Chicago from July 2015.

C. Witnesses

C.I *Witnesses of fact*

9. An unusual feature of the present case is that all the witnesses of fact were called by the Respondents, with the Joint Liquidators' case being based upon the documents and the expert evidence.
10. I have already identified in the previous section the witnesses who gave evidence on behalf of the Respondents, but it is necessary to say a little more about them:
 - i) Mr Pennycook – Mr Pennycook was the CEO of tCG at the time of Project Chicago. He initially joined tCG as CFO in 2013, at a time when the latter was facing very significant financial difficulties. He described these difficulties, and the crisis faced as a result of what he described as the “*catastrophic position*” of the Co-operative Bank, and the priorities of tCG’s Board (“**the tCG Board**”) at the time. Mr Pennycook described tCG’s “*Rescue, Rebuild, Renew*” and “*True North*” strategies, and the approach of the tCG Board to Project Chicago, and its assessment of alternative options such as administration or a Company Voluntary Arrangement (“CVA”), and the possibility of withdrawing support from SSL.
 - ii) Mr Bailey – Mr Bailey was Finance Director of the Food Division and, in consequence of this role, held the position as a director of SSL between 2011 and 2016. In this latter capacity, he was ultimately responsible, together with Mr Lang and Mr Crossland, for causing SSL to enter into the impugned transactions. He explained his involvement with Project Chicago from late 2014, some considerable time after Project Chicago had been under discussion within tCG, until April 2016 when he left tCG. He gave evidence as to the position adopted by SSL and the SSL Directors (as defined below) vis-à-vis tCG, and the circumstances in which the impugned transactions came to be entered into. It was his evidence that he believed that tCG would follow through on a threat to withdraw support from SSL if it did not go along with Project Chicago, and that it was inconceivable that SSL could continue without that support. Further, he denies that he had any desire to prefer any entity within tCG over SSL’s other creditors.
 - iii) Mr Lang – Mr Lang joined tCG in 1998. He held a number of senior finance roles within the Food Division and latterly at group level. In 2014, Mr Lang became Financial Director (Corporate), and as a consequence of that role, took on other directorships within tCG, including CWS, and SSL itself from 30 May 2014. He became Chief Risk Officer in 2018 and left tCG in 2022. Mr Lang had been involved in tCG’s acquisition of SSL in 2009, and the subsequent integration of the latter’s stores into tCG’s portfolio. He also gave evidence as to his involvement with Project Chicago, and the approach taken by the directors of SSL to the decision to enter into the impugned transactions. He also denies that he had any desire to prefer any tCG entity.
 - iv) Mr Cutting – Mr Cutting is now Director of Corporate Development at tCG. At the time of Project Chicago, he was the joint Head of Corporate

Development, together with Mr Wormald. He was primarily responsible for the coordination of Project Chicago between early 2014 and July 2015. His evidence explained the genesis of Project Chicago, the designation of SSL's stores as "core" and "non-core" to tCG's strategic aims, and his role in liaising with internal stakeholders and external advisers. His evidence also dealt with reports and briefing papers prepared by Deloitte LLP ("**Deloitte**") and AP in connection with Project Chicago described in more detail below, tCG's consideration of other options available to it, and its initial engagement with SSL's Directors (as defined below) in relation to Project Chicago.

- v) Mr Wormald – Mr Wormald was the joint Head of Corporate Development at tCG together with Mr Cutting at the time of Project Chicago and took over from Mr Cutting responsibility for coordinating the latter in July 2015. Mr Wormald's evidence dealt with the financial position of SSL, tCG's "*True North*" strategy and the structure and mechanics of Project Chicago. He explained how tCG came to approve Project Chicago, and the engagement with SSL's Directors in relation thereto. Further, Mr Wormald dealt with the circumstances behind the Hilco Share Sale in 2016, and subsequent failed attempts by SSL to pursue a CVA.
 - vi) Mr Hore – Mr Hore joined the Corporate Development team at tCG in mid-2015 on secondment from Grant Thornton and on a permanent basis in mid-2016. He is now Director of Finance in the Group's Funeralcare and Life Services Division. As number two to Mr Wormald, Mr Hore was responsible for day-to-day coordination of Project Chicago as approved before he joined tCG, and he gave evidence regarding the context of Project Chicago, how it was carried into effect and the subsequent sale of SSL pursuant to the Hilco Share Sale.
 - vii) Mr Rowland – Mr Rowland is currently Corporate Head of Pensions at tCG. At the time of Project Chicago, he was a Corporate Pensions Technical Specialist who provided specific pensions input into the same. His evidence contained an explanation of some basic pension concepts, as well as an outline of how a defined benefit scheme operates. His evidence described tCG's various pension schemes, including the defined benefit scheme specifically relating to employees of SSL ("**the SSL Pension Scheme**"). His evidence dealt with the deficit in relation thereto, and that in relation to other pension schemes within tCG. In the circumstances described below, contemporaneously with the transactions behind Project Chicago, and on the Respondents' case as part thereof, SSL was formally released as statutory employer of the SSL Pension Scheme and ceased to act as guarantor for liabilities in respect of other pension schemes within tCG. Mr Rowland's evidence dealt with the circumstances behind the same.
11. It is necessary to take into account that the key events in the present case took place more than 10 years ago. The present case is therefore a classic case in which the considerations identified by Leggatt J (as he then was) in *Gestmin SGPS S.A. v Credit Suisse Limited* [2013] EWHC 3560 (Comm) at [15]– [22] with regard to the unreliability of memory and recollection are liable to come into play. It is therefore necessary to apply considerable caution before placing particular weight on witnesses'

recollections of what was said in meetings and conversations, and of their contemporaneous understanding of matters and recollection of events. It may therefore be necessary to base factual findings on inferences drawn from the documentary evidence and known or probable facts, but this does not mean that the evidence of witnesses, and their performance under cross-examination does not have an important part to play in the fact finding process where it is plainly credible and not inconsistent with the contemporaneous documentary evidence or the probabilities of the situation.

12. A particular concern identified by Leggatt J was the ability of a witness, in seeking to recall events that took place some time ago, to falsely do so, but to do so with genuine conviction and belief that their recollection is accurate. Thus, as Leggatt J cautioned in *Gestmin* at [22]:

"... it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

13. This consideration was amply demonstrated by one particular piece of evidence. In cross-examination, Mr Wormald was taken to an email that he wrote on 22 December 2016 in which he had referred to insolvency being *"always anticipated [as the] endpoint for SSL."* It is a potentially important consideration whether insolvency had always been anticipated as being the fate of SSL. When asked about this under cross-examination, Mr Wormald said: *"I have reflected on this email several times as part of my evidence to understand why I wrote that when my recollection is not that I believed that to be the case and trying to square up the two things ..."*. I consider that what Mr Wormald wrote at the time is more likely to reflect his actual contemporaneous understanding than his recollection many years later that is more supportive of the Respondents' position.
14. In their closing submissions, the Joint Liquidators contended that there are aspects in which the evidence of the Respondents' witnesses of fact was unsatisfactory, as a result of the latter being evasive and/or failing to answer the relevant question. It is true that a number of the Respondents' witnesses were somewhat defensive in the way in which they gave their evidence, and that, at times, gave the impression that they were being evasive and avoiding the question. In particular, I found Mr Pennycook and Mr Bailey to be particularly defensive witnesses, whereas I found that Mr Lang was very much more open and forthcoming in what he had to say.
15. Apart from his defensiveness, Mr Pennycook's recollection of detail was not good, but this is likely to be explained by the fact that he was operating at tCG Board level within tCG, rather than dealing on a day-to-day basis with Project Chicago. One particular piece of Mr Pennycook's evidence that I was unable to accept was the extent to which he downplayed the financial position of SSL prior to Project Chicago, only reluctantly accepting that the relevant financial documents showed SSL to have a positive EBITDA, and disputing that SSL was cash generative, when the documentary evidence, and the evidence of other witnesses suggested otherwise albeit that there is an issue as to the extent thereof.
16. The Joint Liquidators maintain that, by and large, the evidence of the Respondents' witnesses supports their case. However, as made clear in their closing submissions,

they do challenge one particular aspect of the Respondents’ evidence. It is the Joint Liquidators’ case that it is clear from the contemporaneous documents that a demand made on SSL by AG on behalf of other tCG entities by letter dated 27 October 2015 (“**the Transaction Demand**”) was coordinated between tCG, its advisers, and SSL as part of the arrangements for facilitating Project Chicago. It is submitted that the witnesses should have accepted this under cross-examination, which they did not. Further, related to this, Mr Bailey and Mr Lang both gave evidence that they thought it was likely that tCG would immediately force SSL into insolvency if they did not go ahead with Project Chicago in response to the Transaction Demand. It is submitted that this evidence should not be accepted.

17. I will make findings in relation to these issues in due course. However, subject thereto, the general impression that I had was that the Respondents’ witnesses did their best to recall the events in question and to assist the court as best they could, and that there was no deliberate attempt on the part of any of them to give false or misleading evidence. Nevertheless, for the reasons that I have explained, I consider that I must be cautious before accepting at face value what they say, unless clearly supported by the contemporaneous documents, or supported by inferences there from or from known or probable facts, and that it is quite possible that the Respondents’ witnesses have persuaded themselves as to a position in relation to a particular matter, such as their thinking about the Transaction Demand, which cannot, in the light of the documentation, be true.

C.II Expert Evidence

18. I heard evidence from experts in relation to five disciplines as set out in the table below:

Discipline	Issue addressed	Identity of Experts
Pensions/ Actuarial	Valuation of assets and liabilities relating to: (i) the SSL Pension Scheme; and (ii) the other tCG pension schemes which SSL had guaranteed.	Richard Gibson (“ Mr Gibson ”), Fellow of the Institute of Actuaries, for the Joint Liquidators. Bob Scott (“ Mr Scott ”), Fellow of the Institute of Actuaries, for the Respondents.
Covenants	The benefit to SSL of being released from its liabilities and contingent liabilities in respect of: (i) the SSL Pension Scheme,	Mark Jennings (“ Mr Jennings ”), Covenant Advisor, Practitioner, for the Joint Liquidators Gary Squires (“ Mr Squires ”), Chartered

Discipline	Issue addressed	Identity of Experts
	<p>(ii) the other tCG pension schemes; and</p> <p>(iii) tCG’s banks and bondholders.</p>	<p>Accountant and Insolvency Practitioner, for the Respondents</p>
Property	<p>Valuation (including contingent liabilities) of properties transferred to CFS and Rochpion, as well as those retained by SSL and certain properties transferred to CGF (“the CGF Properties”).</p>	<p>Victoria Seal (“Ms Seal”), RICS Registered Valuer, for the Joint Liquidators.</p> <p>Sarah Fellows (“Mrs Fellows”), RICS Registered Valuer, for the Respondents.</p>
Fixtures & Fittings	<p>Valuation of fixtures and fittings of the above properties, including any contingent liabilities.</p>	<p>Ms Seal for the Joint Liquidators.</p> <p>Jeff Wignall (“Mr Wignall”), Chartered Surveyor, for the Respondents.</p>
Solvency	<p>Solvency of SSL before and after the impugned transaction and the outcome for SSL’s creditors had SSL entered an insolvency process instead thereof.</p>	<p>Geoff Rowley (“Mr Rowley”), Certified Accountant and Insolvency Practitioner, for the Joint Liquidators.</p> <p>Gary Davies (“Mr Davies”), Chartered Accountant, for the Respondents.</p>

19. I will consider further the expert evidence in dealing with the specific issues to which it relates.

D. Key factual background

20. The key factual background against which the case requires to be decided is as follows.

D.I History of Somerfield Stores Limited

21. SSL was first incorporated as a company limited by shares in 1959 under the name J.H. Mills, Limited, operating a chain of supermarkets.
22. In 1994, SSL changed its name and the branding of its supermarkets to “*Somerfield*” Stores Limited. Over the following decade, the business was undertaken a number of acquisitions and sales with varying consequences for its financial position.

D.II History of tCG

23. tCG, formerly known as the Co-operative Wholesale Society, is a British member-owned co-operative established in 1863 that owns and runs a group of retail businesses, spanning grocery, legal, funeral, insurance and, previously, banking, pharmacy and farming.
24. Within tCG, the subsidiaries are themselves predominantly also registered societies, governed by the Co-operative and Community Benefit Societies Act 2014 (“**CCBSA 2014**”),¹ rather than being limited liability companies governed by the Companies Act 2006.
25. At the time of the events giving rise to these proceedings, tCG had around five million members. These members are predominantly customers of its high-street businesses, including supermarkets, each of whom had contributed £1 of capital to become a member. Although each member is a holder of a tCG share, it is a feature of the co-operative structure that its members are unlikely to wish to contribute meaningful further capital to the business. As a result, the Group’s only recourse to further funds is through debt finance, rather than being able to raise equity in the manner that companies typically can.
26. As explained in §B above, the entities in tCG relevant to the Joint Liquidators’ claims are:
- i) **CGL** – a registered society that acts as a holding entity for tCG. Its board and executive are respectively referred to as the “*TCG Board*” and “*Group Executive*”, and in practice it substantially oversees the operation of the business on a day-to-day basis. This includes both retail operations, such as the “*Food Division*” operating the grocery businesses, and finance activities.

¹ Prior to the CCBSA 2014, registered societies were known as ‘industrial and provident societies’.

- ii) **CGF** – a registered society which, as already identified, held over 99.99% of SSL’s shares prior to Project Chicago, and which undertook the Withdrawals of Share Capital which are the subject matter of the present proceedings. CGF held shares in other societies including, following the implementation of Project Chicago, CFS. CGF and its subsidiaries comprised the “*Food Division*”.
- iii) **CFS and Rochpion** – registered societies to which SSL transferred properties, along with various other assets, under Project Chicago.
- iv) **Holdings** – a registered society which held a single share in SSL.

D.III Co-operative Group acquisition of SSL

- 27. In March 2009, tCG acquired SSL and the Somerfield supermarket business for approximately £1.57 billion. This was part of an expansionist strategy with a view to becoming the fourth largest supermarket in the UK and to achieving greater economies of scale. Elsewhere within tCG, it also acquired the Britannia Building Society around the same time, which was incorporated into the banking division.
- 28. Following tCG’s acquisition, SSL was converted into an industrial and provident society on 12 November 2010.
- 29. Upon conversion into and registration as an industrial and provident society in 2010, SSL adopted the “*Rules of Somerfield Stores Limited*” (“**the SSL Rules**”) as its governing document, by which it continued to be governed until reconverted into a limited liability company on 18 March 2016.
- 30. A structure chart setting out the structure of tCG can be found in the Appendix to this judgment.
- 31. Following the acquisition of SSL by tCG, SSL’s stores were rebranded as “*Co-op*” stores and run as part of the Food Division. All of the infrastructure and services that SSL required to operate were managed centrally by tCG, including its operational management, finance arrangements, supply chain and employees. It is common ground between the parties that SSL was entirely reliant upon tCG’s support to operate its stores.
- 32. SSL ‘paid’ Group for the various resources and services that it received from Group through the group-wide Intersociety Loan Account operated by CGL, referred to herein as “*the ISLA*” (“**the ISLA**”). The Group would determine the contribution that it required from SSL, as well as its other subsidiaries, by reference to both revenues and costs, for the purpose of management accounts. CGL also provided SSL with an audit confirmation letter on an annual basis confirming that it would continue to fund SSL as a going concern for the following 12 months.
- 33. Mr Bailey, Mr Lang and Mr Crossland (“**the SSL Directors**”) were appointed as the directors of SSL following tCG’s acquisition, in the case of Mr Lang and Mr Crossland not directly, but via their directorship of CWS. Given the extent of

integration of SSL's operation within the broader Food Division, and as they readily acknowledged, the SSL Directors were not responsible for day-to-day management of SSL. Mr Bailey and Mr Lang both stated in their evidence that, prior to Project Chicago, their involvement with SSL was limited to approving its annual statutory accounts.

34. SSL's financial position is considered in greater detail at various points in this judgment below, but the position as at 2014 bears mention at this stage. In 2014, SSL had a reported annual turnover of c. £2.2 billion, with operating profits of £33.7 million and a profit margin of 1.5%. Contrary to Mr Pennycook's evidence, but as confirmed at paragraph 2.1.5 of Mr Davies' first report, it had also contributed c. £77m of cash to the Group. The parties differ as to their views of the strength of this financial position, and it is fair to say that Mr Davies did regard margins as fairly tight. Nevertheless, it is common ground that there was no imminent concern surrounding SSL's solvency based on the continued ordinary operation of the business.

D.IV Co-op banking crisis and broader remedial steps

35. In 2013, tCG faced significant challenges across its whole business, with Mr Pennycook describing the situation as both a "*crisis*" and a "*disastrous year*" in tCG's 2013 Annual Report.
36. The core issues were twofold:
- i) Most existentially, Co-operative Bank ("**the Bank**"), a wholly owned subsidiary of CGL, identified a £1.5 billion 'black hole' in its regulatory capital. This led to Moody's downgrading the Bank's debt rating to 'junk' status and the Bank of England requiring it to be re-capitalised by the end of the year (failing which it risked being effectively put into insolvency). Not only did this affect the immediate position of the Bank, but the wider Group was also financially exposed to the Bank's liabilities due to cross-guarantee and default provisions.
 - ii) In parallel, the Bank's chairman was publicly embroiled in a series of scandals which affected the Group's reputation as a trustworthy and ethical business.
37. Mr Pennycook's evidence is that the Bank's financial difficulties required tCG to make "*a significant number of extremely difficult decisions*" in order to "*save*" the Group. The Bank's capital shortfall was funded in part by a write off of tCG's investment in the Bank, a sale and leaseback of its Angel Square headquarters in Manchester, and a sale of its pharmacy and farm businesses. Mr Lang's evidence is that sale of the pharmacy business, in particular, was a significant loss for the Group. Not only was it profitable, but it was "*in the heart of the community...[and] aligned with the mission and purpose of what the Co-op should be*". Additionally, and despite the significant remedial steps already taken, tCG also subsequently sold a 70% stake in the Bank as a result of a debt-for-equity swap by the Bank's bondholders. In tCG's

2013 Annual Report, Mr Pennycook described the consequence of these steps as leaving the Group in a “weakened state”.

38. The wake of these crises also prompted close scrutiny of the operation of the Group as part of its “*Rescue, Rebuild, Renew*” turnaround strategy. Significant governance reforms were implemented to develop tCG into a more professionally run organisation, and underperforming areas of the business were critically evaluated to avoid further financial exposure. This included SSL.
39. By this time, it was widely recognised within the Group that, despite the financial performance referred to in paragraph 34 above, SSL had been a poor acquisition. Part of the reason for this was that the SSL stores tended to be larger formats, whereas the market was moving in the direction of smaller, convenience stores. In addition, by 2013, a number of stores in SSL’s portfolio had closed, and others were either loss-making or considered not compatible with the Food Division’s “*True North*” strategy which focused on convenience stores in high footfall areas. It was also suggested that the Somerfield business was underperforming at the time of its acquisition by tCG, and Mr Pennycook’s evidence was that he considered SSL had been overvalued in the Group’s accounts since its acquisition. In the event, tCG reduced the goodwill on its balance sheet relating to SSL by £247 million in 2013, which Mr Pennycook attributed in tCG’s 2013 Annual Report as one of three principal causes of the Group’s significant losses that year.
40. The evidence is to the effect that, in the light of these considerations, there emerged the idea of “*cleaning up*” the SSL portfolio in order to achieve two parallel aims. First, it was considered that this would help ensure that the Food Division remained solvent and streamlined, as a key underpin to tCG’s financial stability going forward. Second, it was considered that this would avoid properties from stagnating and/or becoming vacant, which was considered to be neither economically right nor socially acceptable from the point of view of the Group’s member-owners. In a public articulation of this strategy, Mr Pennycook stated in tCG’s 2013 Annual Report that: “*by the conclusion of the True North programme, over 60% of the store space acquired in the Somerfield transaction will have been divested by the Group.*”

D.V Conception of Project Chicago

41. The genesis of Project Chicago can be seen through the instruction of and initial restructuring advice prepared by Deloitte in September 2013.
42. On 26 September 2013, an initial meeting with Deloitte was held, of which a handwritten note headed “*Project Chicago Meeting*” records possible options for the scope of Project Chicago. The first is listed as: “*Sale of business after moving ‘good’ bits out.*” Further options referred to were a CVA, and negotiations with landlords on threat of a CVA, or insolvency. In respect of any sale, the note also recorded: “*Sale of business – may have to pay dowry to enable SSL to keep going for two years as if collapses can look back two years.*”

43. Deloitte's engagement letter dated 27 September 2013 recorded that Group's mandate was "*to consider its options in relation to SSL and whether it can be restructured to reduce or eliminate the on-going liability for closed and non-core properties.*"
44. On 11 October 2013, and following the initial contact with tCG, Deloitte produced its first report on Project Chicago ("**the 2013 Deloitte Report**"), which reflected the earliest articulation of the purpose and likely consequences of the project:
- i) First, tCG had informed Deloitte that it wished to transfer core profitable stores out of SSL as a first step, as it "*would be unwilling to expose the core profitable stores held within SSL to uncertainty that would be caused by a restructuring.*"
 - ii) Second, Deloitte advised that SSL would be significantly loss-making following the transfer out of the core stores, estimating negative EBITDA of c. £14m per annum.
 - iii) Third, and in anticipation of SSL's loss-making position, Deloitte contemplated the risk of a "*subsequent failure*" of SSL through insolvency and advised the Group of litigation risk from potential liquidators. The report noted that "*it is inadvisable to implement a CVA or Administration within 2 years of the transfer as this could be challenged and a Court may reverse the transfer or impose significant liabilities on the Group.*" This thus recognised the two-year 'lookback' period for TUV or preference claims.
 - iv) Fourth, Deloitte noted that a solvent restructuring option "*appears the most appropriate option for a restructuring*". The outline of this option included two key details that were subsequently carried through to Project Chicago as implemented:
 - a) a two-stage process, with the first stage involving a transfer of the core profitable stores out of SSL ("**Phase 1**"), and the second stage involving a sale of the remaining loss-making stores and onerous leases to a third-party ("**Phase 2**"); and
 - b) payment of a dowry to support any sale, including on terms that managed future litigation risk for the Group: "*the timing and structure of any dowry would need to be carefully considered to ensure that SSL can keep trading for the required period.*"
 - v) Fifth, Deloitte recognised that a restructure followed by a solvent sale would generate substantial financial benefits for Group, estimated at £79 million, through the release of a provision for SSL's onerous leases which was held in CGL's, and subsequently Holdings', accounts.
45. By April 2014, an internal Project Chicago team had been assembled within Group, led by Mr Cutting, and AG were instructed to provide legal advice.
46. The evidence is to the effect that, although Project Chicago was still at an early stage, Mr Cutting and his team were already beginning to implement steps to support the anticipated restructure by:

- i) naming the Newco to be used in the restructure (i.e. CFS) and approving a structure chart showing it as a sister entity to SSL – see project team notes of meeting on 2 April 2014;
 - ii) obtaining Mr Pennycook’s approval to seek consent from the banking syndicate for the transfer of the groupwide pension guarantees from SSL to CFS (as required as an underpin to Project Chicago) – see Ibid; and
 - iii) seeking Deloitte’s input on a summary of the proposed project for the pension trustees. Under the heading “*Business rationale*”, Mr Cutting drafted a high-level explanation of the project that set out: “*the intention is to transfer “good”/profitable stores from SSL into a newly established corporate entity... SSL will retain the “bad” assets...SSL will be sold to a third party*”.
47. On 14 May 2014, the Group Executive team were briefed on the proposed restructure. The materials for that meeting expressly viewed the restructure as “*an opportunity for Group to extract various benefits*” from SSL relating to onerous lease liabilities and trading losses, and articulated the plan to:

*“Transfer ‘core assets’ out of SSL by end of 2014 (key dependency on SSL pension trustees and Banking syndicate approval)
Divestment of SSL by end of 2015
Depending on the method and timing of divestment, the business may have to continue to support the buyer (operationally or financially) for 12-18 months.”*

48. On 26 June 2014, Group outlined Project Chicago to the directors of the SSL Pension Scheme. As was recognised, approval from the scheme trustees was critical for the project to proceed for two reasons:
- i) First, SSL provided the primary covenant for the SSL Pension Scheme. Given that transferring the ‘core’ stores out would weaken the strength of SSL’s covenant, tCG needed to ensure that the posited replacement did not detract from the SSL Pension Scheme’s overall covenant position to avoid a default situation.
 - ii) Second, SSL was also a guarantor for the Group’s bank and bondholder debt and the wider Group pension schemes, given its status as a “*Material Subsidiary*”.² However, it was recognised that SSL would lose this status after the implementation of Project Chicago given what would thereupon become its much weaker financial position. This was liable to trigger an event of default across tCG’s financial obligations unless the liabilities were first transferred to another (stronger) subsidiary.

² “*Material Subsidiary*” is defined in the Group’s Facilities Agreement dated 26 July 2012 as “*a Subsidiary [...], the total assets or EBITDA of which [...] account for 10 per cent or more of the consolidated total assets or consolidated EBITDA of the Group.*”

49. The paper provided to the Group Executive for this meeting explained that “*the proposed transaction has been designed to ensure that the covenant of the Scheme is at least maintained and more likely improved*” on the basis that “*Newco is expected to be more profitable than SSL*”. Newco’s enhanced profitability was based on the anticipation that it would not be encumbered by SSL’s onerous leases and loss-making stores. It was also explained to the pension trustees that “*following the transfer, it is intended that the Group will look to dispose of SSL to a third party, via a share sale.*” The position was more fully explained as follows:

“Ideally, SSL would transfer these non-trading and onerous leases to another entity. However, the landlords of SSL’s non-trading or onerous leases are unlikely to consent to such a transfer: the landlords currently have SSL “on the hook” for these obligations and have no incentive to transfer them to a new company with a weaker covenant.

Therefore, Group has been considering options to transfer the core stores away from SSL and leave the non-trading and onerous leases behind with a view to the ultimate disposal of SSL.”

50. Further to the 2013 Deloitte Report, on 27 June 2014, Deloitte produced a further report for tCG (“**the June 2014 Deloitte Report**”), which set out additional detail in respect of the proposed transaction scope and implications for stakeholders:
- i) First, Deloitte articulated the purpose of the project as follows: “*The key principle underpinning Project Chicago is to separate the core stores that the Group wishes to retain from the non-core stores and onerous leases.*”
 - ii) Second, Deloitte outlined the framework of the internal restructure, likely following discussions with/instructions from tCG:
 - a) “*SSL will use the proceeds from the transfer to repay its intercompany debt due to Food in full and then to return share capital to its parent company.*”
 - b) “*Transfers are being made to a dedicated Newco specifically designed to support the SSL Pension Scheme covenant*” and “*the proposed transaction has been designed to ensure that the covenant of the Scheme is at least maintained and more likely improved.*”
 - iii) Third, it is clear by this time that a sale of SSL was envisaged by tCG, or at least by Deloitte, rather than merely considered as an option in that it was explained that: “*The Group will seek to dispose of SSL to a third party*”. Further, Deloitte provided further detail of expected mechanics of this anticipated sale:

Approved Judgment

- a) *“Given the expected loss-making position of SSL it is likely that any potential purchaser will be either: a trade buyer [...] and/or a restructuring specialist”*; and
 - b) *“It is probable that any sale of SSL will require a payment from Group to the purchaser to cover the costs of restructure and cost of onerous leases for a specified period. However, this payment is expected to be significantly less than the liabilities for the remaining periods of the leases.”*
- iv) Fourth, Deloitte anticipated that Newco would be in a substantially stronger financial position than SSL: *“Illustrative P&Ls show that profits in Newco could be c.£39m higher than currently in SSL as Newco will no longer incur losses from non-core trading stores and the cost of onerous leases.”* Newco’s strong financial position would be further underscored by receipt of *“all freehold stores”* from SSL.
51. On 17 July 2014, CFS was incorporated as the *“Newco”* that was intended to acquire the core, profitable stores from SSL.
52. On 10 September 2014, tCG’s Executive Board and what was known as the *“Food Executive”* were updated on the evolution of Project Chicago. The relevant briefing paper set out that the project was created to *“mitigate onerous lease liabilities within SSL”* and that *“Group will subsequently seek to dispose of the shares in SSL”*. It also re-articulated the financial value to tCG of the release of the onerous lease liabilities from tCG’s accounts (estimated at c. £80 million) and referred to the requirement to keep SSL running for two years following the restructure *“to demonstrate that the transaction has not adversely affected creditors”*.

D.VI – Engagement with the SSL Directors

53. Despite the fact that Project Chicago had been discussed and considered within tCG between September 2013 and September 2014, it was not until October 2014 that tCG began to share its thinking with the SSL Directors.
54. On 13 October 2014, Mr Cutting emailed the SSL Directors to explain the outline of what was proposed regarding Project Chicago. On 27 October 2014, and following discussion with the SSL Directors in the interim, Mr Cutting followed up with two further updates:
- i) First, to recommend that the SSL Directors instruct solicitors, with PM (a tCG panel firm) being suggested, to provide independent legal advice (funded by tCG), and
 - ii) Second, to inform the SSL Directors that Deloitte were preparing a *“short pack”* to explain the proposal and its *“estimated financial implications”*.
55. The evidence is to the effect that upon initial consideration of tCG’s proposal, the SSL Directors quickly became concerned about what was expressed to be the

“*aggressive*” commercial approach that was being adopted, as well as about the personal and professional risk they considered themselves exposed to, being simultaneously senior individuals employed within the Food Division whilst also acting as directors owing fiduciary duties to SSL.

56. These concerns were expressed in contemporaneous communications, including the following:
- i) On 28 October 2014, Mr Lang emailed Ms Sellers setting out that: “*the three of us have sufficiently full agendas to not need the additional burden of seeking legal advice for a company we are just director figure heads for, rather than actively managing. To this end, I’d still suggest that it would make sense for the key individuals who are proposing the Chicago scheme to volunteer themselves as Directors of SSL if their belief in the validity of the scheme is so strong? [...] This point should not be considered lightly by the Group – if there is personal risk to the three of us, I want to be absolutely certain the risk is very, very minimal?*”
 - ii) Following further discussion, Mr Lang also noted in an email to Mr Cutting that: “*I’m sure you understand that placing ourselves in a potentially vulnerable professional situation is not a comfortable place for us to make any decision from!*”
 - iii) On 29 October 2014, Ms Sellers emailed a member of the pensions team to indicate that: “*The hold up has been the nervousness of [the SSL Directors] to the Chicago project overall given their responsibilities and the possible adverse consequences.*”
57. On 6 November 2014, Mr Cutting sent a briefing pack to the SSL Directors which set out an “*indicative*” analysis of the proposed restructure. This expressly set out that “*Group is no longer willing to unconditionally support SSL and requires a restructuring to address future liabilities.*” It explained that the proposed restructure as being the transfer by SSL of properties funded by CGF withdrawing share capital from SSL (rather than providing its subsidiary with an injection of cash). Mr Bailey’s evidence was that, by this point, he understood the project to involve transferring the “*desirable*” stores out and leaving the remainder with SSL, and that he was concerned by the non-cash nature of the transaction and the impact this would have on SSL.
58. Discussions continued internally, but it is clear from the contemporaneous documentation and from Mr Bailey’s and Mr Lang’s evidence, that the SSL Directors were not sufficiently reassured by tCG, particularly in relation to the risk they felt they were being asked to take on. One suggestion to help mitigate this risk had been for tCG to provide an indemnity against personal liability for the SSL Directors, which would manage their financial risk. On 9 December 2014, Mr Cutting emailed the Project Chicago team to note: “*I can’t foresee a scenario where [the SSL Directors] don’t ask for the indemnity*”.
59. Around this time, PM was formally instructed to advise the SSL side of the transaction. There is an issue as to whether PM were instructed to advise SSL itself or the SSL Directors personally. SSL is identified as the client in PM’s letter of

engagement, but in response to a number of disclosure applications made in the period leading up to trial where legal advice privilege issues were at the forefront, the SSL Directors maintained that the advice was provided to them in an individual capacity in light of their concerns regarding the project (a position which the Respondents deferred to at trial). Whilst not necessary to resolve this issue for the purpose of this judgment, in so far as relevant, it broadly appears from the contemporaneous documents that PM's advice was provided to *both* SSL and its directors.

60. In terms of the anticipated scope of PM's advice, Mr Cutting emailed Ms Sellers on 12 December 2014 referring to the "*limited budget to deliver the Project*" and expressing a hope that PM's work would be "*relatively light in that we would hope to have agreeable documentation which should only require checking rather than any negotiation*". This was notwithstanding that SSL would be the counterparty to the other tCG entities involved in Project Chicago, a project that was liable to have a significant impact on SSL, and where ordinarily between parties acting at arm's length, one would have expected detailed advice and negotiation as to the terms of the transaction, particularly in the light of the SSL Directors' significant concerns.
61. In parallel, PM attended SSL's board meeting on 12 December 2014 and provided initial advice that:³
- i) "*it would be worthwhile to have an Independent Director appointed to the SSL Board now*", notwithstanding tCG's view that this might be appropriate at a later stage, not least as a result of the conflicted position that the SSL Directors were in;
 - ii) "*the end result for SSL could be that it goes into insolvency*";
 - iii) as a result of the insolvency risk, transactions undertaken within two years prior "*could be overturned*" and "*therefore tCG should be asked for a commitment not to sell within the two year post transaction period*";
 - iv) "*more thought needs to be given as to how SSL will trade during the two year post transaction period in order to ensure it remains solvent*"; and
 - v) the SSL Directors should request both more visibility over tCG's thinking and process, and an indemnity in their favour in respect of "*potential liabilities arising from their roles*".
62. On 15 December 2014, Mr Bailey, on behalf of the SSL Directors, wrote to Mr Cutting formally setting out the requests arising from PM's advice. The SSL Directors also requested that "*as a sign of solidarity, a member of the tCG Executive or a tCG main Board director be appointed to the board of SSL.*"
63. On 23 December 2014, Mr Cutting responded to Mr Bailey's letter confirming that tCG was willing to consider the appointment of an independent director and to offer

³ Certain aspects of this advice as recorded in the first draft of the minutes were deleted following the circulation thereof – in particular, the reference that SSL could go into insolvency, and PM's advice surrounding the two-year hold period and suggested appointment of an independent director to the SSL Board. The marked up revised versions of the minutes as produced at trial are likely to have been revised by Annette Dale of tCG's secretariat.

an indemnity, but he declined to agree to any member of tCG's Executive or Board being appointed to the SSL Board. On 13 January 2015, Mr Cutting followed this up with CVs of two potential candidates for appointment as an independent director, both of whom were said to have "*significant experience in restructuring*".

64. Despite this reassurance to the SSL Directors, it is clear from the evidence that there remained scepticism within Group regarding the value that an independent director would bring and practically how and when someone could be appointed. An email dated 14 January 2015 from Claire Davies, an employee in tCG's secretariat noted that: "*In any event, if the transaction makes the company insolvent, who in their right mind would take on that directorship?*"
65. At the same time, tCG also shared a further briefing pack containing Deloitte's analysis with the SSL Directors. However, at no time were they provided with the 2013 Deloitte Report or the June 2014 Deloitte Report. The pack provided to the SSL Directors contained six slides of substance (compared with the 90 slides prepared for Group in the 2013 Deloitte Report), and it explained tCG/Deloitte's view that (i) consensual negotiations with landlords were unlikely to achieve reductions in SSL's lease liabilities and (ii) a CVA was undesirable from tCG's perspective and could not succeed without tCG's support. The analysis also forecast a *worse return* for creditors from an insolvency process following the implementation of Project Chicago, compared with an immediate insolvency of SSL.
66. On 14 January 2015, the SSL Directors held a further board meeting and discussed Deloitte's analysis. One director set out that he was concerned about the project "*from a moral point of view.*"
67. The SSL Directors' dual roles as senior Group employees and SSL Directors were also a continued source of internal debate. On 20 January 2015, Mr Cutting asked Mr Bailey to review a tCG Board paper on Project Chicago in his position as a senior Group employee, noting "*as you know you have a duty to act in the best interests of the Society you are representing at the relevant time, the fact that you are a director of (or assisting/advising) more than one entity does not by itself affect your ability to act.*" Mr Murrells, in his capacity as Chief Executive of the Food Division, followed up on this email to ask "*Steve do you need to talk through as conscious you might feel exposed here*", to which Mr Bailey replied: "*It is a big issue more broadly, Steve, (still unresolved) on which I and the other two SSL directors (Andy Lang and Anthony Crossland) are seeking legal advice.*"
68. By 21 January 2015, and following further discussions with tCG, the SSL Directors became more comfortable about not pursuing the appointment of an independent director further at that stage. However, as expressed by Mr Lang in an email dated 21 January 2015 to Ms Sellers, Mr Bailey and Mr Crossland, this was "*on the condition that [the SSL Directors] receive appropriate level of advice / guidance from Bridget [Groarke]*", the latter being a member of tCG's Legal Department. Mr Lang and Mr Bailey both gave evidence to the effect that they could have pressed their request for an independent director had they considered it necessary but felt at the time that with sufficient legal advice, they would be able to ensure that they took effective, well-informed decisions from SSL's perspective.

D.VII Negotiation and approval of Project Chicago proposal

69. With the SSL Directors briefed on Project Chicago and advised by PM, tCG began to take further steps to prepare for the restructure.
70. AP, then known as Zolfo Cooper, were instructed to advise on the basis that *“once the necessary preparation structuring is put in place, the desired option is for a sale of SSL which achieves our commercial objectives but equally would not be reputationally damaging.”*
71. Although tCG had, in light of Deloitte’s advice, previously discounted pursuing a CVA on the basis of the risk to core stores, and reputational, pensions and banking impact, AP’s oral advice at this stage, as recorded in an email dated 22 January 2015, from Mr Cutting to Mr Pennycook and Mr Murrells, was that, *“managed correctly, it may be possible to mitigate away the risk of loss of core stores and the landscape for the other impacts has changed considerably.”*
72. The SSL Directors engaged variously with tCG to seek to obtain financial/accountancy advice to inform their assessment of the project from SSL’s perspective. Initially, on 28 January 2015, PM wrote to AG to *“propose that tCG shares any advice it has received in this regard with SSL. In the event such advice cannot be provided to SSL, SSL will consider engaging accountants directly.”*
73. This question appears to have been discussed offline over the following week, after which Bridget Groarke emailed Mr Cutting on 5 February 2015 saying: *“Please can you confirm that the appointment of Zolfo Cooper will be a joint instruction – if it is not then this will be a concern to the SSL Board.”* Mr Cutting responded that: *“I am advised that we don’t require a joint engagement letter at this stage. We can, however, add a duty of care to SSL into the work Zolfo Cooper are doing.”* Bridget Groarke replied that this position was *“exceptionally disappointing and may cause concern to the SSL Board.”*
74. On 6 February 2015, AG responded to PM, noting in respect of external financial advice that: *“we re-iterate our client's desire to work with SSL on this project and keep dialogue open. To that end we very much hope to avoid the need for SSL to engage external consultants as the intention is certainly to work together to find the best solution for SSL and its key stakeholders.”*
75. On 19 March 2015, a meeting was scheduled with the Group project team, SSL Directors, AG, PM and AP, at which AP presented a 14-slide report entitled *“Project Chicago – Restructuring Options”*. It is evident that both the slides and AP’s speaking notes for the meeting had been tailored prior to the meeting *“to reflect the audience”* (i.e. the SSL Directors) – see e.g. the email dated 17 March 2015 from Claire Winder of AP to Mr Cutting, Mr Barnes and Ms Foster. They did not, for example, contain any information on AP’s views on the associated risks of the restructure.
76. Following this meeting, Mr Cutting emailed the SSL Directors the same day saying: *“I hope that the update was useful. As agreed, we will be in touch at the earliest opportunity to confirm the direction of travel following discussion with the Group*

Executive and will engage with you at that point to plan any involvement required from you in the next steps.”

77. In an email dated 20 March 2015, Mr Hulme observed to Mr Cutting as follows:
- “ ... I suspect we will want to get to a severity assessment of impact/probability around these residual risks as we go forward eg in CVA although low probability a failure and subsequent insolvency is very high impact, whilst the solvent sale may have lesser impact on Group in future insolvency in third party hands it is a high probability (certain?) it will happen”.*
78. On 20 March 2015, AP provided Group with a far more extensive 88-slide report, containing substantial additional analysis of the *“risk of failure of CVA and associated options”*, *“Financial assessment of options”*, and *“Sale considerations”*. This was never provided to the SSL Directors.
79. Whilst the SSL Directors had received some initial analysis from AP, they continued to consider that *“specialist financial advice from restructuring professionals”* was required from an SSL perspective. This was discussed at an SSL board meeting on 27 March 2015 and set out in a letter from PM to AG dated 30 March 2015. There was no reply to this letter.
80. In an email dated 7 April 2015 to Mr Sobers, Mr Cutting recorded that: *“As discussed, we have to be very careful with what we share with the SSL directors to ensure we do not lose legal privilege in the event of an insolvency.”*
81. On 20 April 2015, Project Chicago was presented at a meeting of the Group Executive for approval. The *“Decision Paper”* prepared for the meeting presented two options:
- i) *“Option 1 – Move freeholds out of SSL and withdraw support. SSL would then have to make binding agreement with creditors (landlords) who would have to vote in favour to restructure SSL”*; or
 - ii) *“Option 2 – Move core & guaranteed stores out of SSL and provide ‘dowry’ to purchaser to take SSL with remaining non-core stores.”*
82. The Group Executive approved option 2, which closely reflected the initial solvent restructuring option first proposed by Deloitte back in 2013.
83. SSL was subsequently informed of the decision by the Group Executive. On 1 May 2015, PM wrote to AG noting *“our client is disappointed that the CVA option has been dismissed by tCG without any further discussion following the meeting on 19 March 2015.”*
84. Group’s decision was further discussed at a meeting between SSL and the Group project team on 14 May 2015 where Mr Cutting (again) explained that the CVA option had been dismissed *“due to reputational considerations”* and any CVA *“would not be feasible without tCG support”*. The draft minutes of this meeting record:

- i) Mr Barnes (of AG) having stated that although tCG would currently continue to support SSL, it could look to review the position and thereby put SSL and the SSL Directors in a more disadvantageous position;
 - ii) In this context, Mr Bailey stating “... *that it almost seemed like the SSL directors would be better off to be backed into a corner by the actions of the Group*”; and
 - iii) Mr Barnes later suggesting that “*it was in the SSL directors’ interests to have limited options.*”
85. The latter two comments were subsequently excised by Mr Cutting in a later version of the minutes.
86. Mr Bailey’s evidence was that his remark at the meeting on 14 May 2015 was “*a loose comment*” borne of frustration and was not representative of his wider dealings with Group, whilst Mr Lang’s evidence suggested this was a description of the state of affairs at that time rather than an invitation to Group as to how to proceed with the restructure. Mr Cutting’s evidence was that he could not recall why he amended the draft minutes, but he accepted the Joint Liquidators’ suggestion that he was controlling the paper trail given that the comments were unhelpful for Group, and in the context thereof observed: “*I took legal advice at every turn.*”
87. Following the meeting with tCG on 14 May 2015, SSL held a further board meeting on 19 May 2015. The note thereof that has been produced records that the SSL Directors “*agreed that the Board does not currently have sufficient information to reach any conclusions as to the viability of Project Chicago or the financial consequences for SSL and its stakeholders.*” Mr Cameron and Ms Latham of PM were present (by telephone), and Peter Rylands of tCG’s Legal Department was present in person. It was agreed that PM should request information from AG on some eleven points, including for copies of the Deloitte and AP reports that the SSL Directors had not been provided with. PM also emphasised at this meeting that “*the Board’s overriding duty is likely to be to act in the best interests of creditors*”.
88. On 20 May 2015, PM wrote to AG to emphasise that the SSL Board did not currently have sufficient information to reach any conclusions as to the viability of Project Chicago or the financial consequences for SSL and its stakeholders. The letter made the request for information that had been discussed at the meeting on 19 May 2015 and sought tCG’s “*views on the appointment of an independent turnaround specialist [...] to the board of SSL.*”
89. On 1 June 2015, SSL held a further board meeting at which the question of obtaining independent advice was discussed. In circumstances where tCG had not agreed that Deloitte would provide specialist professional advice to SSL but instead suggested it could extend a duty of care in respect of discrete documentation, PM “*recommended that the Board should consider whether it would require the benefit of specialist financial advice going forward.*”
90. Following other correspondence, on 17 June 2015, AG (Mr Barnes) responded to say: “*although we appreciate that the transaction is subject to the SSL directors becoming more comfortable and tCG Board approval tCG are keen to maintain that*

momentum. There is a concern that an appointment of someone new at this stage could jeopardise the timescales and add to the costs. [Ms Foster (of AG)] is to forward a proposed timeline which should help demonstrate what needs to be done and when (and explain the concerns about “derailment”).”

91. On 25 June 2015, Project Chicago was approved by the TCG Board on the following basis that had been outlined in a tCG TCG Board Paper prepared by Mr Cutting:
- i) The commencement of the internal restructure by transferring the designated freehold and leasehold core profitable stores to CFS – i.e. Phase 1;
 - ii) The pursuit of a solvent sale, for which approval was to be sought again from the Board once the final sale proposal was defined – i.e. Phase 2;
 - iii) The provision of an indemnity for the SSL Directors to mitigate “*personal risk*”;
 - iv) The appointment of an independent director to SSL, if required; and
 - v) The commitment to appropriate financial support for SSL for at least two years of continued trading to mitigate insolvency risk.
92. This approval was granted notwithstanding the SSL Directors’ continued concerns regarding Project Chicago, in respect of which the TCG Board Paper noted that: “*there needs to be commercial pressure exerted in order to make it financially and commercially rational for the SSL Board to conclude that it should go ahead with the restructuring. It will be necessary for the Group to consider withdrawing its support and calling in the intercompany loan, unless SSL complies with its requests.*” I am satisfied that this reflected the thinking within tCG by this time that it would be necessary to threaten withdrawal of financial and other support services in order to provide a basis, or even pretext, for the SSL Directors to enter into Project Chicago, as being in the best interest of SSL and relevant stakeholders.
93. Notwithstanding the above discussion regarding the withdrawal of financial support from SSL, on 30 June 2015, CGL issued its annual formal letter of support to SSL, copied to KPMG for audit purposes, confirming that it was the Group’s “*present policy*” to enable SSL to “*pay their debts as they fall due and to provide financial support to them accordingly whilst they remain within the Group’s ownership.*” SSL’s financial statements as at 3 January 2015, as signed off on 1 July 2015, referred to the “*continued availability of the Group’s facilities*” as underpinning the adoption of the “*going concern basis*” for its accounts.
94. On 2 July 2015, CGL informed the SSL Directors that its board had approved the internal ‘Phase 1’ restructure. At this point, Mr Wormald also replaced Mr Cutting as project team lead for Project Chicago, supported by Mr Hore (who was initially on secondment from Grant Thornton).

D.VIII Implementation of Project Chicago “Phase 1” restructure

95. Following the TCG Board’s approval of the restructure, the project team moved quickly over the following weeks to put steps in place for the implementation of Phase 1. This included the following:
- i) Mr Wormald confirmed that the SSL Directors would be replaced as directors of CFS: *“in order to avoid conflicts of interest [in light of] the potential sale of assets between the two entities”*.
 - ii) tCG proposed amendments to the SSL Rules to address the SSL Directors’ concerns in relation to conflicts of interest arising out of their senior roles within the Food Division.
 - iii) Deloitte began preparing estimated outcome statements (“EOSs”), including by gaining access to analysis prepared previously by AP. Of note, Mr Wormald emailed Deloitte on 3 August 2015 to say: *“I would be keen to understand as early as possible if the post restructure position of SSL is going to be net liabilities, and if so, what the remedial actions would be”*.
96. The SSL Directors had expressed concern about the solvency of SSL if the restructure were to proceed, as evidenced by the tCG project team’s minutes of a meeting on 5 August 2015 noting: *“Work ongoing to provide SSL Directors with necessary level of comfort re post transaction support and solvency.”*
97. The evidence shows that tCG were, in parallel, continuing to plan for a sale of SSL under Phase 2 of Project Chicago, even before Phase 1 had been approved by the SSL Board. As early as 20 August 2015, Mr Wormald indicated to AP that he *“would welcome a meeting with the team at Greybull”*, a reference to a potential purchaser. Following such a meeting, in early September, by email dated 5 September 2015, Mr Wormald reported back internally regarding Greybull Capital’s interest in acquiring SSL following Phase 1, and a number of issues associated therewith, including sharing information with the latter subject to a non-disclosure agreement (“NDA”). Mr Murrells responded that this seemed a *“fruitful area for further discussion.”*
98. Mr Bailey resigned as a director of CFS on 3 September 2015 and from CGF on 10 September 2015.
99. With regard to Project Chicago as a whole, on 8 September 2015, AG wrote to PM stating that: *“tCG has concluded that it is only willing to continue its support if the SSL business is restructured in line with what is known as “Project Chicago”, and that “[i]t is tCG’s intention to issue formal demand for the repayment of the inter-company loan due to tCG on or around 21 October 2015”*. AG also emailed PM in parallel presenting the *“only options available to SSL”* as being (i) administration, or (ii) Project Chicago restructuring, and explained that *“faced with the threat of support being withdrawn, the SSL directors need to consider which Option provides the best outcome for creditors.”*
100. PM responded on the same day to request *“draft correspondence re demand / withdrawal”*. This is relied upon by the Joint Liquidators as showing, at least, a

degree of co-ordination between AG, on behalf of tCG, and PM, on behalf of the SSL Directors regarding the Transaction Demand referred to below.

101. On 9 September 2015, a board meeting of SSL took place. The minutes record that the SSL Directors noted that: *“they were broadly supportive of Project Chicago as being in the best interests of SSL and its creditors when compared to the alternative of immediate administration”* subject to outstanding concerns regarding solvency, pension guarantees and legal documentation about which they remained *“seriously concerned”*.
102. On 15 September 2015, CGL entered into a deed of indemnity for the benefit of the SSL Directors.
103. On 16 September 2015, tCG provided the SSL Directors with a draft report prepared by Deloitte dated 14 September 2015 (**“the September 2015 Draft Deloitte Report”**) addressing the financial implications of the proposed restructure, albeit that it was expressed to have been prepared for the sole purpose of advising CGL and stated that no other party was entitled to rely upon it. It included EOS and balance sheet positions for SSL for before and after the restructure, which suggested that Project Chicago represented a better outcome for SSL and its creditors compared with an insolvency following a withdrawal of tCG support.
104. Particular points to note from the September 2015 Draft Deloitte Report are the following:
 - i) Although the EOSs purported to show a better position for creditors in the case of an insolvency of SSL two years after the proposed restructure than an immediate insolvency of SSL, this was on the basis that landlords benefited from receiving an additional two years’ rent. However, this did not take into account that in the event of an immediate insolvency, landlords would be in a position to determine the relevant lease or tenancy. This accounted for the difference between the position as shown in EOSs that had been prepared for the SSL Directors in January 2015, which had shown Project Chicago to be the less favourable option.
 - ii) Whilst the relevant EOS included a provision for onerous leases of £44.6 million, it did not include as an asset any right to recover any liability in respect of onerous leases from CGL or any other entity.
 - iii) The balance sheet that had been prepared showing the position following the transfer of properties and other assets by SSL to CFS and Rochpion showed a balance sheet surplus of £40.7 million. However, this balance sheet contained no provision for onerous leases despite the fact that provision for the same had been made in the EOS.
105. A further meeting took place between the tCG project team and the SSL Directors on 16 September 2015. The minutes of this meeting included the following under the heading *“Deloitte EOS report and transaction valuation – balance sheet analysis and queries”*:

- “13 [Mr Crossland] noted that the onerous lease provision was not included in the balance sheet, as they are held on a balance sheet elsewhere in the Group.
- 14 A discussion took place regarding the potential value of these liabilities (of c£60 million net of 2 years support from Group), and the potential impact on the SSL Directors ability to agree a statement of solvency.
- 24 [Julian Heathcote (of Deloitte)] and [Mr Crossland] raised the point that should the onerous lease provision be moved onto the SSL balance sheet, this would result in an intercompany debtor being created (due by Group Holdings) and that the net assets of SSL would not be affected. [Mr Bailey] agreed it would not affect net assets, assuming the intercompany debt was recoverable.
- 25 [Mr Cameron] raised the question as to the release of the SSL guarantee to the Somerfield Pension Scheme. The process to remove the guarantee was discussed, in that it is a process to apply post transaction with the consent of the Trustee.
- 26 It was agreed that the SSL Directors and [Mr Wormald] would consider the position regarding the onerous lease provision in the coming days.”
106. It is apparent therefrom that the SSL Directors remained concerned about the impact of the onerous leases on SSL’s solvency position and agreed to discuss this further with Mr Wormald. Mr Crossland also exchanged urgent emails with tCG’s “Group Finance”, saying: “what we need to understand is how the onerous leases relating to SSL got transferred to 2011 holdings in terms of accounting entries.”
107. As part of the transaction documentation, the SSL Directors understood that they would be required to sign a solvency certificate confirming both that SSL was solvent prior to the transaction and that it would not become insolvent as a result of the transaction. In order to ensure that they would be in a position to sign this certificate, the SSL Directors began to discuss the prospect of deferring an element of CGF’s withdrawal of share capital to a later date in order to ensure that SSL’s assets exceeded its current and contingent liabilities following the restructure (“**the Deferred Consideration**”). Mr Bailey’s evidence was that it was considered necessary to defer part of the consideration given that the SSL Directors were “*three cautious accountants*” who were keen to take an “*overly cautious*” position to ensure the solvency certificate could be validly signed.
108. The level of the Deferred Consideration was negotiated between SSL and Group, with PM emailing AG on 22 September 2015 to set out that: “*the directors therefore*

believe that a figure of £50m would be more appropriate” than a lower level, on the assumption that “the information provided in relation to the onerous lease liabilities (believed to be in the region of £62m) is complete and accurate.”

109. On 24 September 2015, there was an email exchange between Mr Sobers, Mr Wormald and Mr Hore regarding a risk register. In the course thereof, Mr Sobers asked whether “*we need to add a risk about the SSL Directors (sic) view of the Balance Sheet post Transaction in that with the onerous leases it would be insolvent.*” Mr Wormald responded: “*I don’t need the SSL directors (sic) risk on thanks.*” In evidence, Mr Wormald said he could not remember the email and suggested that it had been framed by a junior team member who did not understand the solvency issue. I did not find this response to be convincing, and I consider it more likely that this reflected his own words at the time.
110. On 28 September 2015, SSL held a further board meeting to discuss Project Chicago. The minutes recorded that: “*... in the face of the ultimatum threatened by tCG, the Board considered [redacted] and discussed the options available to SSL and agreed that it was presented with two options: (i) support Project Chicago, or (ii) risk the withdrawal of tCG’s support and the consequent insolvency of SSL.*” Having considered their fiduciary and other duties, “*the Directors agreed that they were broadly supportive of Project Chicago as being in the best interests of SSL and its creditors when compared to the alternative of an immediate administration of SSL*” [my emphasis], subject to resolution of the outstanding points under negotiation (particularly solvency).
111. At a meeting between the SSL Directors and tCG on 1 October 2015, Mr Wormald confirmed that a level of £50 million for the Deferred Consideration “*was acceptable to the Group.*”
112. Once this was agreed, the SSL Directors resolved at a board meeting on 8 October 2015 that Mr Bailey and CWS were authorised to act on behalf of SSL in relation to Project Chicago.
113. On 9 October 2015, SSL executed various documents relating to the reorganisation of the SSL Pension Scheme, set to take effect on 3 November 2015. These documents included a Flexible Apportionment Arrangement (“**FAA**”) pursuant to which SSL transferred its obligations under the SSL Pension Scheme to CFS, and a Deed of Alteration of Scheme Rules (“**the Deed of Alteration**”), revising the SSL Pension Scheme Rules to enable the pension rearrangement to proceed.
114. It should be noted that:
 - i) The pension reorganisation provided for by the documents executed on 9 October 2015 was entirely reversible in the event that Project Chicago did not proceed as anticipated by 3 November 2015; and
 - ii) Recital (D) to the Deed of Alteration recorded that: “*The Trustee [of the SSL Pension Scheme] has been informed that the core assets of SSL will be transferred from SSL to [CFS] during October 2015. In consideration of such transfer of assets, [CFS] has agreed to assume all the liabilities of SSL in relation to the [SSL Pension Scheme].*”

115. Meanwhile, and notwithstanding that the SSL Directors had not yet agreed to the Phase 1 internal restructure, Group continued developing its plans for the Phase 2 sale of SSL alongside the finalisation of Phase 1. I note that:
- i) On 13 October 2015, Mr Wormald emailed tCG Finance to say that:
- “Phase 2 of the Chicago project is the divestment of SSL, where the significant NPV benefit arises. We will refresh the NPV analysis (including the potentially reduced economies of scale point) once the quantum and structure of the likely Dowry become clearer through discussions with Greybull.”*
- ii) Further, Mr Hore emailed Mr Wormald and Mr Rowland on 19 October 2015 to say that:
- “The main reason for the 2 year point is that the directors could be challenged if SSL fell into insolvency within 2 years of restructure. [...] As part of any sale of SSL we will be looking to secure a similar window between the restructure and any sale.”*
116. With regard to Phase 1, the solvency analysis remained at the forefront of discussion right up to the execution of transaction documentation on 2 November 2015. Although by this point the SSL Directors had agreed the Deferred Consideration with Group at a level of £50 million, further work was done in order that the SSL Directors could gain more confidence about signing off on SSL’s solvency.
117. Of particular note, on or about 19 October 2015, Mr Crossland prepared a balance sheet showing the position of SSL following the First Withdrawal of Share Capital and before the second deferred Withdrawal of Share Capital, on which Deloitte also advised. Although this showed a net asset position of £24.3 million immediately after the First Withdrawal of Share Capital, it suggested that there would be a negative asset position of £25.7 million following the Second Withdrawal of Share Capital, and it only showed a net asset position at all because the Deferred Consideration of £50 million had been included as an asset on the balance sheet.
118. It was Mr Bailey’s evidence that this document was prepared for the purposes of the solvency statements that the SSL Directors were required to provide, and out of an abundance of caution. His recollection was that Deloitte were comfortable that there was a corresponding intercompany claim in respect of the onerous lease provision. However, he was unable to provide an explanation as to why, in the balance sheets and EOSs that Deloitte prepared at that time, the onerous leases were provided for in the EOSs without a corresponding intersociety claim, and why there was a distinction between the position shown by the balance sheets and the EOSs.
119. In addition to the September 2015 Draft Deloitte Report, Deloitte also prepared an “*Analysis Update Report*” on 27 October 2015 (“**the Deloitte October 2015 Report**”). Despite the wording in the covering letter on the second page of this report, the evidence is to the effect that Deloitte agreed to the SSL Directors relying on this analysis in their decision-making. The EOSs and balance sheets were prepared on the same basis as the September 2015 Draft Deloitte Report, albeit with revised figures and reflecting the Deferred Consideration. Thus, the EOS showing the position in the

event of an insolvency of SSL two years after the proposed restructure showed onerous lease liabilities of £54.9 million, without any corresponding intersociety claim, and estimated total liabilities of £75.3 million. Further, it showed landlords benefitting through the receipt of rent through SSL trading for a further two years.

120. Thus, the post Phase 1 Project Chicago balance sheet was split so as to show the position after stage 1, i.e. before the payment of the Deferred Consideration, and the position after stage 2 and the payment of the Deferred Consideration. The position after stage 1 showed a balance sheet surplus of £104.5 million, but on the basis that the Deferred Consideration was shown as an asset, and without containing any provision for onerous leases (or corresponding asset). The position after stage 2 showed a balance sheet surplus of £54.5 million, but again without making any provision for onerous leases (or corresponding asset).
121. A “*Progress Update*” dated 27 October 2015 prepared by Mr Wormald for TCG Board flagged up as a “*key risk*”, amongst other things, “*Future insolvency of SSL – Given that SSL will become loss making after restructure*”. The note continued: “*this risk is mitigated by a deed of support from [CGL] whilst SSL remains in Group ownership*”.
122. On 27 October 2015, AG, on behalf of CGL, CGF and other tCG societies sent to SSL the Transaction Demand which formally set out that “*Group is only willing to continue its support of the SSL business if it is restructured in line with Project Chicago*”, i.e.:
 - i) the sale of certain properties and other assets to CFS and Rochpion;
 - ii) repayment of the outstanding ISLA debt between CGL, CGF and SSL; and
 - iii) withdrawal of share capital by CGF “*at a level to support the transaction*”, i.e. in an amount to cover the price payable by CFS for the properties and assets to be acquired by it.
123. The Transaction Demand threatened that “*in the event that SSL do not carry out any of the stages detailed above then Group will take enforcement action to recover the inter society debt and will withdraw the support services it currently provides to SSL.*”
124. There was served together with the Transaction Demand:
 - i) A demand letter from CGL for repayment of the outstanding intercompany debt; and
 - ii) A draft notice from CGF to request the withdrawal of share capital from SSL to fund, by way of set-off, the purchase of the properties and assets to be acquired by CFS.
125. Following consideration of the Transaction Demand, PM wrote to AG on 30 October 2015 to record that: “*in the face of the ultimatum threatened by your client, our client has considered the limited range of options available to it and has reached the*

conclusion that, in the circumstances, the implementation of Project Chicago would be in the best interests of [SSL] and its stakeholders.” [My emphasis].

126. On 30 October 2015, the trustees of the SSL Pension Scheme confirmed to SSL that they would release SSL from its obligations to the SSL Pension Scheme upon the earlier of (i) SSL being retired as a “*Material Subsidiary*”; or (ii) sufficient landlords consenting to the assignment of their properties to secure £17m of profit before tax (on top of the freehold trading performance) in CFS; or (iii) on the completion date of the disposal of SSL if this were to occur earlier.
127. Further, on 30 October 2015, the SSL Directors resolved to make, and did make, declarations of solvency confirming that (a) SSL’s assets exceeded its liabilities (taking into account its actual, contingent and prospective liabilities) and would do so immediately after the transaction; and (b) SSL would not become insolvent at any stage in the transaction or transactions giving effect to Project Chicago or immediately thereafter.
128. On 2 November 2015, SSL held two board meetings in short succession at which the SSL Directors respectively approved: (i) the sale of freehold and leasehold properties and assets to CFS and Rochpion, (ii) CGF’s withdrawal of share capital, and (iii) repayment of the outstanding ISLA debt. Although these steps were approved in separate meetings, Mr Lang’s evidence was that the SSL Directors considered the steps to be concurrent. The resolution relating to the withdrawal of capital approved unconditionally a first withdrawal of capital of £431,042,860, but approval of a further withdrawal of £50,000,000 was expressed, by the resolution, to be conditional upon SSL receiving confirmation that it was no longer a “*Material Subsidiary*”.
129. Following approval by the SSL Board, Phase 1 of Project Chicago was carried into effect on the same day by way of the following documentation:
 - i) The Rochpion Sale Agreement, i.e. the Sale Purchase Agreement dated 2 November 2015 between SSL (1) and Rochpion (2) for “*the sale and purchase of a portfolio of properties and certain assets*” for a consideration of £5.
 - ii) The Foodstores Sale Agreement, i.e., the Sale Purchase Agreement dated 2 November 2015 between SSL (1) and CFS (2) for “*the sale and purchase of business and assets*” for a consideration of £496,334,262 (later reduced to £493,002,797 following a post-completion reconciliation exercise). In respect thereof, it should be noted that:
 - a) The consideration of £496,334,262 was apportioned as set out in clause 6.1 thereof. This included £173,811,333 in respect of “*the Properties*” (as defined) (being the book value of £200,670,475 less certain liabilities relating thereto);
 - b) Completion was to take place immediately after execution of the Foodstores Sale Agreement when an initial consideration of £446,334,262 was payable;

- c) Clause 8 provided for payment of a “*Deferred Consideration*” of £50,000,000 upon the earlier of (i) the satisfaction of the conditions set out in clause 8.2 or (ii) 2 May 2016.
 - iii) A Deed of Support dated 2 November 2015 between CGL (1) and SSL (2) (“**the Deed of Support**”) and accompanying side letter dated 2 November 2015 (“**the Side Letter**”), requiring CGL to:
 - a) provide financial and support services to SSL in the same manner as immediately before the date thereof until the termination thereof (which included on a change of control of SSL), to be paid for by the creation of a corresponding ISLA liability due to CGL by SSL;
 - b) To use “*all reasonable endeavours*” to work with any new owner of SSL to avoid an insolvency event within two years of the Second Withdrawal of Share Capital .
 - iv) A funds flow letter dated 2 November 2015 (“**the First Funds Flow Letter**”) executed on behalf of each of CGL, CGF, SSL, and CFS confirming the multilateral set-off arrangements provided for thereby whereby SSL would transfer the properties and assets provided for by the Foodstores Sale Agreement to CFS, to be funded, so far as the initial consideration was concerned, by a withdrawal of share capital from SSL by CGF of £431,042,860, a repayment by SSL to CGL of £15,291,401.04 thought to be due under the ISLA and the subsequent loan of such sum by CGL to CGF, and the subscription by CGF of £446,334,262 for shares in CFS to be used by the latter to pay the initial consideration under the Foodstores Sale Agreement.
 - v) A Notice of Withdrawal of Share Capital dated 2 November 2015 from CGF to SSL requesting approval and consent to withdraw £481,042,860 of the share capital held by CGF in SSL. The letter concluded by asking SSL to “*confirm your consent to the above by signing the enclosed copy of this letter*”. The letter purports to have been executed as a deed by the signature of Ms Sellers who purported to have executed the same on behalf of both CGF and SSL.
- 130. On 3 November 2015, the reorganisation of the SSL Pension Scheme was completed, and SSL was released from its obligations relating to the SSL Pension Scheme, including its liability as a statutory employer (save in relation to a replacement guarantee (“**the Replacement Guarantee**”), from which it was released on 3 February 2016).
- 131. SSL was subsequently released from guarantees and indemnities relating to other tCG pension schemes and from its guarantee obligations under the banking and bondholder facilities on 14 December 2015 as described further below.

D.IX Completion of Chicago “Phase 2” – the sale of SSL

132. As has been explained, the scope of Project Chicago had, from its inception, envisaged a two-stage process whereby SSL would be sold to a third-party purchaser following the transfer out of SSL’s “good” assets.
133. Very shortly following the completion of the internal restructure, it was recognised within tCG that a quick sale would maximise the financial benefit to be obtained from Project Chicago. Thus, in an email dated 6 November 2015, from Mr Hore to Mark Brewer (of tCG’s Strategic Planning team), copying in Mr Wormald, Mr Hore commented: *“Re the timing, the earlier the better in terms of benefit to the Group, as you correctly note that the longer we wait, the more of the onerous lease costs we will have incurred. The broad principles of the NPV analysis is that the Dowry is much less than continuing to hold the properties, therefore the quicker we do it, the greater the NPV (depending on the final Dowry level of course)”*.
134. The Project Chicago team therefore began to take steps to progress a potential sale of SSL promptly from November 2015, including by the following means:
- i) By an email dated 11 November 2015, Mr Wormald reached out to Deloitte to enquire whether they *“had been able to give any further thought to who we should potentially approach in respect of divesting of the Chicago portfolio. I have been asked to speak to Steve Murrells (Food CEO) tomorrow with a view on likely interested parties.”*
 - ii) Shortly thereafter, tCG’s Estates team prepared a slide deck setting out an overview of the potential pool of purchasers, and a process timeline which envisaged exchange by March 2016; and
 - iii) AP pitched to tCG to advise on the sale process and, on 22 December 2015, CGL formally instructed AP to prepare marketing documents for a share sale of SSL.
135. Discussion also began with potential buyers, with Alteri signing an NDA to access commercial information on 20 November 2015, and Greybull Capital making a first offer to tCG on 4 December 2015.
136. It is evident that, against this background, concern remained as to the financial position of SSL going forward and as to the likelihood of insolvency. Thus, for example:
- i) Mr Hookins emailed Mr Wormald and Mr Hore on 13 November 2015 noting: *“I think we have to flag the concern that [...] operating these large stores as Food operations is highly unlikely to be successful”*;
 - ii) AP’s pitch materials dated November 2015 included as an objective for the sale that purchasers would be asked for *“a commitment to no insolvency process in SSL until after 1 November 2017”* ;

- iii) Mr Hore emailed AP on 14 December 2015 to say: *“I would like to pick your brains on: - the two year hold point, [...] – the likely of use of an insolvency process swiftly (in particular which interested parties are likely to line a process up sooner than others)”*; and
- iv) An *“Item Summary”* presented by Mr Wormald at the Group Executive meeting on 14 January 2016 recognised that insolvency *“is likely to be used by a purchaser to mitigate the onerous lease liabilities”*, and it proposed a process to convert SSL to a limited company immediately and *“rename to mitigate the connection to the Group in the event of a future insolvency”*.
137. Against the background of these concerns regarding insolvency of SSL, tCG continued to discuss the length of hold period that it would be appropriate to require from a purchaser.
138. In an internal email dated 12 January 2016, Mr Wormald commented that:
- “The more complex piece is the question of how long a purchaser should be made to hold it before they can put it into an insolvency process. [...] Subject to people being comfortable with the legal arguments made it becomes a timing and brand/reputations risk mitigation question. There is no right answer just a continuum over which we have to pay more by way of a dowry but we reduce our risk.”*
139. On 14 January 2016, the tCG Executive discussed the prospective sale and approved (i) the plan to proceed with Phase 2, and (ii) a minimum hold period of 13 months to operate SSL to at least 30 November 2016. The reduced hold period of approximately 13 months was anticipated to reduce the dowry required to support a sale and thereby increase the financial benefit to the Group, compared with the originally anticipated two years.
140. Unsurprisingly, the SSL Directors were concerned to learn at a meeting on 20 January 2016 that tCG was intending to reduce the hold period down from two years. PM contemporaneously recorded this meeting as having been *“emotive”* as the SSL Directors considered that CGL was reneging on the commitments made under the Deed of Support and Side Letter to use *“all reasonable endeavours”* to ensure that no insolvency event happened prior to November 2017. Following further discussion amongst themselves, the SSL Directors informed Group that they were unwilling to approve the Second Withdrawal of Share Capital unless tCG reverted to the *“original timescales”* and the terms of the Deed of Support.
141. On 27 January 2016, Phase 2 was considered by tCG Board and, likely in the light of the concerns raised by the SSL Directors, approval was granted in the following terms:
- “the divestment of SSL, after its conversion to a limited company and change of name, be approved subject to a purchaser agreeing to avoid an insolvency of SSL before 30 November 2016 and if the period was to be extended following discussion with the SSL Directors for a dowry payment of less than £50m.”*

Approved Judgment

142. This was communicated to the SSL Directors by AG in an email to PM dated 10 February 2016. Later the same day, the SSL Directors approved the Second Withdrawal of Share Capital at a board meeting. By this time, SSL had been released from liability in respect of the SSL Pension Scheme, and from liability as guarantor in respect of other Group pension schemes and bank and bondholder liabilities. Further, by a deed dated 3 February 2016, SSL had been released from the Replacement Guarantee.
143. On 11 February 2016, CGF sent to SSL and CFS a second funds flow letter (“**the Second Funds Flow Letter**”) relating to the Second Withdrawal of Share Capital of £46,668,530 to be used, effectively, to pay the Deferred Consideration as adjusted to this amount. The Second Funds Flow Letter was in similar terms to the First Funds Flow Letter, save that it did not need to make any mention of the repayment of the ISLA. Consequently, whilst it was executed as a deed by CGF, CFS and SSL, CGL was not a party thereto.
144. Notwithstanding the discussion (and approval) of a shorter hold period, the risk of insolvency for SSL was further expressly discussed, in that:
- i) On 26 January 2016, Mr Wormald wrote to tCG’s Estates team that: “*my expectation is that by the end of 2016 SSL will enter into an insolvency process*”; and
 - ii) Various offers were received by tCG for SSL, predominantly from purchasers specialising in distressed assets and all requiring substantial dowry payments. This does, to my mind, indicate that all potential purchasers considered SSL, by this stage, to have negative equity value.
145. By 15 March 2016, Hilco was selected as the preferred bidder due to its ability to provide a limited transition period and thus facilitate a clean break from tCG. It was the evidence of a number of the Respondents’ witnesses that Hilco were thought to be best positioned to support SSL’s continued operation. This is disputed by the Joint Liquidators, who say that Hilco’s business model was understood to focus on profiting from the insolvencies of distressed retailers.
146. On 18 March 2016, in preparation for the sale, SSL was converted to a limited liability company with a new name – “*S206374 Properties Limited*”. It is reasonably clear from the “*Item Summary*” presented by Mr Wormald at the Group Executive meeting on 14 January 2016 that this change of name took place to distance SSL from tCG following the sale.
147. On 1 April 2016, Mr Bailey resigned as a director of SSL.
148. On 29 April, CGL entered into a share purchase agreement with HUK 65 Limited, a Hilco entity, for the sale of 100% of SSL’s share capital for consideration of £1 (“**the Hilco SPA**”).
149. In addition to the Hilco SPA, CGL also executed a Deed of Capital Contribution in favour of HUK 67 Limited, under which a dowry of £34.5 million was provided to this separate Hilco entity. This was structured on the proviso that SSL would not enter into insolvency prior to 28 February 2018, and no CVA would be proposed prior to 1

March 2017. This enabled tCG to pay a dowry substantially lower than their maximum amount of £50m in return for agreeing to accept weaker insolvency protection for SSL compared with a full two-year hold period from the Phase 1 execution (i.e. up to November 2017) as initially envisaged.

150. The sale of the share capital of SSL to HUK 65 Limited completed on 25 July 2016, at which point:
- i) CWS resigned as director of SSL;
 - ii) The Deed of Support was terminated due to the change of control of SSL; and
 - iii) SSL changed its name again to “**The Food Retailer Operations Limited**” (i.e. FROL).
151. In relation to this sale of the share capital of SSL to HUK 65 Limited, Holdings’ financial statements for the year ended 31 December 2016 contained under note 15, Provisions, reference to a credit of £73,652,000 to the income statement with the following explanation:

“A credit of £73,652,000 has occurred in 2016 following the derecognition of former Somerfield onerous leases. On 25 July 2016, Co-operative Group Food Limited, a fellow group undertaking, sold its investment in Somerfield Stores Limited to HUK (65) Limited which is not part of tCG. As part of the sale, HUK (65) Limited agreed to take responsibility to pay the onerous leases which had been transferred to the Society during the restructuring of Somerfield following its acquisition by the Group in 2009.”

D.X Post-sale events

152. As early as 7 November 2016, a winding up petition was presented against SSL by Chatham Estates, a landlord. It is clear that, by this stage, SSL’s financial position had become uncertain. Shortly thereafter, as evidenced by a letter dated 30 November 2016 from AG to Shoosmiths, solicitors then acting for the then sole director of SSL, the director of SSL had proposed a CVA.
153. Notwithstanding that tCG had sought to agree with the relevant Hilco entities that SSL would not enter administration prior to February 2018 (or a CVA prior to March 2017), the terms of the Hilco SPA did not expressly prevent SSL from being placed into administration or a CVA at an earlier date. Rather, it simply provided that, should insolvency occur earlier, tCG would have no further liability for dowry payments and previous dowry payments would be repayable.
154. As such, Hilco entered into discussions with tCG about the possibility of Group agreeing to an earlier CVA, and Shoosmiths were instructed by SSL to advise on the process.

Approved Judgment

155. On 22 December 2016, Mr Wormald emailed a group of senior individuals within tCG, including Mr Pennycook, seeking “*urgent approval*” for Hilco to start a CVA process “*imminently*”. Within his explanation of the request, he indicated that “*it was always anticipated that the end point for SSL would be an insolvency*”, but that Hilco were making the request earlier than anticipated as a result of “*poor trading performance*”. Mr Pennycook responded to approve the CVA from tCG’s perspective, suggesting it was “*Hobson’s choice*”.
156. A CVA was duly proposed by SSL on 10 January 2017. However, this was not approved by the necessary majority of creditors at the first meeting (which was adjourned) or at a second meeting on 9 February 2017. A key objection from creditors was the asset disposal under Phase 1 of Project Chicago. As one creditor put it: “*The situation seems to be that sometime in 2015 a decision was made by CGF to cherry-pick the viable assets of the business and withdraw £500m and then leave a rump of landlord creditors substantially unpaid.*”
157. Further statutory demands were served and winding up petitions presented between late December 2016 and early February 2017.
158. Following the failure of creditors to agree the proposed CVA on 9 February 2017, on 10 February 2017, SSL entered into administration, with individuals from PricewaterhouseCoopers appointed as joint administrators.
159. On 7 June 2017, Malcolm Cohen and Mark Shaw of BDO were appointed as additional administrators of SSL.
160. On 13 March 2018, the original joint administrators of SSL were removed.
161. On 9 February 2019, SSL converted from administration to creditors’ voluntary liquidation, and Malcolm Cohen and Mark Shaw were appointed as joint liquidators. Shane Crooks replaced Mark Shaw as a joint liquidator on 14 October 2024.
162. These present proceedings were commenced by the Respondents on 3 February 2023.

E. Relevant provisions of the IA 1986

163. It is not in dispute that although SSL was, at the relevant time, a registered society, and not a company, the relevant provisions of the IA 1986 apply to it.
164. The TUV provisions in s. 238 IA 1986 apply where a company (or a registered society) has entered into administration or gone into liquidation, and the reference therein to “*the office-holder*” is to the administrator or liquidator – see s. 238(1).
165. Ss. 238(2)-(5) then provide as follows:

“(2) *Where the company has at a relevant time (defined in section 240) entered into a transaction with any person at an undervalue, the office-holder may apply to the court for an order under this section.*

- (3) *Subject as follows, the court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the company had not entered into that transaction.*
- (4) *For the purposes of this section and section 241, a company enters into a transaction with a person at an undervalue if—*
 - (a) *the company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration, or*
 - (b) *the company enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company.*
- (5) *The court shall not make an order under this section in respect of a transaction at an undervalue if it is satisfied—*
 - (a) *that the company which entered into the transaction did so in good faith and for the purpose of carrying on its business, and*
 - (b) *that at the time it did so there were reasonable grounds for believing that the transaction would benefit the company.”*

166. S. 239 IA 1986, relating to preferences, provides, so far as relevant, as follows:

- “(1) This section applies as does section 238.*
- (2) *Where the company has at a relevant time (defined in the next section) given a preference to any person, the office-holder may apply to the court for an order under this section.*
- (3) *Subject as follows, the court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the company had not given that preference.*
- (4) *For the purposes of this section and section 241, a company gives a preference to a person if—*
 - (a) *that person is one of the company's creditors or a surety or guarantor for any of the company's debts or other liabilities, and*
 - (b) *the company does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the company going into insolvent liquidation, will be better than the position he would have been in if that thing had not been done.*
- (5) *The court shall not make an order under this section in respect of a preference given to any person unless the company which gave the*

preference was influenced in deciding to give it by a desire to produce in relation to that person the effect mentioned in subsection (4)(b).

(6) A company which has given a preference to a person connected with the company (otherwise than by reason only of being its employee) at the time the preference was given is presumed, unless the contrary is shown, to have been influenced in deciding to give it by such a desire as is mentioned in subsection (5)."

167. It is to be noted from s. 239(6) that if the other elements of a preference are successfully established by the Joint Liquidators, then there is a presumption that SSL was influenced in deciding to give it by a desire to put the preferred party in a better position, in the event of an insolvent liquidation, than they would have been in had the preference not been made.
168. So far as the "*relevant time*" for the purposes of s. 238(2) and s. 239(2) is concerned:
- i) S. 240(1) provides that, subject to s. 240(2), in the case of a TUV or of a preference which is given to a person who is connected with the company, then the "*relevant time*" is a period of two years from the onset of insolvency, here the date of SSL going into administration on 10 February 2017. It is not in dispute that, in the present case, any TUV was entered into and any preference was given to a person connected with SSL. Consequently, the period of two years is applicable, and it is not in dispute that this particular condition is satisfied in the circumstances of the present case given that the transaction that is sought to be impugned took place on 2 November 2015, within two years of 10 February 2017.
 - ii) However, s. 240(2) then provides that time is not a relevant time for the purposes of s. 238 or 239 unless the company or society:
 - a) at the time of the TUV or preference was "*unable to pay its debts within the meaning of*" s. 123 IA 1986; or
 - b) "*becomes unable to pay its debts within the meaning of that section in consequence of the transaction or preference*".
 - iii) S. 240(2) goes on to provide that the requirements of that subsection are presumed to be satisfied, unless the contrary is shown, in relation to any transaction at an undervalue which is entered into by a company with a person who is connected with the company. The consequence of this is that, in relation to the Joint Liquidators' TUV claim, SSL is presumed to have been insolvent, or to have become insolvent "*in consequence of*" the transaction sought to be impugned. On the other hand, in the case of the preference claim, the onus is on the Joint Liquidators to prove insolvency. The question of insolvency is very much in issue in the present case.
169. The expression "*transaction*" is widely defined by s. 436(1) such that: "[it] *includes a gift, agreement or arrangement, and references to entering into a transaction shall be construed accordingly.*"

F. An outline of the Joint Liquidators' case

F.I "At a relevant time"

170. As already identified, it is not in dispute that the temporal requirements of the transaction at an undervalue and preference claims are satisfied in the present case, with the impugned transactions taking place within two years of SSL entering into administration.
171. With regard to s. 240(2) IA 1986 and the insolvency requirement, the Joint Liquidators now accept that SSL was not insolvent at the time that it entered into the impugned transaction, but it is the Joint Liquidators' case that SSL became unable to pay its debts within the meaning of s. 123 in consequence of the transaction or preference. It is primarily their case that SSL became insolvent immediately upon entering into the impugned transaction, or the giving of the preference. Alternatively, it is their case that SSL became insolvent "*in consequence of*" the transactional or preference at a later stage upon the entry into of the Hilco SPA.
172. Recognising that the presumption in favour of the Joint Liquidators only applies in the case of the TUV, it will be necessary, in due course, to consider in some detail the basis upon which it is contended that SSL became insolvent in consequence of the impugned transaction or preference.

F.II Transaction at an undervalue

173. The relevant transaction was pleaded out in paragraph 18 et seq of the Amended Points of Claim. It was there pleaded that between October 2015 and February 2016, SSL was restructured "*through one or more transactions referred to at the time as "Project Chicago" (referred to hereinafter as "the Transaction")*". It was asserted that the Joint Liquidators' "*primary case*" was that "*the Transaction*", as so defined, comprised a single transaction for the purposes of sections 238 and 239 IA 1986.
174. In paragraph 19 of the Amended Points of Claim, it was pleaded that the "*principal elements of the Transaction*" were:
- i) The reorganisation of the SSL Pension Scheme "*under documents entered into on 9 October 2015 and taking effect on 3 November 2015*";
 - ii) The sale of property and other assets by SSL to CFS and Rochpion on 2 November 2015 for a stated consideration of £496,334,262;
 - iii) The withdrawal of £477,711,390 of share capital from SSL by CGF split into a withdrawal of £431,042,860 on 2 November 2015 and £46,668,530 on 11 February 2016; and
 - iv) The repayment by SSL of an intersociety loan of £15,291,401.04 to CGL on 2 November 2015.
175. In paragraph 56 of the Amended Points of Claim, it was averred by the Joint Liquidators that "*as part of the Transaction*", SSL received the following consideration:

- i) The release from liability for a deficit contribution valued at £23.4 million (or such other sum as the Court determined) relating to the SSL Pension Scheme; and
 - ii) The intersociety loan repayment of £15,291,401.04, subject to the Joint Liquidators being satisfied as to the validity and/or amount of the latter.
176. In paragraph 57 of the Amended Points of Claim, it was pleaded that the consideration provided by SSL “*within the Transaction*” was as follows, namely:
- i) SSL transferred properties and assets with a stated value of £493,002,792 to CFS under the Foodstores Sale Agreement; and
 - ii) The true value of properties and assets transferred to Rochpion under the Rochpion Sale Agreement, less the sum of £5.
177. It is implicit in this pleading that no value or consideration was to be attached to the return by SSL to CGF of £477,711,390 of share capital albeit that the return of share capital was pleaded as having been part of the “*Transaction*”. It is therefore the disparity in value between the consideration referred to in paragraphs 56 and 57 respectively that was alleged to have amounted to the TUV pursuant to section 238 IA 1986 that was relied upon as the primary case as to undervalue in paragraph 59 of the Amended Points of Claim.
178. It is on the basis of this primary case that the court directed expert evidence as to the value of the relevant transferred properties and fixtures and fittings, and also as to the value of the release of SSL from liability as statutory employer in respect of the SSL Pension Scheme, so as to enable the court to determine whether there had been a TUV and, if so, the extent thereof.
179. In paragraph 58 of the Amended Points of Claim, the Joint Liquidators pleaded an alternative case that the Withdrawals of Share Capital in themselves, i.e. taken alone, “*amounted to consideration of £477,711,390 being paid by SSL to CGF with nil consideration being received by SSL in return*”. On this basis, in paragraph 59, it was pleaded in the alternative that the withdrawals of share capital themselves were TUVs pursuant to Section 238 IA 1996.
180. Notwithstanding the alternative case pleaded in paragraph 58 of the Amended Points of Claim, the Statement of Agreed Facts and Issues in Dispute agreed between the parties ahead of the trial identified the issues between them on the basis of the Joint Liquidators’ primary case, without any reference to the alternative case. Thus, it was recorded therein that: “*the Transaction comprised a single transaction*” for the purposes of s. 238 and s. 239. The “*principal elements of the Transaction*” were referred to as being “*the reorganisation of the Somerfield Pension Scheme...the sale of properties and other assets by [SSL] to [CFS] and Rochpion...the withdrawal of £477,711,390 of share capital...and the repayment by [SSL] of an intercompany loan of £15,291,401.04 to CGL*”.
181. It therefore, understandably, came as something of a surprise to the Respondents when, in the Joint Liquidators’ Skeleton Argument for trial filed and served on 23 December 2025, the Joint Liquidators stated that their alternative case was now their

primary case, and so the focus was very much upon whether the Withdrawals of Share Capital, in themselves, amounted to TUVs.

182. As dealt with in very much more detail below, the essence of the Joint Liquidators' case, in respect of both the primary and alternative cases, is that the Withdrawals of Share Capital were akin to the payment of a dividend by a company. The declaration and payment of a dividend have been held by the Court of Appeal to be a transaction "*on terms that provide for [the company] to receive no consideration*", at least for the purposes of s. 423 IA 1986 – see *BTI 2014 LLC v Sequana* [2019] EWCA Civ 112, [2019] 1 BCLC 347 ("**Sequana CA**").
183. The Joint Liquidators' case is the Withdrawals of Share Capital, are, for this purpose akin to the declaration and payment of dividends and therefore provided for SSL to receive no consideration within the meaning of s. 238(4)(a) IA 1986, which is in like terms to s. 423(1)(a) IA 1986.
184. Despite the primary case having shifted to reliance upon the alternative case as to the "*Transaction*", it was, as I understood it, still the position that the Joint Liquidators accepted that the Court would still have to grapple with the issue of undervalue by reference to the value of the properties and fixtures and fittings transferred to CFS and Rochpion pursuant to the Foodstores Sale Agreement and the Rochpion Sale Agreement, and the expert evidence relating thereto. I note that in opening it was contended on behalf of the Joint Liquidators that the Foodstores Sale Agreement and the Rochpion Sale Agreement were "*the means by which*" the Withdrawals of Share Capital were paid.
185. The principal difference between the case that the Withdrawals of Share Capital in themselves amounted to a TUV, and the original primary case based upon a wider "*Transaction*", is that the Joint Liquidators contend that this means that the benefit of the release by SSL of its obligations as statutory employer under the SSL Pension Scheme, and the benefit of the release of other contingent liabilities in respect of other Group pension schemes and bank and bond holder liabilities, could not, on any view, be regarded as consideration provided to SSL pursuant to the "*Transaction*".
186. The Joint Liquidators' case was refined further in closing in that it was then contended that the consideration provided by SSL pursuant to the "*Transaction*" was, on proper analysis, not the value of the subject matter of the Foodstores Sale Agreement and the Rochpion Sale Agreement, but rather the choses in action representing the price payable pursuant to these agreements on the basis that the latter was satisfied by the Withdrawals of Share Capital. This was said to represent the true extent of the undervalue when compared to the absence of consideration provided to SSL in respect of the Withdrawals of Share Capital. If this is right, then the expert valuation evidence is rendered otiose and redundant.
187. Although this would value the extent of the undervalue at £477,711,495, the Joint Liquidators accepted that the claim should be limited to a sum sufficient to pay all outstanding creditors of SSL who have proved in its liquidation (estimated at £98,488,394.94 inclusive of interest as at 3 October 2025) together with the costs of the liquidation, the present estimate of the sum required to meet creditor claims and the costs of liquidation being, on the basis of the Joint Liquidators' best estimate, approximately £205 million.

F.III Preference

188. The first matter that is relied upon, which is relied upon in any event, is the intercompany loan repayment of £15,291,401.04, which is described in paragraph 62 of the Amended Points of Claim as “*part of the Transaction*”. It is alleged that this put CGL in a better position, in the event of SSL entering into insolvent liquidation, than it would otherwise have been in. In fact, although the sum of £15,291,401.04 is pleaded, subject to further issues that arise, the Joint Liquidators accept that the amount of set-off as against the ISLA was, in fact, only c. £4.6 million.
189. The second matter, pleaded in paragraph 63 of the Amended Points of Claim, is the settlement of the Withdrawals of Share Capital. This is pursued as an alternative claim in the event that the court should conclude that CGF, by its subscription of shares in SSL, had provided consideration for the settlement of the Withdrawals of Share Capital. It is therefore the Joint Liquidators’ case that if, for this reason, the Withdrawal of Share Capital did not amount to, or form part of, a TUV, then the effect thereof was to put CGF in a better position than it would have been in in the event of SSL entering into insolvent liquidation. This is on the basis that the Withdrawals of Share Capital enabled CGF to subscribe for shares in CFS, which was then used as the vehicle to purchase the assets comprising the subject matter of the Foodstores Sale Agreement. It is submitted that in the event of an insolvent liquidation of SSL, then CGF would have received significantly less than the value of the Withdrawals of Share Capital of £477,711,390 settled as provided for by the First Fund Flow Letter and the Second Funds Flow Letter (together “**the Funds Flow Letters**”).
190. In each case it is alleged that, in effecting the preferences, SSL was influenced by a desire to improve the position of CGL and CGF in the way described. The Joint Liquidators rely upon the presumption to this effect provided for by s. 239(6) IA 1986.

G. An outline of the Respondents’ case

G.I - Solvency

191. The Respondents dispute that SSL became unable to pay its debts within the meaning of s. 123 IA 1986 in consequence of the entry into of the impugned transaction or the alleged preference. Rather, it is their case that SSL only became insolvent upon the later entry into of the Hilco SPA, and that was not properly to be regarded as having been “*in consequence of*” the impugned transaction or preference. Plainly, if the Respondents are right as to this, then an essential ingredient of both the TUV and preference claims is absent, and the Joint Liquidators’ claim must fail.

G.II - Transaction at an undervalue

192. With regard to the TUV claim, the Respondents deny that there was any undervalue in that they dispute that the consideration in money or money’s worth received by SSL under the relevant transaction was significantly less than the value, in money or money’s worth, of the consideration provided by SSL.

193. As to this:

- i) The Respondents submit that consideration was provided for the Withdrawals of Share Capital by the initial subscription for the relevant shares, and thus that the £477,711,390 that is to be taken to have been received by CGF through the Withdrawals of Share Capital was matched by the same amount subscribed for the relevant shares in SSL. They submit that the withdrawal of share capital from a registered society is a different and distinct process from the payment by a limited company of a dividend, and therefore that the decision of the Court of Appeal in *Sequana CA* falls to be distinguished and has no application.
- ii) If this is right, then there can be no question of there having been any TUV, whether one views the “*Transaction*” as having been simply the Withdrawals of Share Capital, or the Withdrawals of Share Capital as having been part of a wider “*Transaction*” as alleged in the Joint Liquidators’ original primary case and as reflected in the Statement of Agreed Facts and Issues. This is because the consideration of £477,711,390 provided to SSL was not significantly less than the consideration provided by SSL in the form of the assets comprising the subject matter of the Foodstores Sale Agreement and the Rochpion Sale Agreement, even on the basis of the Joint Liquidators’ valuation of those assets (between £396,439,723 and £412,628,091).
- iii) However, even if the Respondents are wrong as to the correct approach to consideration and the Withdrawals of Share Capital, it is their case that there was other consideration moving to SSL that exceeded the consideration provided by SSL that requires to be taken into account, and which exceeded the consideration provided by SSL.
- iv) As to this:
 - a) So far as the consideration provided by SSL is concerned, it is the Respondents’ case that this was represented by the value of the assets comprising the subject matter of the Foodstores Sale Agreement and the Rochpion Sale Agreement which they maintain, on the basis of the expert evidence that they rely upon, was no more than £164,563,305, in contrast to the figure placed thereupon by the Joint Liquidators. In this respect, the differences relate to the value of the properties and equipment transferred, in respect of which there are differences between the property and equipment experts of up to £248,064,786.
 - b) So far as consideration provided to SSL is concerned, it is the Respondents’ case that it is appropriate to take into account not only the value of SSL’s release as statutory employer under the SSL Pension Scheme, but also what is said to be the value of the release that occurred from other contingent liabilities in respect of Group pension schemes, and bank and bondholder liabilities. The valuation of these items is the subject matter of the actuarial and covenant expert evidence. It is the Respondents’ case that the value of the former was up to £372.5 million, and that the value of the latter was up to £357.4 million.

Approved Judgment

- c) The Respondents recognise that there are significant disputes with regard to the expert valuation evidence in respect of the properties, equipment, and pension and other releases, but they submit that even ignoring any consideration attached to the Withdrawals of Share Capital, SSL received by way of consideration more than it gave away.
 - v) Further, and in any event, the Respondents rely upon the statutory defence under s. 238(5), which they submit is made out on the facts of the present case.
194. The Respondents therefore submit that, on these further bases, the transaction at an undervalue claim must fail.

G.III Preference

195. The Respondents recognise that if they succeed in resisting the attack upon the Withdrawals of Share Capital as a transaction at an undervalue, then the Withdrawals of Share Capital are potentially open to attack as preferences.
196. However, the Respondents maintain that none of the required ingredients of a preference are made out. Firstly, they submit that the insolvency test under s. 240(2) (b) is not satisfied. They point out that, unlike in respect of the TUV claim, the onus is now on the Joint Liquidators to prove insolvency.
197. Further, it is the Respondents' case that both in relation to the ISLA repayment (pleaded at £15,291,401.04 but in fact c. £4.6 million) and the Withdrawals of Share Capital (valued at £477,711,390), on proper analysis, there was no making of a preference in fact.
198. Further, even if that is not right, then the Respondents submit that, on the evidence, they are able to rebut the presumption that SSL was, in making any preference, influenced by a desire to improve the position of the relevant recipients in the event of an insolvent liquidation of SSL. The Respondents rely upon the evidence of Mr Bailey and Mr Lang in this respect, which they submit was not challenged under cross-examination, and is said to be entirely consistent with the documentary and other evidence in the case.

H. Issues to be decided

199. It follows from the above, that the key issues in the case that require to be decided are, as I see it, the following:
- i) TUV claim:
 - a) What the “*Transaction*” comprised, and what consideration can properly be treated as having been provided to and received by SSL for the purposes of s. 238(4)(a);
 - b) Whether consideration was provided for the Withdrawals of Share Capital by the initial subscription of shares, which depends upon a consideration as to whether the decision in *Sequana CA* in respect of

dividends in a limited company is to be applied by analogy or distinguished;

- c) Whether SSL became unable to pay its debts within the meaning of s.123 in consequence of the relevant transaction;
- d) In the event that there was no consideration for the Withdrawals of Share Capital, whether the transaction was at an undervalue, which depends upon a consideration of:
 - i) The correct approach to the valuation of consideration moving both to and from SSL under the relevant “*Transaction*”, it being common ground that the latter are to be valued by reference to the position of SSL;
 - ii) In so far as may be appropriate by reference to the expert evidence from the actuarial, covenant, property and equipment valuation experts, and applying the correct approach to valuation, whether the value of the consideration provided to SSL pursuant to the relevant transaction was significantly less than that provided by SSL, and, if so, in what amount;
- e) In so far as may be necessary in the light of the above, whether the Respondents are entitled to rely upon the statutory defence provided for by s. 238(5); and
- f) What remedy (if any) is, in all the circumstances, appropriate pursuant to s. 241 IA 1986.
- ii) Preference claim:
 - a) Whether any different conclusion as to whether SSL became insolvent in consequence of the alleged preference is appropriate bearing in mind that the onus is, in the case of preference, upon the Joint Liquidators to so prove;
 - b) Whether there was a preference in fact in relation to the intersociety loan account repayment, or the Withdrawals of Share Capital; and
 - c) If there was a preference in fact, whether SSL, in giving the same, was influenced in deciding to give it by a desire to improve the position of the recipient in the event of an insolvent liquidation of SSL.

200. I will seek to address each of these issues in turn.

I. The Transaction

1.1 - Introduction

201. One plainly starts with the language of s. 238(2), providing that the section applies where a company “*has at a relevant time ... entered into a transaction with any person at an undervalue*”. The focus is therefore upon the company, some other

person or entity, and a transaction between them. As is common ground between the parties, the concept of “*transaction*” is widely defined in s. 436(1).

202. As I have identified, in the present case there is an issue between the parties as to the scope of “*the transaction*” to which any consideration of the application of s. 238 IA 1986 applies. This is relevant not only as to the issue as to the value (if any) of the consideration provided to SSL for the purposes of s. 238(4), but also in respect of the issue as to whether SSL became unable to pay its debts in consequence of entering into “*the transaction*”, and in respect of the possible application of the statutory defence under s. 238(5) where the scope of the transaction is of potential importance.

I.II - Joint Liquidators’ case as to the Transaction

203. Again, as already touched upon, it is now the Joint Liquidators’ primary case that the Withdrawals of Share Capital were themselves each a transaction in terms which provided for SSL to provide consideration of £447,711,390 whilst receiving no consideration in return. It is their case that whilst other elements of Project Chicago may also have amounted to a transaction, that does not mean that the Withdrawals of Share Capital were not each such a transaction for these purposes in their own right.
204. Notwithstanding the valuation evidence that they adduce, the Joint Liquidators refer to the Foodstores Sale Agreement providing for a transfer of the property the subject matter thereof and other assets at book value and say that if the consideration provided for thereby had been satisfied in cash, then there would be no issue. However, it is maintained that what has happened is that the receivable due to SSL from CFS pursuant to the terms of the Foodstores Sale Agreement has been “*paid*” by way of set-off against the Withdrawals of Share Capital pursuant to the Funds Flow Letters, and so one is not now concerned with the actual value of the assets transferred but the amount of the receivable.
205. The Joint Liquidators maintain that, from the perspective of SSL and its creditors, the objectionable element is that the two Withdrawals of Share Capital were satisfied by set-off against the valuable receivable due to SSL from CFS and representing the consideration for the transfer of the properties and other assets to CFS.
206. The Joint Liquidators rely upon *Sequana CA* as authority for the proposition that the payment of a dividend by a company, and hence a withdrawal of share capital from a registered society which is said to be akin thereto, is in itself to be regarded as a “*transaction*” for the purposes of s. 238(2), and one which provides for the company to receive no consideration. This is an issue which I will return to in order to determine in the next section of this Judgment.
207. Further, the Joint Liquidators place particular reliance on what was said by Morritt LJ in *Phillips v Brewin Dolphin* [1999] 1 WLR 2052 (“**Phillips CA**”) at page 2060, in respect of a transaction the subject matter of a TUV claim:

“... the transaction must be identified by reference to the person ... with whom the company entered into it. Only the elements of the transaction between the company and that person may be taken into account. Thus, without more, a contract between the company, A and B cannot be part of a transaction entered into by the company, A, with C. I introduce the

caveat 'without more' to guard against cases where the transactions are artificially divided." (My emphasis).

208. The House of Lords in *Phillips v Brewin Dolphin* [2001] 1 W.L.R. 143 (“**Phillips HL**”) affirmed the decision on different grounds, holding that consideration might be provided by a third party if agreed as part of the transaction between the company and another person. Notwithstanding, the Joint Liquidators rely upon the above passage from the judgment of Morritt LJ in *Phillips CA* at page 2060, relying on the fact that it has been approved and applied very recently by Miles LJ in *Credit Suisse v Softbank* [2025] EWHC 2631 (Ch) (“**Credit Suisse v Softbank**”) at [588]-[581], and also by the Court of Appeal in *TAQA Bratani Limited v Fujairah Oil and Gas UK LLC* [2025] EWCA Civ 1669⁴ (“**TAQA CA**”) at [53]-[54], per Falk LJ.
209. The Joint Liquidators rely upon these authorities as establishing the following propositions, namely:
- i) When identifying the transaction for the purposes of s.238, the court will be reluctant to view a number of contracts involving different parties as constituting a single transaction; and
 - ii) The fact that each step in a series would not have happened without the others does not mean that the entire series constitutes a single transaction.
210. These authorities are said to support the Joint Liquidators’ case that the only relevant “*transactions*” for present purposes are the Withdrawals of Share Capital, and that only the elements of that transaction as between SSL and CGF should be taken into account. Consequently, it is submitted that it would be wrong to aggregate together different transactions for the purposes of s. 238, particularly when they involve different parties. Instead, so it is submitted, the focus should be upon the position as between the company (or society) and the person with whom the company (or society) entered into the transaction, i.e., here SSL and CGF in relation to the Withdrawals of Share Capital.
211. The Joint Liquidators place particular reliance on the approach taken by the Court of Appeal in respect of a dividend that was a feature of a share sale of the company that paid the dividend in *TAQA CA*. This case involved a situation where the share capital of a company was to be sold on a cash-free basis, and shortly prior to completion the company declared a dividend. The claimants alleged that the dividend was a TUV. At first instance, Dias J held that the relevant transaction for s.238 purposes was the wider arrangement by which the company was sold, and not the dividend in isolation. The Court of Appeal reversed the decision of the trial judge finding that the dividend required to be viewed in isolation, and that it was a transaction which was entered into by the company at an undervalue.
212. It is the Joint Liquidators’ case that once the “*transaction*” is analysed in the terms that they contend that it should be, then there can be no proper basis for treating the discharge of SSL from its liabilities to the SSL Pension Scheme as giving rise to consideration received by SSL for the purposes of the transaction under scrutiny for

⁴ Permission to appeal against the decision of the Court of Appeal was refused by the Supreme Court on 30 April 2026.

the purposes of s. 238(4). Further, it is submitted that the position is even clearer that the release of SSL's liabilities as guarantor in respect of other tCG pension schemes, banking facilities and bond debt ought not to be treated as consideration received by SSL for the purposes of the transaction.

213. With regard to the reorganisation of the SSL Pension Scheme, it is the Joint Liquidators' case that the latter was a separate transaction with different parties entered into in advance of the First Withdrawal of Share Capital and set to take effect subsequently. The Joint Liquidators highlight the following points:
- i) The approval for the entry into of the Deed of Alteration, the FAA and the Replacement Guarantee was provided by the SSL Board on 8 October 2015, with the relevant documentation being executed the following day. The SSL Directors did not approve the entry into Project Chicago, and the First Withdrawal of Share Capital did not take place, until a board meeting on 2 November 2015.
 - ii) The parties to the Deed of Alteration were SSL, CGL, CFS and the trustee of the SSL Pension Scheme. The parties to the FAA were SSL, CFS and the trustee of the SSL Pension Scheme. CGF was not a party to either instrument.
 - iii) They contend that the Withdrawals of Share Capital were not made "*on terms*" (cf. s. 238(4)(a)) that the pension scheme reorganisation formed part of the consideration in that, so it is said, nowhere is the pension scheme reorganisation expressed to be part of the "*terms*" on which the Withdrawals of Share Capital took place.
 - iv) It is further submitted that the "*consideration*" provided to SSL in respect of the pension scheme reorganisation was provided by the trustee of the SSL Pension Scheme, in that it was the latter which was agreeing to release SSL as statutory employer, and CFS which was becoming the replacement employer. Consequently, no consideration was provided by CGF.
214. As already identified, the Joint Liquidators' alternative case, that was originally its primary case, is that the "*transaction*" for s.238 purposes included the transfer of assets effected by the Foodstores Sale Agreement and the Rochpion Sale Agreement, the pension reorganisation involving SSL's replacement as statutory employer by CFS, the intersociety loan repayment and the Withdrawals of Share Capital. This thus encompasses the pension reorganisation and the benefit received by SSL by virtue of being released from liability as statutory employer.
215. However, the Joint Liquidators submit that, even in respect of their alternative case, the following elements of Project Chicago do not form part of the transaction, namely:
- i) SSL's release from its contingent liability as guarantor of tCG's obligations to banks and bondholders; and
 - ii) SSL's release from its contingent liability as guarantor of other tCG pension schemes.

216. A number of points are advanced in support of the argument that, even on the basis of the alternative case, the above elements do not form part of the transaction, in that:
- i) It is submitted that the releases were given subsequent to implementation of the key elements of Project Chicago, involved other parties outside tCG, and, to all intents and purposes, occurred automatically. As to the latter, reliance is placed upon:
 - a) Mr Wormald having accepted in evidence that the relevant releases “took place sometime later automatically, simply as a result of SSL ceasing to be a material subsidiary for the purposes of the finance documents”; and
 - b) Mr Rowland having agreed with this assessment, and with the proposition that the “guaranteed obligations fell away as a formality once SSL ceased to meet the test of material subsidiary”.
 - ii) None of the releases are said to have been identified as consideration received by SSL in any contractual document connected with Project Chicago and nor, so it is said, were they regarded as such by any of the parties at the relevant time. Thus, neither the asset disposals nor the Withdrawals of Share Capital were, it is said, made “on terms” (cf. s. 238(4)(a)) that the releases be given as part of the consideration.
 - iii) With regard to banking facilities, the Joint Liquidators had relied on clauses 22.17 and 26.7 of a Facilities Agreement dated 26 July 2012 as providing that any guarantor, such as SSL, which ceased to be a “Material Subsidiary” was entitled to resign provided that the remaining guarantors represented more than 80% of tCG’s assets/revenue/EBITDA. In reply, Mr Smith KC accepted that the banking facilities had been replaced by an amended and restated Facilities Agreement dated 11 December 2013, and that under the terms of clause 26.8 thereof, even though SSL had ceased to be a “Material Subsidiary”, it was necessary to obtain a waiver from the relevant banking syndicate. However, he pointed to the fact that a waiver had been obtained through an email exchange on 23 November 2015, and submitted that, in consequence thereof, the resignation of SSL as a guarantor took place automatically upon the submission of a resignation letter. He submitted that the release was plainly not part of the “transaction”, having taken place subsequently and having been “essentially triggered” by the fact that SSL was not a “Material Subsidiary”.
 - iv) With regard to the bond debt, reliance is placed on clause 3.3 of the Series A notes and the Series B notes provided for by the Trust Deeds dated 25 May 2011 as providing for SSL to be released from liability in respect of the notes once it had been released from liability in respect of the banking facilities.
 - v) As to the guarantees in respect of other tCG pension schemes, reliance is placed on clause 16.2 of the Deeds of Guarantee and Indemnity relating thereto that provided that SSL would immediately cease to be a guarantor in respect thereof if it ceased to be a guarantor under the bank facilities.

- vi) Consequently, following its resignation as a guarantor in respect of the bank facilities, SSL submitted resignation letters in respect of the other tCG pension schemes. Again, reliance is placed upon the fact that neither CGF nor CFS were parties thereto.
217. In response to the Respondents' point that the minutes of the meeting of SSL's board dated 2 November 2015 provided that the withdrawal of the 50,000,000 shares to be paid for by the Deferred Consideration should be held pending confirmation that the relevant bank no longer defined SSL as a "*Material Subsidiary*", the Joint Liquidators contend that the agreement provided by SSL to the withdrawal of share capital in the total amount of 481,042,860 shares by way of signature added to the request dated 2 November 2015 was unconditional, and that AG, in an email dated 3 February 2016, expressed the view that the SSL Directors, "*have already made the decision to allow the Second Withdrawal of Share Capital on 2 November 2015 following [CGF's] formal request*".
218. In short, therefore, it is submitted that these releases were far too detached from the transactions giving effect to Project Chicago to properly be regarded as consideration received by SSL for the purposes of the "*transaction*", even if it does have the wider meaning of "*Transaction*" as in the Joint Liquidators' original pleaded case. On this point, an analogy is drawn with the position in respect of the pension write-off considered by the Court of Appeal in *TAQA CA*. At [77], Falk LJ identified that the correct question to ask was whether the pension write-off fell to be treated as consideration for the dividend under s. 238(4). She held that it did not, observing, at [90], that there was "*nothing to indicate that the pension write-off was in exchange for the dividend. It was in no sense part of a bargain that [the company] entered into under which the dividend was paid.*"

I.III - The Respondents' case as to the Transaction

219. The Respondents point to the way in which the Joint Liquidators' case regarding the "*transaction*" has evolved from the case as originally pleaded in paragraphs 18 and 19 of the Amended Points of Claim. They emphasise the following particular matters in relation thereto:
- i) In response to paragraphs 18 and 19 of the Amended Points of Claim, the Respondents' Points of Defence admitted the Joint Liquidators' summary of the "*components of the Transaction*", but went on to plead "*additional relevant components*", namely in addition to SSL's release from the SSL Pension Scheme, its release from contingent liability as guarantor and indemnifier in respect of the other tCG pension schemes, and its release from its contingent liability as guarantor of tCG's bank and bondholder debt.
- ii) The directions given in relation to expert valuation evidence, concerning the value of the pension and other releases and of the properties and equipment transferred to and retained by SSL, were given on the basis of the "*Transaction*" as pleaded in paragraphs 18 and 19 of the Amended Points of Claim, whereas the Joint Liquidators now maintain that this evidence is all now otiose, notwithstanding the costs incurred, and the time taken up at trial, in relation thereto.

- iii) The agreement as to the elements of the “*Transaction*” contained in paragraph 16 and 17 of the Statement of Agreed Facts and Issues as referred to in paragraph 180 above.
220. The Respondents emphasise the importance of this issue bearing in mind that what the “*Transaction*” comprised goes to a number of important issues in the case as referred to above.
221. The Respondents do not take a pleading point, even if it were otherwise open to them to do so, because they have been able to deal with the changes in the Joint Liquidators’ case. However, the Respondents submit that the Joint Liquidators’ change of position is indicative of a muddled and misconceived change in strategy, apparently triggered by the decision of the Court of Appeal in *TAQA CA*.
222. The Respondents submit that the Joint Liquidators’ case, and in particular the new case as advanced in closing, is misguided in law and in fact.
223. With regard to the cases relied upon by the Joint Liquidators:
- i) As to *Sequana CA*, the point is made by the Respondents that the sole act under scrutiny in that case was the payment of a dividend and that there was no suggestion that it formed part of a wider transaction.
- ii) As to *Credit Suisse v Softbank* (supra):
- a) The Respondents emphasise that whilst Miles LJ had, at [670], indicated that the court will not “*generally*” treat agreements to which the company is not a party as part of a single transaction for the purposes of s. 423 IA 1986, he made clear, at [599], that the Court must take a “*common sense view*” and that: “... *it is possible for a transaction to comprise or include arrangements which are not legally binding contracts to which the debtor is party.*”
- b) In the course of closing submissions, Mr Potts KC, on behalf of the Respondents, referred to the fact that at [582] and [593], Miles LJ had referred to the decision of the Federal Court of Australia in *Re Emanuel (No 14) Pty Limited* (1997) 147 ALR 281, where the court had held that there was a transaction between A and C despite the lack of a direct contract between them. At [593] he observed that: “... *the overall arrangement in question was one to which all of A, B and C were parties, as A had to accept that payments by B to C would discharge B’s debts to A and C had to accept the payments from B would discharge A’s debts to C. It is easy to see why A, which initiated the dealings, was treated as entering into the wider transaction even if was not strictly a contracting party. Indeed the court confined its conclusions to a situation where “there was a course of dealings initiated by the debtor for the purpose of and having the effect of extinguishing the debt.”*”
- c) It was submitted that, in the present case, all of the components of the wider transaction contended for by the Respondents involved SSL on

any commonsense view, and that the transaction was properly to be regarded as a single package in which none of the steps would have happened without all of the others. This is in contrast to the facts of *Credit Suisse v Softbank* in which the mere interlinking of a series of steps was said not to lead “*necessarily*” to a conclusion that there was a single transaction, the point being made that a transaction in which no step occurs without all of them is entirely different.

- iii) With regard to *TAQA*, the Respondents submit that this also does not assist the Joint Liquidators. In that case, Dias J had found that the dividend was “*merely an afterthought*” only decided upon after the share purchase agreement was agreed. It is submitted that it was this that opened the door to an appeal – see at [41], per Falk LJ. Further, the company that declared the dividend was not a party to the share purchase agreement at all, its share capital being the subject matter of that agreement. Thus, the only transaction that the company entered into was the payment of the dividend to its parent company, with the effect of extinguishing an intercompany debt. It is submitted that it was on this basis that the Court of Appeal found that the transaction was not the wider share purchase agreement and was confined to the dividend payment. This is said to be in contrast to the present case where SSL was a party to the Foodstores Sale Agreement, the Rochpion Sale Agreement and the FAA, as well as being the entity which approved the Withdrawals of Share Capital.

224. The Respondents submit that it is misconceived to try to divorce the Withdrawals of Share Capital from the wider “*Transaction*”, particularly having regard to the following:

- i) The Transaction Demand, which expressly made clear that the transaction would include a number of stages, i.e. (a) the sale of the properties and assets to CFS and Rochpion, (b) the repayment of the intersociety loans and (c) the Withdrawals of Share Capital “*at a level to support the Transaction*”.
- ii) The First Funds Flow Letter, which it is contended underlined the role of the withdrawals of share capital in the wider transaction. Thereunder, the “*Initial Consideration*” was to be treated as paid through CGF providing share capital to CFS, CFS having paid the Initial Consideration to SSL and SSL having paid (a) £15.291 million to CGL in respect of the intersociety loan account, and (b) £431 million to CGF in respect of the First Withdrawal of Share Capital . Reliance was placed on the fact that each of CGF, CGL, SSL, and CFS executed the First Funds Flow Letter as a deed, thereby binding each of them to each other contractually or by deed. Further, CGF, SSL and CFS each executed the Second Funds Flow Letter, there being no need for CGL to do so as the intersociety loan had already been set off.
- iii) The FAA was reversible down to 3 November 2015, after the “*transaction*” closed on 2 November 2015. In a note prepared and attached to an email dated 12 May 2015, Mr Rowland recorded: “... *The transfer of the core stores and the transfer of the [SSL Pension] Scheme to [CFS] are intrinsically linked. One cannot be transferred without the other without the threat of the Pensions Regulator.*”

- iv) It is contended that the addition of CFS as a “*Material Subsidiary*” and guarantor in respect of tCG’s bank and bondholder debt was to permit the disposal of the properties, and the release of SSL was required as a condition for the Second Withdrawal of Share Capital . Further, reliance is placed upon the release of SSL from its status as a guarantor also being a condition of the Foodstores Sale Agreement itself – see clause 8.2 thereof.
225. The Respondents submit that the artificial nature of the Joint Liquidators’ approach to the scope of the “*transaction*” was demonstrated in their opening when it was asserted that the Foodstores Sale Agreement and the Rochpion Sale Agreement were “*the means by which*” the Withdrawals of Share Capital were paid. It submitted that the Joint Liquidators thereby recognised that it was impossible to separate one element of the wider transaction from another, even on their narrow formulation. The Respondents submit that what the Joint Liquidators are seeking to do is to formulate a narrow “*transaction*” which does not reflect reality and which invites the Court to ignore the elements which benefited SSL and its creditors.
226. By way of fallback, the Respondents submit that even if the Joint Liquidators’ analysis of the transaction is correct, this does not ultimately help them because if the Court were to find the transaction at an undervalue case to be made out, then, in fashioning relief, the Court would be required to take into account any benefits accruing to SSL as a result of the transaction, even if those benefits were not part of the consideration received by SSL under the impugned transaction itself – see *TAQA CA* at [92]-[94], per Falk LJ.
227. The Respondents thus invite the Court to find that the “*transaction*” comprised the various elements identified by the Joint Liquidators in their originally pleaded primary case as admitted by the Respondents in their Points of Defence, together with the additional elements identified by the Respondents, namely SSL’s release from contingent liabilities as guarantor relating to the other tCG pension schemes and bank and bondholder liabilities.
228. Dealing in rather more detail with whether the latter release from contingent liabilities formed part of the “*Transaction*” for the purposes of s. 238, the Respondents’ case is as follows:
- i) In short, it is submitted that the release was a term of the “*transaction*” and a condition to the Second Withdrawal of Share Capital .
- ii) Reliance is placed on clause 8 of the Foodstores Sale Agreement which provided for payment of the Deferred Consideration on the earlier of (a) the satisfaction of the conditions set out therein or (b) 2 May 2016, the conditions set out therein being the release of SSL as a guarantor in respect of the bank and bondholder liabilities, and evidence of that release being provided.
- iii) Release as guarantor in respect of the bank and bondholder liabilities could not occur without a release from liability as guarantor in respect of the other tCG pension schemes. Reliance is placed upon Mr Hore having stated, at paragraph 24 of his witness statement that: “*there was a rule within the banking facility agreements that no one of those three groups (banks, bondholders, or pension schemes) could have a guarantee if the other ones did not.*”

- iv) Although clause 8 provided for the “*Deferred Consideration*” to be payable by 2 May 2016 in any event, it is submitted that the intention was that it be set off against SSL’s liability in respect of the Second Withdrawal of Share Capital . Reliance is placed upon paragraph 5.1 of the minutes of the SSL board meeting dated 2 November 2015 under which the request for withdrawal of £481,042,860 of the share capital held by CGF was expressed to be subject to a number of conditions including that:
- “(ii). ... *the remaining 50,000,000 shares remain held by [CGF] until [SSL] receive[s] confirmation that the relevant bank institution no longer defines [SSL] as a “Material Subsidiary” (in relation to all and any relevant finance documents).*”
- v) It is said that upon the release being given, the board of SSL permitted the Second Withdrawal of Share Capital to proceed, reference being made to paragraph 3.2 of the minutes of the board meeting dated 10 February 2016: “*the chairman confirmed that [SSL] have now received the confirmation from the relevant bank institutions and therefore the conditions imposed by the board in relation to the Second Share Withdrawal had now been satisfied.*”
- vi) Relying thereupon, it is argued that, consistent with the language adopted by Falk LJ in *TAQA CA* at [82], the release of SSL from the guarantee liabilities was the “*quid pro quo*” for the payment by SSL of the Second Withdrawal of Share Capital . In other words, SSL would not have agreed to the Second Withdrawal of Share Capital unless it was released from the guarantee liabilities.
- vii) In answer to the case that had been advanced that on ceasing to be a “*Material Subsidiary*”, SSL simply had the right to resign as a guarantor, it has been the Respondents case that:
- a) The net effect of clauses 22.18, 26.5, 26.7 and 26.8 of the amended and restated Facilities Agreement dated 11 December 2013 was that SSL did not have any right to a release from its guarantee liability upon ceasing to be a “*Material Subsidiary*”. Rather, the release was dependent upon CGL making a request that SSL cease to be a guarantor by delivering to “*the Agent*” (i.e. The Royal Bank of Scotland plc) a resignation letter, and the “*Lenders*” waiving clause 26.8 (“*No resignation of Guarantors*”).
- b) Whether to deliver such a request was entirely within CGL’s discretion, whilst any waiver of clause 26.8 was a matter for the Lenders albeit that, in the event, the Lenders provided the relevant waiver enabling CGL to deliver a resignation request.
- viii) The Respondents submit that, on the basis of the above, SSL’s release from its guarantee liabilities clearly did form part of the consideration received by SSL under the relevant “*transaction*”. The Respondents submit that, on a commonsense analysis of the commercial structure thereof, that position is entirely unsurprising given that, pursuant thereto, a substantial proportion of the net assets of SSL (principally comprising properties and equipment) were

transferred from SSL to CFS. Those assets were viewed by banks, bondholders and pension trustees as important security. From a commercial perspective, the guarantees provided by SSL were only able to be released because SSL transferred the relevant assets to CFS which was consequently in a position to provide what was effectively a replacement “*Material Subsidiary*” guarantee by which CFS assumed a new and very substantial contingent liability to the banks, bondholders and other tCG pension schemes in place of SSL, which obtained a release from those contingent liabilities.

I.IV - Determination of the scope of the “Transaction” issue

The law

229. Plainly, one begins with the words of the statute, and that s. 238(2) IA 1986 applies where a company has at a relevant time “*entered into a transaction with any person at an undervalue.*” There must therefore not only be a transaction, but the transaction must be entered into with a person, and at an undervalue. This therefore requires one to identify a transaction (which need not be a formal contract) between the relevant company and another person, which is at an undervalue.
230. However, as *Phillips HL* demonstrates, the consideration to be taken into account in determining whether there has been an undervalue need not necessarily come from the person with whom the company has entered into the transaction. As Lord Scott put it at [20]:
- “But if a company agrees to sell an asset to A on terms that B agrees to enter into some collateral agreement with the company, the consideration for the asset will, in my opinion, be the combination of the consideration, if any, expressed in the agreement with A and the value of the agreement with B.”* [My emphasis]
231. As the words that I have emphasised make clear, if the consideration provided by B is to be taken into account, that must be in consequence of the terms of the agreement entered into with A.
232. The quotation from the judgment of Morritt LJ in *Phillips CA* referred to in paragraph 207 above, that is relied upon by the Joint Liquidators, has clearly been approved in *Credit Suisse v Softbank* and *TAQA CA* as providing a starting point to a consideration of the issue. Nevertheless, it is to be borne in mind that the Court of Appeal had, in *Phillips CA*, decided that the consideration provided by the third party should not be taken into account, and the statement in *Phillips CA* at page 2060 that only the elements of the transaction between the company and “*that person*” may be taken into account has to be read subject thereto.
233. I consider that it is in this context that Miles LJ, at [589]-[590] in *Credit Bank v Softbank*:
- i) Referred to Morritt LJ’s passage as providing “*helpful guidance*” about the meaning of “*transaction*”, noting that Morritt LJ had used the qualifier “*without more*”, referring to guarding against cases where the transaction was artificially divided;

- ii) Made the point that the passage was no more than guidance, and was no substitute for the words of the statute, and stated that he considered that the position was well expressed by McPherson and Keay on the Law of Company Liquidation, 5th edn, at para 11-030 ⁵: “*as indicated by the quote taken from Morrill LJ’s judgment, the courts are likely to be reluctant to view a number of contracts involving different parties as constituting a single transaction*”; and
 - iii) Referred to what Jonathan Parker LJ had said in *Feakins v Department for Environment Food and Rural Affairs* [2005] EWCA Civ 1513 at [76], where he referred to the identification of the relevant transaction as being fact specific, and that whilst in some cases it may be appropriate to treat a single step in a series of linked dealings as the relevant transactions, in others it may not.
234. I have referred in paragraph 223(ii)(b) above to the reference made by Miles LJ in *Credit Suisse v Softbank* at [582] and [593] to the decision of the Federal Court of Australia in *Re Emanuel (No 14) Pty Limited*. His analysis of this case does demonstrate that there may be a transaction between A and C despite the lack of a direct contract between them, although I note that at [593] Miles LJ observed that the court had there confined its conclusions to the situation where: “... *there was a course of dealings initiated by the debtor for the purpose of and having the effect of extinguishing the debt.*”
235. Albeit recognising that Miles LJ was, in *Credit Suisse v Softbank*, concerned with a case under s. 423 IA 1986 which has a rather different statutory purpose, I consider that the following sub-paragraphs of his summary of the case law at [599] in that case are helpful:
- “(iv) *It is possible for a transaction to comprise or include arrangements which are not legally binding contracts to which the debtor is a party.*
 - (v) *The court must take a common sense view of what is comprised in a transaction and should have regard to the statutory purpose of preventing the avoidance of debts.*
 - (vi) *The fact that a series of steps may be interlinked, even in the strong sense that one step would not have happened without the other(s), does not mean that the entire series necessarily constitutes a single transaction for the purposes of section 423.*
 - (vii) *Indeed, the courts are likely to be reluctant to view a number of contracts involving different parties as constituting a single transaction unless the contracts have been artificially divided.*

⁵ It is to be noted that the authors began this passage by saying: “*The House of Lords subsequently [to Morrill LJ’s judgment] heard an appeal from the Court of Appeal’s decision, and dismissed it, but importantly their Lordships did say that linked, but distinct, commercial contracts can make up a single transaction for the purposes of s. 238, but ...*”

- (viii) *The phrase “a person enters a transaction” is a composite one. There must be a transaction and the relevant person must have entered into it.*
- (ix) *In deciding whether the transaction includes a step said to comprise part of a wider transaction, it is material to consider the subject matter of the step, the parties to the relevant step and to the other elements of the alleged transaction, and whether there has been an artificial division of an overall transaction into [apparently] separate parts.*
- (x) *The purposes of the debtor in entering into a particular step may be relevant to whether it constitutes part of the relevant transaction for the purposes of the statute.”*

236. I note that in *TAQA CA*, Falk LJ, in finding that a pension write-off was not consideration for the payment of the dividend, at [82], observed that the only transaction that the relevant company had entered into was the dividend, that there was no reference in the documentation for that transaction to the pension write-off, and that there was nothing in the judge’s findings or drawn to the Court of Appeal’s attention from the evidence that indicated that the company paid the dividend in any sense in return, or as a quid pro quo, for the pension write-off.

Application to the facts

237. In paragraph 107 of the Joint Liquidators’ Closing Submissions, they say that, from the perspective of SSL and its creditors, the objectionable element of what occurred was the withdrawal of share capital which was satisfied by way of set-off against the valuable receivables due to SSL. This is used to support the argument that the “*transaction*” is simply the Withdrawals of Share Capital, rather than some wider transaction. However, the complexity in the present case is that Project Chicago involved a number of interlinked transactions of which SSL was party to at least three, including the transfer of the property and other assets to CFS, the repayment to CGL of the intersociety loan, and the return of share capital in SSL to CGF though the Withdrawals of Share Capital. I note the manuscript document that preceded the 2013 Deloitte Report and represented the genesis of Project Chicago referred to sale of the business “*after moving “good” bits out*”. In terms of objection, if there is one, then I consider that one might at least equally say that the relevant transaction was the transfer out of SSL of the properties and other assets pursuant to the Foodstores Sale Agreement and the Rochpion Agreement, and the fact that it was effectively funded, not in cash, but by the Withdrawals of Share Capital.

238. Further, I consider it important to consider the circular nature of the transactions that took place as documented by the Funds Flow Letters, with SSL being at the beginning and the end of the chain involving the transfer of properties and other assets to CFS, and the Withdrawals of Share Capital.

239. Particularly important considerations are, I consider, the following:

- i) Apart from the release as statutory employer under the SSL Pension Scheme, and the release from liability as guarantor of the other tCG pension schemes

and bank and bond debts, all the various steps were documented not only in the Transaction Demand, but more significantly in the Funds Flow Letters that were executed between the relevant parties to bind them to the terms thereof. The net effect was that the properties and other assets transferred were paid for by the Withdrawals of Share Capital by CGF through the operation of the multilateral set-off arrangements provided for thereby.

- ii) I consider that the Respondents are correct in saying that all the elements of the chain of transactions, on any common sense view, involved SSL, and that the chain of transactions is properly to be regarded as a single package in which none of the steps would have happened without all the others. This is, as the Respondents submit, different from the mere interlinking of a series of steps which will not “*necessarily*” lead to the conclusion that there was a single transaction.
- iii) Whilst the release of SSL as statutory employer under the SSL Pension Scheme was not documented as part of the arrangements for the transfer of the properties and other assets to CFS and the sequence of transactions reflected in the Funds Flow Letters, the Deed of Alteration of Scheme Rules entered into by CGF, CFS, and SSL with the SSL Pension Scheme trustee clearly recited that it was in consideration of the transfer by SSL of the relevant assets to CFS and that CFS had agreed to assume all the liabilities of SSL in relation to the SSL Pension Scheme. It is clear that the Deed of Alteration of Scheme Rules and the FAA dated 9 October 2015 were structured in such a way that the pensions reorganisation would not have occurred had not the principal elements of Project Chicago taken place on 2 November 2015 and was entirely reversible. This, to my mind, reinforces the point that either all the various steps would be given effect to, or none of them would, including the pension reorganisation.
- iv) It was clearly an essential element of the overall transaction that SSL was released as statutory employer under the SSL Pension Scheme, and that CFS took its place. It was plainly of some benefit to SSL to be so released, but what the evidence establishes, in my judgment, is that it was essential for the success of Project Chicago and the “*moving “good” bits out*” by way of the transfer of properties and other assets to CFS that CFS should become statutory employer, and that SSL should be released from liability. So far as the importance of CFS becoming statutory employer is concerned, see Mr Rowland’s note referred to in paragraph 224(iii) above referring to the transfer of the “*core stores*” and the transfer of the SSL Pension Scheme being, as he put it, “*intrinsically linked*”. With regard to SSL being released from liability, in relation to both the SSL Pension Scheme and SSL’s liability as guarantor in respect of the other tCG pension schemes and tCG bank and bond debt, the evidence establishes that this was of importance given the perceived risk that if SSL subsequently became insolvent, this was liable to cause insurmountable difficulties for tCG as a whole given the ability, in those circumstances, of the banks and bondholders to call in their debts, and bring about the crystallisation of the pensions liabilities and a claim against SSL, and potentially against other tCG societies, on the basis provided for by s. 75 of the Pensions Act 1995 (“**the s. 75 Basis**”), as referred to further below.

240. In these circumstances, I consider that the Joint Liquidators were correct in their initial approach to the present case in pleading that the relevant “*Transaction*”, to use their definition, was not simply the Withdrawals of Share Capital but rather involved the “*principal elements*” pleaded in paragraph 19 of the Amended Points of Claim, namely the reorganisation of the SSL Pension Scheme, the sale of the properties and other assets, the Withdrawals of Share Capital, and the repayment of the intersociety loan. Bearing in mind what I consider to be the intrinsic link between each of these elements, under which none of the steps would have occurred without any of the others, I consider that it would be wholly artificial to isolate the Withdrawals of Share Capital as the sole relevant “*transactions*”.
241. Certainly, as demonstrated by *Sequana CA* and *TAQA CA*, any withdrawal of share capital would be capable of being treated as individual transactions for the purposes of s. 238(2) in much the same way as a dividend. However, I consider that the Respondents were correct to identify that, by asserting in opening the case that the Foodstores Sale Agreement and the Rochpion Sale Agreement were “*the means by which*” the Withdrawals of Share Capital were paid, the Joint Liquidators were thereby recognising the impossibility of separating out one element of the wider “*transaction*” from another. I agree with the Respondents’ submission that in seeking to formulate a narrow transaction confined simply to the Withdrawals of Share Capital, the Joint Liquidators are doing so in a way that does not reflect reality and ignores key elements of the “*transaction*”.
242. This approach is, I consider, consistent with the authorities that I have referred to, and in particular the point made by Miles LJ in *Credit Suisse v Softbank* at [599(v)] to the effect that the court “*must*” take a commonsense view of what is comprised in the transaction. The present case is also, I consider, clearly distinguishable from *TAQA CA*, where the company paying the dividend was not a party to the relevant share sale transaction, and where, as an afterthought, the dividend was used as a mechanism to fund a cashless purchase.
243. The more difficult question, I consider, is as to whether the benefit (if any) to SSL of the release from its liability as guarantor in respect of the other tCG pension schemes, and tCG bank and bond debts is also properly to be regarded as consideration received by SSL in respect of the impugned transaction as alleged by the Respondents.
244. I consider the following to be important considerations:
- i) From a commercial perspective, at least, the release of SSL from liability as guarantor for the other tCG pension scheme liabilities, and bank and bond debts formed an important part of the overall transaction. As I have explained, it was in the interests of the other tCG societies, and in particular CFS, that the latter should step into SSL’s shoes in respect of the liabilities, and for SSL to be released from liability given the foreseen real risk of the insolvency of SSL following the entry into of Project Chicago.
 - ii) Payment of the Deferred Consideration provided for by the Foodstores Sale Agreement was clearly tied to the release of SSL from its guarantee obligations in respect of the bank and bondholder debt by clause 8 thereof. Whilst clause 8.1 did refer to the earlier to occur of the satisfaction of the conditions referred to in clause 8.2, and 2 May 2016, the Board of SSL had

resolved on 2 November 2015 that the Second Withdrawal of Share Capital should not take place until SSL had been released from these liabilities, in circumstances in which it was always envisaged, as reflected in the Second Funds Flow Letter, that the Deferred Consideration would be paid, via the various “*principal elements*” of the “*Transaction*”, by way of set-off against the Second Withdrawal of Share Capital .

- iii) It is true that, as the Joint Liquidators have pointed out, the approval given by way of counter signature to the request to withdraw dated 2 November 2015 was not expressed as being conditional. However, it was, as I see it, plain that such approval could not reasonably have been regarded as entirely unqualified bearing in mind that there were other steps that were required to be taken before the Second Withdrawal of Share Capital could take place, including the signing of the Second Funds Flow Letter, as ultimately signed on 11 February 2016. A further factor is that the Board of SSL did, in fact, pass a resolution approving the Second Withdrawal of Share Capital well prior to the 2 May 2016 long stop date, no doubt to facilitate the steps being taken to sell to Hilco.
 - iv) Whilst Mr Wormald and Mr Rowland may have accepted under cross-examination that the relevant releases took effect automatically simply as a result of SSL ceasing to be a Material Subsidiary, that was not the case as was, I believe, to all intents and purposes accepted by Mr Smith KC in reply submissions. The terms of the Facilities Agreement dated 26 July 2012 that I have referred to did make release dependent upon CGL making a request that SSL cease to be a guarantor by delivering a letter to the Agent, and upon the Lenders waiving clause 26.8. A request was made and the waiver may have been obtained, but this was not an automatic consequence of ceasing to be a Material Subsidiary, and the request was required to be from CGL.
245. The Joint Liquidators say that none of this matters because the release took effect subsequent to the key events of 2 November 2015, and effectively involved dealings with the banking syndicate, bondholders and pension trustees otherwise than as part of the Project Chicago transaction.
246. I consider that the key question is how the words “*enters into a transaction with that person for a consideration*” in s. 238(4)(b) might properly be applicable to these releases, i.e. whether the benefit of the releases can properly be regarded as consideration under that transaction, whether provided by “*that person*” or a third party as in *Phillips HL*, representing a quid pro quo for something provided by SSL.
247. Clause 8 of the Foodstores Sale Agreement does link a key element of the “*transaction*”, namely the payment of part of the consideration for the asset disposal, to the release. Further, despite the long stop date of 2 May 2016, it is difficult to see that the payment of the “*Deferred Consideration*” and the Second Withdrawal of Share Capital would have proceeded unless the relevant releases had been obtained.
248. Although the relevant waiver was obtained, and the resignation letter, sent after the events of 2 November 2015, given the arrangement regarding payment of the Deferred Consideration, ultimately by way of the Second Withdrawal of Share Capital, key elements of the transactions comprising Project Chicago were yet to be completed at the time thereof. Further, the obtaining of the waiver and the request for

release plainly did not happen out of the blue, and, in light of the commercial considerations that I have referred to, were plainly planned as part of the process of safely disengaging the property the subject matter of the Foodstores Sale Agreement and the Rochpion Agreement from SSL's ownership, and into that of CFS without risk to CFS or other companies within tCG of the subsequent insolvency of SSL, which was regarded as a real possibility if not more. Further, SSL could only be released because of the transfers effected by the Foodstores Sale Agreement and the Rochpion Agreement. The former enabled CFS to become a Material Subsidiary so that it could provide a substitute material subsidiary guarantee.

249. In the circumstances, I do not consider that this element of the parties' dealings can be dismissed on the basis that "*none of this was part of our transaction*" as put by Mr Smith KC in closing. Rather, I consider that it is properly to be regarded as part of it. If, as I have held, the relevant "*transaction*" does extend beyond simply the return of share capital, and includes the "*primary elements*" pleaded in paragraphs 18 and 19 of the Amended Points of Claim, then I consider that these releases are properly to be included as an integral part of what was passed to SSL, and thus that the value of the releases to SSL is properly to be taken into account as consideration received by SSL. It was, as I see it, part of the quid quo pro for the transfer of the properties and other assets, and, to the extent required, the return of share capital through the Withdrawals of Share Capital.

J. Was there consideration for the Withdrawals of Share Capital?

J.I - Introduction

250. The Joint Liquidators' TUV claim depends upon them establishing that, as a matter of law, the Withdrawals of Share Capital involved SSL entering into a transaction with another or others "*on terms that provided for the company to receive no consideration*" - s. 238(4)(a) IA 1986. If the Joint Liquidators fail to so establish, then the TUV claim must fail. However, it is common ground that, in these circumstances, the approval of the Withdrawals of Share Capital by the Board of SSL will have given rise to the discharge of liabilities or debts due to CGF, and the question then arises as to whether the satisfaction thereof through the multilateral set-off arrangements provided for by the Funds Flow Letters amounted to a preference or preferences within the meaning of s. 239 IA 1986.

J.II The respective parties' positions

The Joint Liquidators

251. The Joint Liquidators rely upon the decision of the Court of Appeal in *Sequana CA*, as followed and applied in *TAQA CA* at [45], per Falk LJ, as authority for the proposition that, for the purposes of s. 423 IA 1986, and thus also for s. 238 IA 1986, the payment of a dividend does amount to a transaction entered into by the company declaring and paying the dividend on terms providing for the company to receive no consideration.
252. The Joint Liquidators submit that there is a clear analogy between the declaration and payment of a dividend and the approval of and the payment made upon withdrawals of share capital from a registered society containing rules in like terms to those of

SSL, the key consideration and common factor being in each case that the payment is made in consequence of the exercise by the directors of the company or registered society of an absolute discretion.

253. The Joint Liquidators rely upon Rule 13 of SSL's Rules as having conferred on the SSL Directors an absolute discretion as to whether or not to approve the withdrawal of shares, and to do so without giving reasons.
254. It is the Joint Liquidators' case that there was thus no right or entitlement to withdraw shares as such, merely an ability to ask the SSL Directors to exercise their unfettered discretion to approve a withdrawal of shares which, if the directors did exercise their discretion in favour of the shareholder, gave rise to a transaction for which there was no consideration.
255. It is the Joint Liquidators' case that the approval of the withdrawal of shares given in respect of the Withdrawals of Share Capital, and the payments made (by way of set-off) pursuant thereto, constituted new transactions effected by the exercise by the SSL Directors of their absolute discretion for which no consideration was received by SSL because the funds initially subscribed for the shares are properly to be regarded as past consideration.
256. Further, they submit that, consistent with *Sequana CA* at [39], the approval and payment constituted one single process so that effecting the Withdrawals of Share Capital and paying CGF by way of set-off could not be said to have been in satisfaction of an obligation arising in the approval of the withdrawals.
257. In addition, the Joint Liquidators deny that consideration was provided by the cancellation of the withdrawn shares that took effect pursuant to Rule 14 of SSL's Rules because, so it is argued:
 - i) A shareholder had no right under Rule 47 or 54 of SSL's Rules to receive any future distribution, again, because this was at the absolute discretion of the directors of SSL;
 - ii) From SSL's perspective, it received no benefit from the cancellation, since the cancellation merely changed the identity of the shares which would receive any distributions which happened to be made; and
 - iii) The cancelled shares were, in any event, worthless due to the insolvent state of SSL.
258. The Joint Liquidators submit that their case is strongly supported by the way that SSL's share capital is treated for accounting purposes, being treated and referred to in its audited accounts as "*equity capital*" in accordance with IFRIC 2, which provides for a registered society's share capital to be so described where: "... *The entity has the unconditional right to refuse redemption of a member's shares.*" It is said that this treatment reflects the effect of Rule 13 of SSL's Rules. The Joint Liquidators also rely upon the fact that there is contemporaneous correspondence from tCG's solicitors, AG, suggesting that this is what was understood by them to be the position at the relevant time.

Approved Judgment

259. On the basis of the above, the Joint Liquidators thus submit that the Withdrawals of Share Capital were, subject to the satisfaction of the other requirements of s. 238 IA 1986, TUVs, either as separate “*transactions*” or, alternatively, as part of a larger “*transaction*” with the various “*primary elements*” as pleaded in paragraphs 18 and 19 of the Amended Points of Claim.

The Respondents

260. It is the Respondents’ case that withdrawals of share capital from a registered society are fundamentally different from the declaration and payment of dividends by a limited company. They submit that it is important to understand that a registered society is a very different beast from a limited company, not least because it is not established to make profits for the benefit of its members, and its share capital is of a very different nature from that of the limited company in specifically not providing for members to be entitled to share in the profits of the entity by way of distribution, by way of dividends or on winding up, but, in essence, simply providing for members to be entitled to withdraw their shares and obtain a return of the share capital that they introduced where the society’s rules provide for the issue of withdrawable shares.
261. The Respondents contend that where a registered society is established with withdrawable shares, then the quid pro quo for the subscription for shares is the right or entitlement to withdraw the shares and obtain back the capital introduced, rather than any entitlement to share in profits or in a surplus on winding up. The Respondents submit that any discretion given to the directors of the society, whether expressed to be absolute or not, is properly to be regarded as akin to a negative resolution procedure and that the exercise of the discretion is, in any event, subject to potential challenge if exercised irrationally or for improper purposes, given the usual fiduciary duties to which directors are subject.
262. On this basis, it is the Respondents’ case that the approval of a withdrawal of share capital and the return of the capital subscribed, even if subject to the exercise by the directors of an absolute discretion, does not involve the entry into a new transaction for no consideration open to challenge under s. 238 IA 1986 (or s. 423 IA 1986), but rather carries into effect the original transaction for the subscription of shares upon terms providing for the same to be withdrawable. Thus, on the Respondents’ case, the consideration originally provided for the subscription of shares is not, on proper analysis, past consideration, but remains the quid pro quo for the payment made on the withdrawal of the shares.
263. The Respondents point out that it forms no part of the Joint Liquidators’ case that the SSL Directors acted in breach of duty in approving the withdrawal of share capital by way of the Withdrawals of Share Capital. However, they say that this is irrelevant to the issue in any event, adding nothing to of the existence of the discretion conferred upon the directors in any event.
264. As to the Joint Liquidators’ case regarding there being no consideration behind the cancellation of shares, the Respondents submit that the way that the Joint Liquidators have advanced their case demonstrates that they have not understood the true nature of shares in a registered society. The Respondents make the principal point that the cancellation of shares reflects the fact that, in relation to the shares in question, any liability of the society to that shareholder is terminated, but without any benefit

accruing to other shareholders given that there is no entitlement to share in the profits or assets, simply for them to exercise their own rights to withdraw their shares and obtain repayment of the capital subscribed.

265. In the circumstances, the Respondents submit that there can be no question of the Withdrawals of Share Capital, unlike the payment by a limited company of a dividend, being a transaction entered into with another person for no consideration. On this basis, this essential element of the claim being absent, the TUV claim must, the Respondents submit, fail.

J.III Registered Societies

266. In the light of the submissions made, it is necessary to consider in some detail how registered societies, such as SSL, are constituted in order that one can properly understand the legal analysis of what occurs when a society returns capital to a shareholder upon the latter withdrawing their shares.
267. The legislation in force regulating registered societies such as SSL was at the relevant time, and remains, the Co-operative and Community Benefit Societies Act 2014 (“**CCBSA 2014**”). Registered societies are not regulated by the Companies Act 2006, and CCBSA 2014 is in very much more simple form than the companies legislation.
268. SSL was registered under s. 2(1)(a) of CCBSA 2014 as a “*co-operative society*”. S. 2(1) of CCBSA 2014 provides that any registered society, as a condition of registration under CCBSA 2014, is required to meet the conditions in s. 2(2). These conditions include, amongst other things, that:
- i) The society is a bona fide co-operative society (s. 2(2)(a)(i));
 - ii) The society has at least three members, or two members both of which are registered societies (s. 2(2)(b)); and
 - iii) The society’s rules contain provision in respect of the matters mentioned in s.14 (s. 2(2)(c)).
269. S. 2(3) of CCBSA 2014 provides that, for the purposes of s. 2(2): ““*co-operative society*” does not include a society that carries on, or intends to carry on, business with the object of making profits mainly for the payment of interest, dividends or bonuses on money invested or deposited with, or lent to, the society or any other person.” This is in sharp contrast to a limited company that might be incorporated for any lawful purpose – cf. s. 7(2) of the Companies Act 2006.
270. S. 5 CCBSA 2014 provides that the FCA, which oversees the registration of registered societies, may cancel the registration of a registered society if any of the conditions A to E set out in s. 5 are met. Of these conditions, condition D specifies a ground for cancellation if it appears to the FCA, in the case of a registered society, that the condition in s. 2(2)(a)(i) is not met. Thus, if a society were to start making profits mainly for the payment of dividends on money invested, it would cease to qualify as a co-operative society, and its registration would be liable to be cancelled by the FCA.

271. S. 14 of CCBSA 2014 sets out the provisions which a registered society's rules must contain. In relation thereto:
- i) Paragraph 9 thereof provides as follows regarding shares:

“9. Shares Determination whether any or all shares are transferable, and provision for the form of transfer and registration of shares, and for the consent of the committee to transfer or registration. Determination whether any or all shares are withdrawable, and provision for the method of withdrawal and for payment of the balance due on them on withdrawing from the society.”
 - ii) Paragraph 11 thereof provides as follows with regard to withdrawal of shares:

“Withdrawal etc Determination whether members may withdraw from the society and if so how.”
272. S. 15 of CCBSA 2014 uses language rather similar to s. 33 of the Companies Act 2006 to provide that a registered society's rules bind the society, all its members and all persons claiming through them to the same extent as if each member had subscribed their name and affixed their seal to the rules, and there were contained in the rules a covenant on the part of each member and any person claiming through the member to observe the rules (subject to the provisions of CCBSA 2014).
273. Beyond what is said in s. 14, CCBSA 2014 says little about withdrawable shares, and the regulation thereof is therefore left to the society and its members to decide upon in the society's rules.
274. There are a number of other provisions of CCBSA 2014 that are of some relevance in the light of the submissions that have been made, including the following:
- i) S. 24 provides that a member of a registered society (or of a society to be registered) may not have or claim any interest in the society's withdrawable shares exceeding £100,000. This is subject to an exception where the shareholder is, itself, a registered society, as was the case regarding CGF's shareholding in SSL.
 - ii) S. 115 enables a company registered under the Companies Act 2006, by special resolution, to convert into a registered society, and sets out the procedure to be followed. This includes, at s. 115(3), the requirement that the members sign the registered society's rules which, as referred to, must be compliant with the registration requirements including, in the case of a co-operative society, that it is a bona fide one.
 - iii) S. 116 governs the position in relation to a resolution under s. 115 where the nominal value of the company's shares exceeds the amount specified in s. 24(1), generally £100,000. Provision is made for the resolution to convert shares representing any excess over this amount into transferable loan stock, effectively as a substitute for withdrawable shares. The Respondents rely upon this as demonstrating the very different nature of share capital in a society

from that in a company, given that a company could not simply convert shares into debt.

275. I was referred to a consultation paper produced by the FCA relating to guidance on the FCA's registration function that was published in October 2014, prior to Project Chicago, and to the "*Finalised guidance*" produced in November 2015 (the "**FCA 2015 Guidance**"). The latter replicates much of what was said in the former. These documents produced by the FCA provide further insight into the nature of a registered society.
276. I was referred to the following provisions of the FCA 2015 Guidance:
- i) Paragraph 4.12 states that, reflecting the International Co-operative Alliance's "*Statement of Co-operative Identity*", the FCA considers it an indicator that the condition for registration, i.e. as a bona fide co-operative society, is met where the society puts the values set out in paragraph 4.12 into practice through the principles quoted therein. This includes, at paragraph 1 therein, under the heading "*Voluntary and open membership*", the following: "*Co-operatives of voluntary organisations, open to all persons able to use their services and willing to accept the responsibilities of membership ...*". This is relied upon by the Respondents as demonstrating a principle of voluntary and open membership, which is said to encapsulate the idea that a member should be able to leave the society when it wants to, and is not locked in as a member against its will. The Respondents submit that this is achieved, principally, through the concept of withdrawal of share capital.
 - ii) Paragraph 6.3 states: "*We believe that how a society uses share capital can show if it is complying with the conditions for registration (i.e. that it is a bona fide Co-operative ...).*"
 - iii) Paragraph 6.4 states that in the FCA's view there are "*some unique features of society shares*", with reference then being made to the following:
 - a) "*their number can fluctuate significantly*" – reliance is placed by the Respondents upon this as demonstrating a distinction with a limited company arising because of the nature of withdrawable share capital meaning that it is much easier to join and leave a society than a limited company;
 - b) "*they remain at par value (unless written down)*" and "*they do not automatically give the shareholder a share in the underlying value of the society*" – these are relied upon by the Respondents as demonstrating a further important distinction from a limited company;
 - c) "*they cannot be held by the issuing society itself*" – this is, again, relied upon by the Respondents as demonstrating a further distinction from a limited company which might hold treasury shares, and is consistent with the cancellation of shares upon the shareholder in a society recovering their subscription;

- d) *“they do not carry votes in proportion to the amount of shares held”* – this is also relied upon by the Respondents as demonstrating a distinction with a limited company. Rule 22 of SSL’s Rules provided that each member of SSL should be entitled to one vote, in contrast to the position in respect of a limited company where rights at a general meeting are generally proportionate to the number of shares held.
- iv) Paragraph 6.10, under the heading *“Withdrawable shares”*, makes the point that CCBSA 2014 does not define withdrawable shares. It goes on to say: *“The process of withdrawal should be laid down in the society’s rules. Most society rules give the board power to suspend all share withdrawals. Others impose long notice periods for withdrawing shares. Some societies only allow shares to be withdrawn at fixed times or after a certain period of holding the shares.”*
- v) Paragraph 6.11 sets out that it is the FCA’s view that it is an indicator that a society is meeting its conditions for registration if it only allows the withdrawal of shares if:
 - a) it has trading surpluses that match or exceed the value of the shares involved; and
 - b) the directors believe the society can afford to pay its debts taking into account all its liabilities and its situation at the date of the transaction.

This is relied upon by the Joint Liquidators as demonstrating that, even in the case of a registered society, capital maintenance is an important consideration, hence the reference to only allowing a withdrawal of shares if there are trading surpluses available to fund the same. These are said to be similar considerations as arise in the case of a limited company and the limitation on paying dividends otherwise than out of profits available for distribution.

277. I was also referred to Law Commission Consultation Paper No 264, *“The Review of Co-operative and Community Benefit Societies Act 2014”* (**“the Law Commission Paper”**). This is a review not only of the terms of CCBSA 2014, but of the approach taken by the FCA in relation thereto. Plainly, the Law Commission’s views do not have the status of statute or case law. However, I consider that I am entitled to place some weight thereupon in an area where there is limited jurisprudence.
278. I was referred, in particular, to the following paragraphs of the Law Commission Paper, namely:
- i) Paragraph 5.28 et seq within Chapter 5 (Shares), which contains a helpful summary of the history of share capital within registered societies and their predecessors.
 - ii) Paragraph 5.44 refers to the guidance provided in paragraph 6.11 of the FCA 2015 Guidance referred to above, and also to broader FCA guidance, to the effect that a society can suspend withdrawals, for example if its financial position becomes uncertain. At paragraph 5.45 it is observed that these rules have no counterpart in CCBSA 2014, and that whilst they might be financially

sensible rules designed to protect the solvency of the society as a whole, it seems unlikely that the FCA is empowered to insist upon them.

- iii) At paragraph 5.46, the comment is made that the power to suspend withdrawals is reflected in society practice, and that model rules tend to provide that a society's board may, at their sole discretion, suspend the right to withdraw. It is observed that without this discretion, share capital provided through the sale of withdrawable shares must be accounted for as a liability rather than as capital, reference being made to IFRIC 2.
- iv) At paragraph 5.56 et seq, under the heading "*Discussion*", there is discussion of a number of considerations in relation to the concept of withdrawable shares in a registered society, including identifying the need for a definition of a withdrawable share.
- v) At paragraph 5.59, it is observed that:

"... we do not think it correct to describe members selling their shares to the society, or the society buying them back. The word "withdrawable" better accords with the idea of cashing in an entitlement, like withdrawing money from a bank account in credit, or cashing in premium bonds. When a share is withdrawn, there is no contract of sale. Rather, a member puts in money, and then takes it out again."

The Respondents point out that withdrawable shares are described in this way even though the Law Commission has identified that societies' rules tend to include a reserve power giving directors the power to suspend withdrawals. The Respondents contend that the reason for this description is because it reflects market practice and expectations and, in particular, the expectation which both a society and a member have when a member subscribes for withdrawable shares that, if the member wants to leave, the member can have their cash back, and should not be locked in against their will.

- vi) At paragraph 5.75 et seq, there is discussion of a number of proposed changes to the current law including that CCBSA 2014 should prescribe minimum conditions to be satisfied for the withdrawal of society shares.
- vii) At paragraph 5.79, the view is expressed that there should be one minimum condition, namely that a society should pay for withdrawable shares only to the extent that the officers of the society think that the society can also pay its debts at that time and as they fall due over the following year.
- viii) At paragraph 5.81, it is expressly stated that, contrary to the FCA 2015 Guidance, the Law Commission do not think that withdrawable shares need only be paid for out of a trading surplus. The point is made that absence of a trading surplus in a co-operative could be an indication of correct advance pricing, and that a trading surplus is not necessarily an indicator of solvency, nor does it constitute pure profit.

J.IV SSL's Rules

279. The following rules are relevant for present purposes:

- i) Rule 6 provided, amongst other things, that shares in SSL were withdrawable and transferable.
- ii) Rule 8 provided that shares in SSL should be of the nominal value of £1.
- iii) Rule 9 provided that shares were to be paid for in full on allotment.
- iv) Rule 13 governed the withdrawal of shares and provided that:

“... shares may be withdrawn with the approval of the Board. For the avoidance of doubt, such approval shall be given in the absolute discretion of the Board and the Board shall not be required to provide any reason for withholding its approval.”
- v) Rule 13 went on to provide that:
 - a) Without the consent of the Board, not more than one-tenth of the paid-up share capital at the commencement of any calendar year should be withdrawable during that year, and that without such consent, no member should be entitled to withdraw during any year more than one-tenth of the share capital standing to their credit at the commencement of any calendar year unless the member withdrew from SSL as provided for by Rule 15.
 - b) The “*right to withdraw*” might, by resolution of the Board, be suspended either wholly or partially and either indefinitely or for a fixed period.
 - c) The amount paid to a member on withdrawal should be the amount paid-up or credited in the shares to be withdrawn together with any accrued interest.
- vi) Rule 14 provided that any share withdrawn in accordance with Rule 13 should be cancelled.
- vii) Rule 15 provided that a member: “*may withdraw from the Society by withdrawing all the shares in the Society or, if the right to withdraw shares has been suspended, by surrendering all their shares to the Society.*” It was then provided that the directors may, upon such surrender: “*in their absolute discretion pay up to the withdrawing member any amount not exceeding the amount paid up or credited on the shares surrendered.*”
- viii) As already mentioned, Rule 22 provided that each member of SSL should be entitled to one vote at ordinary general meetings.
- ix) Rule 47 provided that the net profits of all businesses carried on by or on account of SSL should be applicable:

- a) In paying interest on share capital at such uniform rate as might be determined by the directors from time to time. As to this, I understand that interest was never, in fact, paid;
 - b) In setting aside such amount, if any, to a reserve fund such amount as the directors might from time to time determine; and
 - c) In paying out of the balance of the profits remaining, such dividend as a General Meeting might declare to persons who were members of SSL at the time of the declaration, and that where a General Meeting so determined, to any other person.
- x) Rule 54 provided that if on a solvent dissolution or winding up of SSL there remained after the satisfaction of its debts and liabilities and the repayment of the paid-up share capital any assets whatsoever, such assets should be transferred to CGL.

J.V Authorities

280. *Re Sequana CA* included, as one of the number of issues before the Court of Appeal, the issue as to whether a dividend paid by a subsidiary to its holding company and paid by way of set-off against monies owed to the subsidiary, constituted a transaction at an undervalue within the meaning of s. 423 IA 1986. In relation thereto, three issues arose, namely whether, for the purposes of s. 423(1)(a), the dividend was a “gift”, whether, if not a gift, the dividend was a transaction “on terms that provide for [the company] to receive no consideration”, and whether, if not a gift, the dividend involves a “transaction”. It is common ground, for present purposes, that the same principles apply to the question of whether there is a TUV within the meaning of s.238, and that *Sequana CA* is authority thereon.

281. The lead judgment was given by David Richards LJ. At [41] he rejected the contention that a dividend was a gift, saying:

“... rights are conferred on shareholders as regards dividends by the terms of issue of the shares or by the articles, and it is pursuant to those rights that shareholders receive dividends. Those rights are attached to the shares for which consideration was provided by the original holders. Dividends are both commercially and legally a return on the investment. It would be startling to categorise dividends as gifts made by a company to its shareholders and there is no reason to think that Parliament intended the word “gift” to carry anything other than its usual meaning”.

282. In considering the alternative submission that a dividend is a transaction for no consideration, David Richards LJ, at [43], referred to what had been said by Rose J at first instance at [2017] EWHC 211 (Ch) at [500]:

“There may be a situation where the consideration paid by the debtor to the third party is fixed in a contract but payment is delayed. Provided that the initial contract was not entered into with the s 423 purpose, that delayed payment is not a transaction with the s 423 purpose because the purpose is to fulfil the contractual obligation to make payment. ... The

payment of the dividend is not, in my judgment, the satisfaction of an earlier obligation in the same way. It is true that the reason why the member of the company, rather than any other person, receives the dividend is because of the pre-existing relationship of company and shareholder. But the decision to pay the dividend and choice of its value is not the consequence of that relationship because it is discretionary not only in its amount but in whether it is paid at all.”

283. This passage is, I consider, helpful and important because it recognises that if a payment is made in performance of an existing contractual obligation, it will not be for no consideration because the consideration is that that supported the contract when the contractual obligation arose. However, although a dividend will be paid in the context of the pre-existing relationship of the company with its members as regulated by the terms of the articles of association, the pre-existing relationship cannot be regarded as having given rise to consideration sufficient to support the dividend because the dividend was declared and paid, not in performance of any existing obligation to pay the particular dividend arising from that relationship, but because of the decision of the directors to exercise their discretion in favour of recommending, and the company paying that dividend.
284. The crux of David Richards LJ’s reasoning as to why a dividend is a transaction for no consideration is contained in his judgment at [50], where he said this:

“50. Once it is accepted that the payment of a dividend involves the payment of funds beneficially owned by a company to its shareholders, the question under section 423(1) remains whether the terms on which the dividend is declared or paid “provide for [the company] to receive no consideration”. In my judgment, it cannot be said that the company receives consideration for the payment of a dividend. It is not enough to say that the dividend is paid in accordance with the rights attached to the shares, where those rights are quite different from, for example, the right to receive interest payments on loan notes or the right to be considered for bonus declarations on a with-profits fund. If and when a company pays a dividend to shareholders, the terms of the dividend do not provide for the company to receive any consideration nor will it receive any consideration. It might be said that to come within the second limb of section 423(1)(a) the terms must expressly provide for no consideration but in my view that would be too literal a reading of the provision. Parliament can hardly have intended the operation of the section to depend on the vagaries of drafting styles”. [My emphasis].

285. This passage does beg the question as to why it was not enough to say that the dividend was paid in accordance with the rights attached to the shares, and why those rights are different from the other rights referred to, including the right to be considered for bonus declarations on a with-profits fund. Further, it raises the question as to whether the rights of CGF under Rule 13 of SSL’s Rules in respect of the withdrawal of shares more closely equate to the payment of a dividend, on the basis that it is not enough to say that monies paid upon a withdrawal of shares are paid in accordance with such rights, or, alternatively, whether such rights are more akin to,

for example, the right to be considered for bonus declarations on a with-profits fund. The Joint Liquidators contend the former; the Respondents contend the latter.

286. I consider that considerable assistance in answering this question is provided by the decision of the Court of Appeal in *Chalcot Training v Ralph* [2021] EWCA Civ 199 relied upon by the Respondents. This case concerns the question of whether certain transactions were, in the context of a tax avoidance scheme, properly to be characterised as distributions to shareholders, rather than as remuneration to director employees. However, an issue arose as to whether past services provided by two of the directors could have amounted to valid contractual consideration for payments made to them.

287. At [70], Lewison LJ commented that a company's obligation is to pay a director the remuneration and benefits provided by the articles of association for the directors, and whether a director has any right to remuneration therefore depends on what the articles say. The articles of association, in that case, provided that:

“(2) *Directors are entitled to such remuneration as the directors determine-*
(a) for their services to the company as directors.”

288. Lewison LJ then went on at [71] to say:

“71. *The articles are framed in the language of entitlement. If someone is entitled to something, it usually means that they have a legal right to it. It follows from this, in my judgment, that as and when directors performed services for the company, they did so on the legally binding basis that the directors would exercise the power of determination given to them by the articles in a rational manner and in good faith: see, by analogy, e.g. Horkulak v Cantor Fitzgerald International [2004] EWCA Civ 1287, [2005] ICR 402. Once remuneration has been declared under that article, it is a debt for which a director can sue: see e.g. Orton v Cleveland Fire Brick and Pottery Co Limited (1865) 3 Hurl & C 868. It is no different, in my judgment, from the case of an employee whose contract of employment provides for the employer to have an (apparently) unfettered discretion to decide whether or not to award that employee a bonus. The decision will, in practice, be taken after the period of service that the bonus is designed to cover; but I do not consider that that makes the services past consideration.*” (emphasis added)

289. The Respondents equate the position of the employee in the latter example with that of CGF in respect of its rights concerning the withdrawal of shares in SSL. In that example, the bonus related to the services previously provided by the employee. However, that did not mean that the services provided represented past consideration, even though the payment of the bonus might have depended upon the exercise by the employer of an apparently unfettered discretion.

290. In light of the fact that David Richards LJ in *Sequana CA* had, at [50], specifically drawn a distinction between a dividend and the right to be considered for bonus declarations in a with-profits fund, Mr Rivett, who made the submissions on behalf of the Respondents in respect of this aspect of the case, took me to a number of cases

that do, I consider, help to explain why David Richards LJ drew the distinction that he did in *Sequana CA* at [50].

291. Firstly, I was taken to the decision of the Court of Appeal in *Re Prudential Assurance Co Limited* [2020] EWCA Civ 1629, [2021] Bus LR 259, concerning the principles which the court should apply when deciding whether to sanction a transfer of an insurance business under Part VII of the Financial Services and Markets Act 2000. The judgment was that of the Court, the panel of which included David Richards LJ. It is clear from a reading of the judgment at [40] that the Court of Appeal was mindful of and concerned with regard to the distinction between various types of insurance business, recognising a distinction between general insurance business and “*policies that vest a discretion in the insurer, most obviously those having a with-profits element, and those that do not.*”
292. Mr Rivett relied upon this as showing that policies having a with-profits element provide a paradigm example of a book of insurance which vests a discretion in the insurer. He makes the point that David Richards LJ would have known this when he referred to the rights to a bonus in a with-profits fund in *Sequana CA* at [50]. I note that *Sequana CA* preceded this decision, nevertheless it can be seen that, at [46], the judgment of the Court of Appeal referred to *In Re Axa Equity & Law Life Assurance Society plc* [2001] 1 All ER (Comm) 1010, and, at [47], to *In Re Royal Sun Alliance Insurance plc* [2008] EWHC 3436 (Ch), two of the more important sanction decisions. David Richards LJ was counsel in the first of these cases, and the judge in the second of them. This was clearly an area with which he was very familiar at the time that he decided *Sequana CA*.
293. Secondly, I was taken to the decision of the Court of Appeal and that of the House of Lords in *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408 (“**Equitable Life**”). This case concerned the payment of bonuses to policyholders in a with-profits fund. In summary, upon maturity of a policy, policyholders could elect to take an annuity at a guaranteed rate or an annuity at the society’s then current rate or from another provider. Because of a fall in annuity rates, the directors of Equitable Life wanted to encourage policyholders to take an annuity at their current rate rather than at their guaranteed rate. This they sought to achieve through their discretion as to the amount of bonus payments. Thus, if a policyholder elected to take an annuity at the guaranteed rate, they would be paid a smaller bonus than the policyholder who took an annuity at the current rate. The Court was concerned with the question as to whether this was permissible when policyholders challenged the exercise by the directors of Equitable Life of their discretion.
294. The relevant discretion arose under Equitable Life’s articles of association, and in particular article 65 thereof as set out at [13] in the judgment of Lord Woolf MR in the Court of Appeal. It is the Respondents’ case that the discretion provided for by article 65 was in the widest possible terms as demonstrated by subclause (3) thereof, and that this is supported by what Lord Woolf MR said at [15].
295. In reply submissions, Mr Smith KC submitted that it is clear from the earlier wording of article 65 that the discretion was as to the amount of payment, not as to whether any payment at all might be made. The relevant wording relied upon by Mr Smith KC refers to the requirement for an investigation to be made as to the financial condition

of the society, including a valuation of the assets and liabilities, and based thereupon, after making provision for liabilities and any special other reserve they may think fit, the directors shall: ... *“declare what amount of the surplus (if any) shown by such valuation may in their opinion, be divided by way of bonus, and they shall apportion the amount of such declared surplus by way of bonus among the holders of the participating policies on such principles, and by such methods, as they may from time to time determine.”*

296. I am not persuaded that the true effect of article 65 was as contended by Mr Smith. I read article 65, as a whole, as enabling the directors to exercise their discretion against awarding a bonus. However, I do not consider that anything turns on this point, because there are certainly other with-profit policies under which the insurer does have an absolute discretion, and I do not consider that any point of principle turns on the particular wording of article 65.
297. At paragraph [20] et seq of his judgment, Lord Woolf MR dealt with the basis of the challenge to the exercise by the directors of their discretion as provided for by article 65. In essence, he held that the exercise of discretion was open to challenge on the basis that it required to be exercised in accordance with the directors’ fiduciary powers, and that also, as a matter of contract, it required to be exercised in good faith and not unreasonably in a *“Wednesbury”* sense (see *Associated Provincial Picture Houses Limited v Wednesbury Corpn* [1948] 1 KB 223).
298. The case was the subject matter of an appeal to the House of Lords. Two speeches were given, namely by Lord Steyn and Lord Cooke, and the decision of the Court of Appeal was upheld.
299. Lord Steyn approached the matter as one of contract, and whether a term should be implied restricting the discretion of the directors. At p 459E-F, he said this:

“The inquiry is entirely constructional in nature: proceeding from the express terms of article 65, viewed against its objective setting, the question is whether the implication is strictly necessary. My Lords, as counsel for the GAR policyholders observed, final bonuses are not bounty. They are a significant part of the consideration for the premiums paid. And the directors’ discretions as to the amount and distribution of bonuses are conferred for the benefit of policyholders.” (emphasis added)

300. At p 460F-G, Lord Cooke said this:

“Lord Steyn, solves this case by invoking the principle that an implied term may be derived from the language of a document read in its particular factual setting. I agree with that way of viewing the case; but the same conclusion may be reached by starting from the principle that no legal discretion, however widely worded (here, by article 65(1), the directors may apportion bonuses “on such principles, and by such methods, as they may from time to time determine”), can be exercised for purposes contrary to those of the instrument by which it is conferred.” (My emphasis).

301. The Respondents submit that what the decision in *Equitable Life* confirms is that just because the ability to enjoy a right is dependent upon a favourable exercise of a discretion by the counterparty does not mean that benefits conferred by the exercise of that discretion are “bounty”, as Lord Steyn put it, granted in return for no consideration. Whilst the payment of the bonuses was said to be within the discretion of the directors, they were specifically found to form a significant part of the consideration for the premiums paid by the policyholder.
302. I should finally mention the application and approval of *Sequana CA* in *TAQA CA*. In the latter case, Falk LJ said this at [45]:

“Sequana CA established that, for the purposes of s.423 IA 1986, a dividend was not a gift but was both a “transaction”, and one “on terms that provide for [the company] to receive no consideration”. It is common ground that there is no relevant distinction between s.423 and s.238 for these purposes, as El-Husseiny confirms. In summary, Sequana CA held that a dividend was not a gift because dividends are a return on the investment originally provided for the shares and are paid pursuant to the rights attaching to them (judgment of David Richards LJ, with whom Henderson and Longmore LJJ agreed, at [41]). While that original investment was insufficient to amount to consideration, there was a “transaction” for the purposes of s.423 for the reasons that David Richards LJ gave at [58]-[64], including that the concept is not limited to bilateral transactions but is intended to cover a dividend as well as a gift, and in any event it is too narrow to describe a dividend as a unilateral act.”

J.VI Determination

303. The central question therefore is whether, as contended by the Joint Liquidators, the Withdrawals of Share Capital from SSL, a registered society, are to be equated with the declaration and payment of a dividend by a limited company. As is apparent from a number of my interventions during the course of submissions, my initial thinking had been that the issue might turn upon the nature of the discretion exercised by the SSL Directors, and that if SSL’s Rules conferred upon them an unfettered discretion as to whether or not to approve a withdrawal of shares, then the position was to be equated with the discretion conferred upon the directors of a limited company in relation to the declaration and payment of a dividend. In other words, that, as is the case with the declaration and payment of a dividend, it is the exercise of the discretion by the directors that initiates a transaction that is entered into with the recipient of the relevant payment who, in these circumstances, gives no consideration for it.
304. However, such an approach is not, in my judgment, supported by either principle or authority. As the above analysis of the nature of registered societies demonstrates, there are a number of fundamental differences between a registered society and a company, and the nature and structure of their share capital. The most fundamental differences being that:
- i) A company can be established for any lawful purpose, and a shareholder investing therein will ordinarily expect to share in the profits of the company

through the payment of a dividend, but have no entitlement thereto unless and until a dividend is declared, and a shareholder will have a share in the equity of the company with, generally, an entitlement to share in any surplus on a solvent winding up.

- ii) On the other hand, registered societies registered as a co-operative society are required to be bona fide co-operative societies within the meaning of s 2(3) of CCBSA 2014 with all that entails. Further, by subscribing for withdrawable shares therein, a shareholder does so with no expectation of sharing in profits or any surplus on winding up, but does so on the specific basis of simply having an expectation of withdrawing their shares and getting back exactly what they put in on subscription of their shares (possibly with interest), albeit that this might be subject to the directors exercising their discretion to approve the withdrawal.

- 305. So far as the terms of SSL's Rules are concerned, it is to be noted that although the discretion conferred on the directors with regard to the withdrawal of shares was expressed in apparently absolute terms at the beginning of Rule 13, the rule went on to provide that "*the right to withdraw*" might be suspended either wholly or partially and either indefinitely or for a fixed period by the directors. This does, to my mind, demonstrate that a "*right to withdraw*" had been conferred on shareholders, subject to the exercise of the discretion provided for and the power to suspend that right. The reference to "*right to withdraw*" thus, as I see it, points to an entitlement to withdraw shares subject to the terms of SSL's Rules.
- 306. In these circumstances, I consider that the proper analysis is that if the directors of a registered society with rules such as those of SSL do exercise their discretion in favour of approving a withdrawal of share capital, then rather than effecting some new transaction with the shareholder, they are giving effect to the rights conferred upon the shareholder on subscribing for their shares to withdraw their shares upon the terms of the rules of the registered society, even where the rules purport to give the directors an absolute discretion to approve a withdrawal. That being the case, the proper analysis is that consideration for the withdrawal was provided by the subscription in the same amount of the withdrawal.
- 307. This conclusion is, I consider, consistent with and supported by Lewison LJ's analysis in *Chalcot Training v Ralph* (supra) at [71] of the position of an employee whose contract of employment provides for the employer to have an apparently unfettered discretion to decide whether or not to award that employee a bonus. Notwithstanding that the employer had an apparently unfettered discretion, Lewison LJ considered that consideration from the employee for the bonus was provided by the employee's past services, and the latter were not properly to be regarded as past consideration. Likewise, in my judgment, the position here. Just as the employee had provided consideration by their past services, so has the shareholder of a registered society by subscribing for their shares.
- 308. The position is, I consider, further supported by the cases relating to the payment of bonuses to policyholders in a with-profits fund. Particular assistance for present purposes is provided by the observation of Lord Steyn in *Equitable Life* at 459E-F that even where the insurer has a discretion with regard to the payment of bonuses,

final bonuses are not bounty, and they are a significant part of the consideration for the premiums paid. This, to my mind, explains why David Richards LJ in *Sequana* at [50] felt able to distinguish the payment of dividends from the right to be considered for bonus declarations on a with-profits fund. He must be taken to have been aware that the payment of bonus declarations on a with-profits fund would be subject to the exercise of a discretion, not least because he described the relevant right as being one of a right to be “*considered*” for bonus declarations.

309. The right to be considered for bonus declarations on a with-profits fund is, I consider, analogous with the rights of shareholders in SSL to have their requests to withdraw their shares considered by the board of SSL. In doing so, the shareholders are not asking for bounty to be conferred upon them. Rather they are asking for the return of the money that they put in, which represents the consideration for the monies that they are seeking to take out.
310. I consider that *Equitable Life* further provides authority for the proposition that a discretion of the kind provided for by Rule 13 of SSL’s Rules is subject to challenge on the basis that it is required to be exercised in accordance with the directors’ fiduciary powers and is required to be exercised in good faith and not unreasonably. I note that, at p 460F-G, Lord Cooke considered that to be the case however widely worded the discretion was expressed to be.
311. Whilst I do not consider the existence of such an ability to challenge the exercise of the directors’ discretion under Rule 13 of SSL’s Rules is necessary to the decision that consideration for the withdrawal is provided for by the initial subscription where the directors do, as they did in the present case, in fact approve the withdrawal, it does, I consider, lend support to the argument.
312. It is necessary to address a number of the arguments advanced by Mr Smith KC on behalf of the Joint Liquidators, in support of the Joint Liquidators’ case that, on a proper application of the decision of the Court of Appeal in *Sequana CA*, a withdrawal of shares such as that in the present case and the payment made thereupon should be treated on the same basis as the declaration and payment of dividends.
313. It is submitted by the Joint Liquidators that, as with the declaration and payment of a dividend, the approval of the withdrawal of shares and the payment made pursuant thereto is to be treated as a single process representing a transaction for the purposes of s. 238, for which there is no consideration. One can see why that might be the case where a dividend is initiated by the directors’ decision to pay it, and the dividend is then paid. However, where the discretion is exercised so as to give effect to an existing right, here to withdraw shares, then the nature of the transaction is, I consider, very different. It is not initiated by the exercise of discretion, but the discretion is exercised in order to give effect to an existing right or entitlement for which consideration has been provided.
314. The point is made that if the Respondents are correct, then a simple way for companies to avoid the capital maintenance rules would be to convert into registered societies with withdrawable shares and then return capital to shareholders through withdrawals of shares. However, it is clear from ss. 115 and 116 of CCBSA 2014 that conversion into a registered society is no easy process. For example, if conversion is to be into a co-operative society, then it must be a “*bona fide co-operative society*”,

there are limitations on the size and extent of its share capital and there is the supervisory jurisdiction of the FCA. In short, I do not consider that registered societies are open to being abused in order to evade capital maintenance rules in the way contended.

315. On the question of capital maintenance, the Joint Liquidators refer to paragraph 6.11 of the FCA 2015 Guidance, including that withdrawals of share capital should not be funded otherwise than out of retained profits. This is said to support the argument that registered societies ought to be regarded as akin to limited companies from a capital maintenance perspective. However, as appears from paragraphs 5.79-5.81 of the Law Commission Paper, the Law Commission considered, in my view quite correctly, that the FCA had no power to insist upon such a restriction, and that, as a matter of principle, it would be inconsistent with the nature of a registered society to do so. Hence, the Law Commission's recommendation that there should only be one minimum condition, namely that a society should pay for withdrawable shares only to the extent that the officers of the society think the society can also pay its debts at that time and as they fall due over the following year.
316. The point is made by the Joint Liquidators that SSL's accounts referred to the shares therein as "*equity capital*" and did so in accordance with IFRIC 2 on the basis that there was an "*unconditional right to refuse redemption of a member's shares.*" However, as paragraph 5.44 of the Law Commission Paper identifies, this is by no means unusual in the case of a registered society with withdrawable shares. Irrespective of the absolute discretion purported to be provided for by Rule 13 of SSL's Rules, the existence of the right to suspend shares is reflected in society practice and will be sufficient in itself to warrant the share capital being reported as capital rather than a liability. In these circumstances, I do not consider that anything significant turns on this point for present purposes once one accepts, as I consider that one must, that the existence of the discretion whether or not to approve a withdrawal of shares does not mean that consideration was not provided for the withdrawal of shares.
317. The Joint Liquidators submit that their position is "*strongly supported*" by the decision of HHJ David Cooke in *Dickinson v NAL Realisations* [2017] EWHC 28 (Ch), [2018] BCC 506. In that case, it was decided that the purchase by a company of its own shares fell within the scope of s. 423 IA 1986 as a transaction at an undervalue. Reliance is placed by the Joint Liquidators upon a passage in Judge Cooke's judgment at [100] where, having referred to the position of a dividend as considered in *Sequana CA*, Judge Cooke explained that:

"The position on a purchase of own shares is different inasmuch as the rights of the selling shareholder in relation to the shares in question are extinguished by the sale, but those rights are only to participate in dividends if and when declared and to participate in the distribution of assets on a winding up (or an earlier permissible return of capital, if and when made). They are not, in my judgment, to be regarded in the same light as claims enforceable against the company by creditors, the discharge of which amounts to consideration received by the company. Extinguishing the participation rights of one shareholder does not mean that the company is released from its (contingent) obligations to

distribute profits or assets, but only that any such distribution is made to those remaining as members. The position of the company is no different, and the contingent benefit produced by paying to buy the shares in goes to the remaining members whose share in subsequent distributions is increased, not to the corporate entity.” (My emphasis)

318. I consider that rather than assisting the Joint Liquidators, this case serves to further demonstrate the distinction between a limited company and a registered society, and that it is readily distinguishable. This case involved a simple purchase by the company of its own shares, and there was no question of the shareholders having any right to withdraw or even redeem their shares. Further, as is clear from the highlighted passage, the basis upon which Judge Cooke found that no consideration was provided by the company was that the purchase of the shares in question did not amount to any form of effective discharge so far as the company’s obligation to shareholders was concerned because, in essence, the benefit of the equity acquired by the company would accrue to the other shareholders. As Judge Cooke put it: “*The position of the company is no different.*” This is very different from a withdrawal of shares from a registered society such as the present. The shares are cancelled upon the return to the shareholder of the capital introduced (together with any interest due thereupon). Any other shareholders, or the shareholder in question if they retain further shares in respect of those shares, gain no benefit therefrom. The position is therefore, in this respect, akin to an enforceable claim against the company by creditors, thereby discharging any continuing obligation of the society towards the shareholder.
319. It is submitted on behalf of the Joint Liquidators that, in the present case, it cannot be said that SSL’s board would have breached any duty if it decided not to approve the withdrawals of share capital that were approved, i.e. that they would have been entitled to exercise their discretion to refuse to approve the withdrawals. However, the reality of the position is that the directors did approve the Withdrawals of Share Capital. In the circumstances, having exercised their discretion in the way that they did, then, on the basis of the above analysis, that enabled CGF to exercise its right to withdraw its shares for which it had, by subscribing for the shares, provided consideration.
320. There was an issue between the parties as to whether the cancellation of CGF’s shares was, in itself, sufficient to amount to consideration for the purposes of s. 238(4)(a). Given that I have found that consideration was otherwise provided, it is unnecessary for me to consider the point. However, it should be observed that the Joint Liquidators’ arguments in relation thereto included the argument that cancellation would have the same effect as the purchase by a company of its own shares as analysed by Judge Cooke in *Dickinson v NAL Realisations* (supra). As I have already held, that is a misunderstanding of the position. Indeed, the effect of the cancellation of CGF’s shares serves to emphasise the difference between a society and a limited company, and why a withdrawal of shares is supported by the consideration provided on the original subscription for the shares.
321. The Joint Liquidators complain that the withdrawal of share capital by CGF in order to fund the acquisition by CFS of the property and assets comprising the subject matter of the Foodstores Sale Agreement was just the sort of egregious transaction that s. 238 IA 1986 was designed to address with a view to seeking to ensure a pari

passu distribution of the assets of SSL amongst its creditors, and to refuse relief under s. 238 would undermine that objective. However, it is to be borne in mind that there are other remedies within an office-holder's toolkit with which to challenge antecedent transactions shortly prior to the formal entry into insolvency with a view to ensuring a pari passu distribution, such as s. 239 or misfeasance claims against those responsible for what may have occurred. A claim under s. 238 can only be maintained where the statutory requirements for doing so are made out which, for the reasons I have explained, I do not consider that they are in the present case.

322. However, it is common ground that the fact that payment was made by way of set-off on the Withdrawals of Share Capital was in satisfaction of the debt that required to be discharged upon the Withdrawals of the Shares Capital, and it is on that basis that the Joint Liquidators pursue their alternative preference claim under s. 239.
323. In view of my finding that the Withdrawals of Shares capital did not amount to transactions at an undervalue within the meaning of s.238, further consideration of the various other requirements of a TUV claim strictly becomes unnecessary, and one moves on to whether the requirements of the preference claim under s. 239 are made out. However, in case I should be wrong in relation to my conclusion in relation to consideration and the Withdrawals of Share Capital, I shall consider whether the various other requirements of the TUV claim would have been made out. The issue of insolvency at the relevant time is, of course, relevant to the claim under s. 238 and that under s. 239, although the burden of proof in relation to each differs.

K. Insolvency at the time of or in consequence of the transaction

K.I Legal Principles

324. The question of solvency is relevant because, as explained in paragraph 168(ii) above, s. 240(2) IA 1986 provides that where a company enters into a transaction at an undervalue or gives a preference within the relevant period, here two years, then that time is not a relevant time for the purposes of s. 238 or s. 239 unless the company:

“(a) is at that time unable to pay its debts within the meaning of section 123 in Chapter VI of Part IV, or

(b) becomes unable to pay its debts within the meaning of that section in consequence of the transaction or preference”.

325. As explained in paragraph 168(iii) above, s. 240(2) goes on to provide that the requirements of that subsection:

“... are presumed to be satisfied, unless the contrary is shown, in relation to any transaction at an undervalue which is entered into by a company with a person who is connected with the company.”

326. As explained in paragraph 171 above, the Joint Liquidators accept that SSL was not insolvent when it entered into the relevant “*transaction*” or gave the alleged preference, but it is their case that SSL became unable to pay its debts within the meaning of s. 123 IA 1986 in consequence thereof.

327. It is common ground that the Respondents were “*connected with*” SSL under s. 249 and s. 435 IA 1986. Consequently, so far as the TUV claim is concerned, the burden lies on the Respondents to rebut the presumption of insolvency. On the other hand, in relation to the preference claim, the onus is on the Joint Liquidators to prove insolvency.

328. It is no part of the Joint Liquidators’ case that SSL was, in consequence of the relevant transaction or preference, unable to pay its debts as they fell due within the meaning of s. 123(1) IA 1986. However, the Joint Liquidators rely upon s. 123(2) IA 1986. This provides that a company is also deemed unable to pay its debts if:

“... it is proved to the satisfaction of the court that the value of the company’s assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities.”

329. It is the Joint Liquidators’ case that SSL became balance sheet insolvent in this sense in consequence of the transaction or preference.

330. As to the presumption of insolvency under s. 240(2), *Re Casa Estates (UK) Limited* [2014] EWCA Civ 383 (“**Casa Estates CA**”) is authority for the proposition that it can only be displaced by clear evidence. At [45], Lewison LJ said this:

“Finally, Mr Randall criticised Warren J for having said that he was not in a position to make findings of fact on some of the matters debated before him. But this overlooks the statutory presumption that the company was insolvent when the payments were made. A presumption is a provisional conclusion that must be displaced by contrary evidence. It is not the same as a trial at which the court starts, so to speak, with a blank sheet of paper. If the judge is not in a position to make a finding of solvency, the presumption prevails. Equally, if he is not in a position to make one or more findings about the building blocks in the case that the company was solvent, then the presumption is not displaced. I do not, therefore, consider that this criticism undermines Warren J’s overall conclusion.” (My emphasis).

331. The leading case on the insolvency test provided for by s. 123(2) IA 1986 is the decision of the Supreme Court in *BNY Corporate Trustee Services Limited v Eurosail-UK-2007-3BL plc* [2013] UKSC 28, [2013] 1 WLR 1408 (“**Eurosail SC**”), and specifically the judgment therein of Lord Walker. The relevant principles to be extracted therefrom were helpfully summarised by Lewison LJ in *Casa Estates CA* at [27]:

“(iii) ... The express reference to assets and liabilities is a practical recognition that once the court has to move beyond the reasonably near future any attempt to apply a cash-flow test will become completely speculative and a comparison of present assets with present and future liabilities (discounted for contingencies and deferment) becomes the only sensible test: para [37].

(iv) *But it is very far from an exact test: para [37]. Whether the balance sheet test is satisfied depends on the available evidence as to the circumstances of the particular case: para [38]. It requires the court to make a judgment whether it has been established that, looking at the company's assets and making proper allowance for its prospective and contingent liabilities, it cannot reasonably be expected to meet those liabilities. If so, it will be deemed insolvent even though it is currently able to pay its debts as they fall due: para [42].*” [My emphasis]

332. It is necessary therefore to make a comparison between present *assets* on the one hand, and present and future *liabilities* (discounted for contingencies and deferment) on the other hand, in order to produce what might be described as a s. 123(2) balance sheet. This is what the solvency experts have sought to do in the present case, albeit with different results.

333. With regard to assets, as is apparent from the language of s. 123(2), the Court is constrained to consider only present assets. As it was put by Morritt C in *Eurosail* in the Court of Appeal, [2010] EWHC 2005 (Ch), at [30]:

“...the assets to be valued are the present assets of the company. There is no question of taking into account any contingent or prospective assets. Thus the conclusion of the Court of Appeal in Byblos Bank SAL v Al-Khudhairy is as applicable to s.123(2) as it is to s.123(1)(e).”

334. The case of *Byblos Bank SAL v Al-Khudhairy* [1986] 2 BCC 99, 549, that Morritt LJ referred to concerned a company that was insolvent from a balance sheet perspective but had an expectation of receiving a further capital injection which would secure the deficiency. It was held that it would not be correct to take this into account, in addition to assets presently owned by the company. This was on the basis that a mere hope or expectation of acquiring further assets in the future without any accompanying right to such further assets could not be treated as an asset for the purposes of the predecessor to s. 123(2) – see per Nicholls LJ at page 562.

335. The same point was made by Snowden J (as he then was) in *Grant v Ralls* [2016] EWHC 243 (Ch) at [170], when he said: *“... the prospects of the company obtaining further assets which it does not already own cannot be taken into account.”*

336. With regard to liabilities, in particular the treatment of contingent or prospective liabilities, I was referred to what was said by Zacaroli J (as he then was) in *In re Burnden Holdings (UK) Limited (in liquidation)* [2019] Bus LR 2878 at [349] – [352]:

“349 It is inherent in the Eurosail test that, while the amounts recorded in the financial statements of a company for its assets and liabilities constitute evidence of, and may even be a starting point for considering, their value, the focus must be on their commercial value. Lord Neuberger of Abbotsbury MR, at para 61 of his judgment in the Court of Appeal, discussing the relevance of the figures in the company's audited accounts, said:

'I do not think that it is possible or helpful to describe in general terms the weight to be given to such figures in such an exercise. Clearly, the fact that the figures have been audited and are said to convey a 'true and fair' view of the company's position in the opinion of its directors should normally have real force. However, the figures will inevitably be historic, they will normally be conservative, they will be based on accounting conventions, and they will rarely represent the only true and fair view.'

350 *Although that passage concluded with a reference to a test ('the point of no return') which was discredited in the Supreme Court, his comments in relation to the relevance of the company's statutory accounts remain valid.*

351 *This is of particular relevance in the present case in relation to two classes of assets: the company's investment in the shares of its subsidiaries (carried at historic cost) and the debts due from its subsidiaries (carried at face value). Whether or not these were accounted for correctly, in considering insolvency it is the real value of the assets that needs to be considered.*

352 *Similarly, a commercial view must be taken of the company's contingent and prospective liabilities. They are not simply to be included at their face amount on the liabilities side of the balance sheet. Instead, 'proper allowance' is to be made for future and contingent liabilities 'discounted for contingencies and deferment': see the Eurosail case, paras 37, 42, per Lord Walker JSC. In the case of contingent liabilities, this requires a series of commercial judgments to be taken, as to the likelihood of the contingency falling in, the date it might do so, the amount of that liability, and the appropriate discounts to apply in relation to each aspect: see, for example, Goode on Principles of Corporate Insolvency Law, 5th ed (2018), para 4-39."*

337. A number of relevant points emerge from this latter authority with regard to any consideration of a s. 123(2) balance sheet, namely:

- i) It is necessary to take a "commercial view" of the company's contingent and prospective liabilities;
- ii) This is likely to involve a series of commercial judgments, in the case of contingent liabilities, as to the likelihood of the contingency falling in, the date it might do so, the amount of that liability, and the appropriate discounts to apply in relation to each aspect. In the case of prospective liabilities, the relevant judgment would, as I see it, be as to the prospects of the company having to meet the liability and, if so, in what amount, applying relevant discounts;

- iii) Figures in a company's accounts prepared in accordance with accounting conventions will rarely represent the only true and fair view. In *Eurosail SC*, Lord Walker said this at [1]:

“There is no statutory provision which links section 123(2) of the 1986 Act to the detailed provisions of the Companies Act 2006 as to the form and contents of a company's financial statements.”

K.II The issues in relation to insolvency in the present case

338. The parties' solvency experts, Mr Rowley and Mr Davies, have included in their revised joint expert report dated 9 February 2026 a revised table showing their respective assessments of SSL's balance sheet solvency as at 2 November 2015, i.e. after Phase 1 of Project Chicago had been carried into effect. This is set out in an abbreviated form below:

Asset or Liability	Mr Rowley (Full liabilities)	Mr Rowley (Mitigated liabilities)	Mr Davies (With Applicants' Expert's values for L&B and F&F) £m
	£m	£m	
Tangible Fixed Assets: Land & buildings owned	0.5	0.5	0.5
Tangible Fixed Assets: Land & buildings leased	1.6	1.6	0
Tangible Fixed Assets: Fixtures & Fittings	2.7	2.7	2.7
Inventories	7.0	7.0	7.3
Cash and cash equivalents	0.7	0.7	0.8
CGL ISLA	30.6	30.6	20.3
CFS Inter-society balance	6.0	6.0	0
TOTAL ASSETS	49.1	49.1	31.6
Pension	0	0	0
Group Pension/Banking Guarantees	0	0	0
Property Liabilities –B Stores	(81.9)	(31.0)	(5.3) to (17.5)
Property Liabilities –C Properties	(126.0)	(89.4)	-
TOTAL LIABILITIES	(207.9)	(120.4)	(5.3) to (17.5)
NET ASSETS/(LIABILITIES)	(158.8)	(71.3)	26.3 to 14.1

339. As appears from the above table, Mr Rowley concluded that SSL had a balance sheet deficit of between £71.3 million and £158.8 million as at 2 November 2015, whereas

Mr Davies has arrived at a surplus of between £14.1 million and £26.3 million. Mr Rowley has, correctly, accepted that his mitigated liabilities figures are the more appropriate ones to work from so far as concerns the property liabilities. It is therefore appropriate to work from his mitigated liabilities deficiency figure of £71.3 million.

340. There is a significant difference so far as concerns the property liabilities relating to “B Stores”. However, it is the difference between the approach to “C Properties” that makes the biggest and most significant difference.
341. So far as the C Properties are concerned, Mr Rowley has included a figure of £89.4 million on a mitigated basis, whereas Mr Davies has made no provision for these properties, and included no liability figure for them. This is because he is of the opinion that it is right to make no such provision because of the accounting treatment for these properties and the fact that the relevant provision relating to them was held not in SSL’s accounts but in CGL’s, and subsequently Holdings’ accounts for the reasons explained below. In the course of his cross-examination, Mr Davies accepted that if he was wrong to exclude these liabilities from his insolvency assessment, then an additional liability of between £80 million and £83 million would need to be included. This compares with Mr Rowley’s figure of £89.4 million.
342. It is apparent, therefore, that the question of balance sheet solvency principally turns upon whether provision ought to be made in a s.123(2) balance sheet for the C Properties. If so, then SSL would have been balance sheet insolvent as at 2 November 2015, if not, then SSL would have been balance sheet solvent, but only marginally so if the provision for the B Stores ought to be as little as £5.3 million as contended by the Respondents.
343. I will go on to describe the accounting treatment of the onerous lease liabilities relating to the C Properties, and how responsibility for the same operated in practice as between Holdings and SSL under the next heading below. However, the essence of the Respondents’ case is summarised in paragraph 26 of their closing submissions where they said:

“Rs’ position is that if applying [the relevant accounting standard] IAS 37, a liability can properly be excluded from the statutory accounts [as were the liabilities in respect of the C Properties], that liability can be valued at zero for the purposes of the balance sheet test. That reflects the economic reality that another entity (in this case, Holdings) had signed off its audited accounts on the basis it has no realistic alternative but to meet the liability based on either a legal or constructive obligation to do so . . . Such an approach accords with commercial reality and gives proper weight to the surrounding circumstances in which the balance sheet test falls to be considered.”

344. It is submitted on behalf of the Respondents that this reflects the position both before and after 2 November 2015, and until the completion of the Hilco SPA, and that, until completion of the Hilco SPA, Holdings continued to make provision in its accounts in respect of the onerous lease liabilities in respect of the C Properties of which SSL was the lessee. Further, it is the Respondents’ case that, consistent with this, both before and after 2 November 2015 and until completion of the Hilco SPA, Holdings or some

other tCG entity paid the rent payable on the C Properties and did so without seeking to recharge the same to SSL. It was only following the completion of the Hilco SPA that Holdings, as recorded in Note 15 to its financial statements for the year ended 31 December 2016, credited the amount of £73,652,000 to profit on ceasing to recognise the provision made up until then in respect of the onerous lease liabilities in respect of C Properties retained by SSL. Thus, the provision had remained within Holdings' financial statements for the year ended 31 December 2015, although SSL appears never to have produced accounts in respect of this latter period.

345. The Respondents submit that they do not need to establish that SSL had a good claim as against Holdings in the event that Holdings failed to meet any onerous lease liabilities in respect of which it had made provision. They submit that it is enough that Holdings had signed off its audited accounts on the basis that it did, and that as a consequence thereof, Holdings had no realistic alternative but to meet the relevant liability. Thus, so it is submitted, there would have been no need for SSL to have made provision for the onerous lease liabilities on 2 November 2015 notwithstanding that Phase 1 of Project Chicago had been carried into effect.
346. However, the Respondents do say that, to the extent that it is necessary to so show, it can be shown that SSL did have a good claim against Holdings, or some other tCG entity in the event that SSL had to meet the liability upon Holdings, or some other company within tCG, failing to do so.
347. On this basis, and on the basis that no provision for onerous lease liabilities relating to the C Properties was required to be included in any s. 123(2) balance sheet prepared for SSL as at 2 November 2015, it is submitted that SSL remained solvent as at that date, and only became balance sheet insolvent following the completion of the Hilco SPA, and Holdings ceasing to provide for the same at that point by taking the provision to profit on the sale of the share capital of SSL. Further, it is submitted by the Respondents that, for the purposes of s. 240(2) IA 1986, insolvency must be an immediate result of the transaction sought to be impugned, rather than some consequence that only occurs sometime after the event.
348. The Respondents submit that the present circumstances are analogous to those in *Re Burnden Holdings (UK) Limited* (supra). In that case, although the company's liability under its own lease was not strictly a contingent liability, both the experts treated it as such for accounting purposes, given that because of its arrangement with one of its trading subsidiaries, it would only be required to pay rent if and to the extent that the latter was unable to do so – see at [303]. In the event, Zacaroli J concluded, at [390]-[393], that it would be reasonable to make little or no provision in respect of this lease liability in an assessment of its balance sheet solvency in view of the good prospects of the subsidiary meeting the rent liability under the company's lease. The Respondents maintain that the present case is analogous, because Holdings assumed a constructive (if not legal) obligation to meet the onerous lease liabilities in respect of the C Properties.
349. The gist of the Joint Liquidators' case in response to this is that the onus is on the Respondents to show that SSL did have a good claim as against Holdings or some other tCG entity, which is available to be offset as against SSL's liability for rent under the relevant onerous leases. The Joint Liquidators rely upon the line of

authorities referred to above to the effect that only a company's present assets can be brought into account for the purposes of preparing a s. 123(2) balance sheet, whereas it is necessary to take into account contingent and prospective liabilities, taking a commercial view as to the amount to be attached thereto, which they submit is the mitigated liabilities figure of £89.4 million as arrived at by Mr Rowley, alternatively the figure of between £80 million and £83 million accepted by Mr Davies under cross-examination. I note that nothing really turns on the difference in these figures in the light of the other figures making up the s. 123(2) balance sheet.

350. The Joint Liquidators submit that, unlike in *Re Burnden Holdings (UK) Limited*, where there was a finding that there were “*arrangements*” as between the company and the subsidiary, the evidence in the present case falls well short of demonstrating that SSL had any such formal claim, and is, indeed, inconsistent with there having been any such claim. On the other hand, it is submitted that because SSL remained liable as lessee under the terms of the relevant leases for rent, there was a liability, which would have been a prospective liability, for future rent that was required to be provided for, on a mitigated basis, in the s. 123(2) balance sheet for SSL as at 2 November 2015. Even on the basis of Mr Davies' own figures, the amount in question was in excess of £80 million, and on that basis, so it is submitted, SSL was plainly balance sheet insolvent as at 2 November 2015, following the implementation of Phase 1 of Project Chicago that day.
351. Further, and in any event, it is submitted on behalf of the Joint Liquidators that it is clear that SSL did become insolvent in consequence of the relevant transaction, because, taking a commercial view of matters, it was clear that Project Chicago was put into effect on 2 November 2015 for the very purpose of ensuring that tCG societies (apart from SSL, which was stripped of its good assets and lined up for disposal) were off the hook in respect of the onerous lease liabilities in respect of the C Properties and the B Stores. Consequently, there can have been no real expectation that Holdings or any other tCG society would in fact ever have discharged those liabilities.
352. As Mr Smith KC put it in his oral reply submissions: “... *ultimately, we respectfully submit there is a lack of commercial reality, to use his word, to my learned friend's submissions and a full fundamental contradiction at their heart which pervades this part of the case. He wishes to rely for the purposes of solvency on an expectation or indeed obligation on the part of the Group to support SSL. But the whole purpose and object of Project Chicago was to avoid any such expectation or obligation. And that is the paradox that essentially undermines his whole case on this. They cannot have their cake and eat it. Which is to avoid their responsibilities towards SSL and then at the same time say, aha, it was actually still solvent because we were maintaining that commitment.*”
353. The argument is that, even if it is not decisive against the Respondents that SSL had no legal claim against Holdings in the event that the latter failed to discharge the onerous lease rent liability in respect of the C Properties, the above considerations must be accounted for in exercising a commercial judgment as to the likelihood of SSL, rather than Holdings, ultimately having to bear the liability in question when one is making provision in respect of contingent and prospective liabilities for the purposes of a balance sheet for SSL prepared for the purposes of s. 123(2) IA 1986 as

at 2 November 2015 immediately post transaction. Alternatively, the Joint Liquidators maintain that these considerations serve to establish the case that even if SSL did only become balance sheet insolvent upon the completion of the Hilco SPA, it did so in consequence of the transaction that occurred on 2 November 2015.

354. So far as the B Stores are concerned, these are properties retained by SSL where the provision for onerous lease liabilities had not been moved to Holdings, or any other tCG society, but remained provided for by SSL. Mr Davies' figure of £5.3 million is based upon contemporaneous internal management figures. His larger, alternative figure of £17.5 million is based upon the Respondents' property expert, Mrs Fellows', negative valuation of the leasehold interests in the B Stores. On the other hand, as explained by Mr Rowley at paragraph 5.3.72 of his report, he calculated his mitigated liabilities figure of £31 million by using "*... the Applicants' Property and Fixture & Fittings Expert's Full Liabilities calculation as a starting point. I then make certain assumptions based on the rental obligations calculated by the Applicants' Property and Fixture & Fittings Expert in her calculation of Full Liabilities, and considered the annual trading performance of stores associated with those properties (where applicable)*".
355. In the event, for the reasons explained below, I do not consider it strictly necessary to resolve these differences in relation to the B Stores. However, I do briefly return to them below.
356. Before determining the central issue as to how the C Properties ought to be dealt with for s. 123(2) balance sheet purposes, it is first necessary to closely examine how the onerous lease liabilities relating thereto were, in fact, dealt with from an accounting perspective.

K.III How prospective liabilities relating to the C Properties were accounted for

357. I do not understand there to be any dispute between the parties as to how SSL's onerous lease liabilities concerning the C Properties were dealt with in practice in SSL's and Holdings' accounts.
358. How they were dealt with was contemporaneously described by Tim Harwood, tCG's Financial Accounting Manager, in an email to Mr Crossland dated 17 September 2015.
359. In essence, the process was as follows:
- i) It was recognised that when SSL closed a store, the relevant lease was required to be treated as onerous because the rent continued to be payable notwithstanding that the store was not generating an income. Consequently, a provision was required to be made to reflect this.
 - ii) The amount of the provision to be made would depend upon the circumstances. It could reflect the rent to the end of the term of the relevant lease, but it might be less if it were possible to mitigate exposure by finding a sub-tenant or surrendering the lease.

- iii) Once a figure had been arrived at representing the provision to be made in respect of a particular property, e.g. £5 million, the amount in question would be debited to SSL's profit and loss account, and the provision recognised in SSL's balance sheet. As and when the obligations under the lease were subsequently discharged through the payment of rent etc., the provision in the balance sheet would be unwound.
 - iv) What happened in the present case is that the provision was moved off SSL's balance sheet and onto CGL's balance sheet, and, in return for the movement of the provision, SSL's liability to CGL under the ISLA would increase by the relevant amount, £5 million in the above example.
 - v) After that, the provision was subsequently moved from CGL's balance sheet to that of Holdings. That is how matters rested until Holdings took the provision to profit following completion of the Hilco SPA.
360. As the Respondents point out, the Joint Liquidators' own covenant expert, Mr Jennings, identified that between 2 January 2010 and 3 January 2015, the cumulative amount of the onerous lease provision which was transferred from SSL to CGL (to be subsequently transferred to Holdings) was £136.2 million. On this basis, SSL incurred a liability under the ISLA in the same amount of £136.2 million to CGL. This was a liability that SSL had largely discharged by 2 November 2015 such that, by that date, the amount due under the ISLA stood at only c. £4.6 million.
361. It is therefore fair to say that, as Mr Jennings observed, whilst there was a net annual cash cost of £13 million owed to onerous lease landlords in relation to the relevant onerous leases, SSL had effectively already paid societies for this liability (and all future onerous lease liabilities) by October 2015. Under the terms of the transaction or transactions identified in the First Funds Flow Letter, SSL's liability under the ISLA was, on 2 November 2015, fully discharged albeit, at that stage, the outstanding balance was thought to be £15,291,401.04 rather than the correct figure of c. £4.6 million.
362. The evidence is further to the effect that once the provision had been moved off SSL's balance sheet and onto that of Holdings (via CGL), the actual continuing rent in respect of the C Properties in respect of which provision had been made was then paid by CGL or Holdings without being recharged to SSL, and CGL/Holdings bore the risk, or had the benefit of the reward, if the liability turned out to be higher or lower than the provision made. The evidence is further to the effect that this position continued after 2 November 2015, until the completion of the Hilco SPA in July 2016, and did so without SSL being recharged.
363. Further, whilst there may be some issue as to the precise number of C Properties, the documentary evidence does suggest that substantially all the properties described by Mr Davies as C Properties were dealt with in the way described in the last paragraph – see, for example a slide deck dated 21 July 2016 entitled "*Onerous Lease Provision: Half Year Review*", which provided a breakdown of the onerous lease provision held by Holdings as at 30 June 2016. This, amongst other things, recorded provisions totalling £71,531,000 relating to the C Properties, the more significant ones of which were identified.

364. Further, the evidence does suggest that SSL was not actually recharged in respect of rent in respect of onerous properties, not only before but after 2 November 2015 and in the period up to the completion of the Hilco SPA, albeit that there is an issue between the parties as to whether this was recoverable by CGL pursuant to the terms of the Deed of Support.
365. It is something of an anomaly that these matters were not dealt with in the Respondents' factual witness evidence, notwithstanding the number of witnesses called. However, the position as described was broadly accepted by Mr Rowley under cross-examination when the relevant documents were put to him, and the documents did seem to support this being the position. At one point in his evidence, Mr Rowley suggested that the fact that rent payments did not appear in SSL's own management accounts might be down to the payments being made through "*cost centres*". However, this explanation does not readily fit in with the evidence as to the role that the cost centres actually played.
366. I have referred to the fact that these various matters were not dealt with by the Respondents' factual witnesses in their statements. In fact, a very much more anodyne description of events was provided as illustrated by Mr Hore's witness statement. In paragraph 48 thereof he referred to the need to calculate a figure in respect of the onerous lease liability in respect of each relevant property, without talking specifically in terms of making provision for the same in any accounts. He then, at paragraph 49, stated that while the relevant leases remained in SSL's name, "*the Group managed those properties centrally through Holdings, and its centralised non-trading property team*", and that it was the job of the latter "*to mitigate Group's exposure by trying to negotiate rent with landlords, find some tenants willing to sublease the premises, have arguments with local authorities about rates, agree final surrender deals with landlords, or dispose of the property.*"
367. At paragraph 50, Mr Hore went on to say that there was no formality around "*how Group carried out this arrangement.*" He made no mention of any wider arrangement concerning how matters were dealt with from an accounting perspective, let alone any mention of who bore the ultimate legal responsibility for paying the rent as between SSL and Holdings/CGL and what arrangements might have been in place relating thereto.
368. The relevant accounting standard applied in relation to how the onerous lease liabilities in respect of the C Properties were accounted for was IAS 37.
369. As to the application of IAS 37:
- i) Paragraph 66 thereof provides that: "*If an entity has a contract that is onerous, the present obligation under the contract shall be recognised and measured as a provision*".
 - ii) However, paragraph 14 thereof provides that a provision should only be recognised where three conditions are satisfied, namely:
 - a) The entity has a "*present obligation (legal or constructive) as a result of a past event*". For these purposes, a "*legal*" obligation is defined as "*an obligation that derives from: (a) a contract (through its explicit or*

implicit terms); (b) legislation; or (c) other operation of law”, while a “constructive” obligation is defined as “an obligation that derives from an entity’s actions where: (a) by an established pattern of past practice, published policies or a sufficiently specific current statement, the entity has indicated to other parties that it will accept certain responsibilities; and (b) as a result, the entity has created a valid expectation on the part of those other parties that it will discharge those responsibilities” – see IAS 37, at paragraph 10. In addition to this, in order to qualify as a legal or constructive obligation, the entity must have “no realistic alternative to settling the obligation” – see IAS 37, at paragraph 17.

- b) It must be “... *probable that an outflow of resources embodying economic benefits will be required to settle the obligation*”. For these purposes, “*an outflow of resources or other event is regarded as probable if the event is more likely than not to occur, ie the probability that the event will occur is greater than the probability that it will not*” – see IAS 37, at paragraph 23.
- c) The position is such that “... *a reliable estimate can be made of the amount of the obligation*”.

370. At all material times up to the completion of the Hilco SPA on 25 July 2016, Holdings held a provision in respect of SSL’s onerous leases in its accounts.

371. Thus:

- i) Note 14 to Holdings’ audited accounts for the period ended 4 January 2014 recorded a provision in the amount of £177,764,000, which “*primarily relates to properties which are no longer used for trading*”. The note added: “*The transfer from other group undertakings relates to properties closed in the period and transferred in from Somerfield Stores Limited*”.
- ii) Holdings’ accounts for the period ended 4 January 2015 contained a similar note but said: “*The transfer from other group undertakings relates to the onerous leases in respect of former head office properties transferred from Co-operative Group Limited and certain former foodstores transferred from tCG’s food business. In the prior year, the transfer was to properties closed in the period and transferred in from Somerfield Stores Limited.*”
- iii) The first set of Holdings’ accounts following the implementation of Project Chicago were those for the period ended 31 December 2016. As referred to in paragraph 151 above, Note 15 to those accounts recorded a reduction in the provision held by Holdings from £232,384,000 as at 2 January 2016, to £164,065,000 as at 31 December 2016, a credit of £73,652,000 having occurred on the completion of the Hilco SPA on the basis that, so it was stated, HUK (65) Limited had “*agreed to take responsibility to pay the onerous leases which had been transferred to [Holdings] during the restructuring of [SSL] following its acquisition by the Group in 2009.*”

- iv) So far as SSL's audited accounts are concerned, the relevant accounts are those for the period ended 3 January 2015. These recorded, under the entry line "*Transferred to another group undertaking*", the movement of onerous lease provisions off its balance sheet in a total amount of £136.2 million between 2 January 2010 and 3 January 2015.
 - v) I was not referred to any accounts of SSL for any subsequent period and given the events after the sale completed in July 2016, it is my understanding that none were ever produced.
372. The Respondents maintain that, having regard to the conditions which must be met under IAS 37 before a provision can be recognised, important conclusions require to be drawn from the movement of the onerous lease provisions from the balance sheet of SSL to that of Holdings. It is submitted that the presence of the provision in Holdings' accounts meant that Holdings was subject to a legal or constructive obligation in respect of the onerous lease liabilities, and that Holdings had "*no realistic alternative*" to settling those liabilities. On the other hand, the accounting treatment, it is argued, recognised that it was more likely than not that SSL would not have to pay anything to settle the relevant liabilities when they fell due. This was the evidence of Mr Davies, but it is fair to say that Mr Rowley, under cross-examination, did not dissent from these contentions as to the significance of the accounting treatment.
373. I can understand how this accounting treatment might have been justified, and how, prior to Project Chicago being proceeded with, a s. 123(2) balance sheet prepared for SSL at that time might have equated, in its treatment of onerous lease liabilities, to the position in SSL's statutory accounts. However, for reasons that I will explore, I do not consider that the position is so straightforward once the decision was taken to proceed with Project Chicago.

K.IV The correct approach to balance sheet insolvency in the present case

374. As referred to above, in *Eurosail SC* at [1], Lord Walker recognised that the exercise of determining balance-sheet solvency pursuant to s. 123(2) IA 1986 is a different exercise from the preparation of audited accounts, that may result in a different 'true and fair view'.
375. The Respondents rely upon there having been, at all times up to the completion of the Hilco SPA, a "*present obligation (legal or constructive)*" (cf. IAS 37, paragraph 14), which required a balance sheet prepared for the purposes of s. 123(2) and the question of solvency to reflect the position in SSL's and Holdings' audited accounts as prepared to date.
376. I can see two possible bases upon which this approach might be justified, namely:
- i) SSL had a valid legal claim, effectively for an indemnity in the event that Holdings (or CGL) failed to meet the onerous lease liabilities; or
 - ii) Alternatively, as part of the exercise of commercial judgment involved in considering whether, and to what extent, the prospective liability for future rent for which SSL was liable as lessee should be taken into account for the

purposes of a s. 123(2) balance sheet having regard to any “*valid expectation*” on the part of SSL, at the relevant time, that Holdings/CGL would “*discharge those responsibilities*” (cf. IAS 37, at paragraph 17) in circumstances in which the latter had “*no realistic alternative to settling the obligation*” (cf. IAS 37, at paragraph 17).

377. The Joint Liquidators’ submissions were largely focused on the question as to whether, in considering the balance sheet position as at 2 November 2015 post transaction for s. 123(2) IA 1986 purposes, the liability representing the prospective liability for future rent could be offset by a present asset representing a claim against Holdings/CGL. It is submitted on their behalf that the Respondents have not pleaded, and have in any event not established such a claim on the evidence, the burden being on them to do so under s. 240(2) IA 1986, and thus there is no offset available. On this basis, it is the Joint Liquidators’ case that this liability for future rent, even appropriately mitigated, made SSL balance sheet insolvent as at 2 November 2015 as demonstrated by the balance sheet included in the solvency experts’ joint report.
378. For the reasons that I explain below, I consider that the Joint Liquidators are right that the Respondents have not established any such claim/present asset. However, I do not consider that this can be the end of the consideration of the solvency of SSL as at 2 November 2015 for the reasons advanced by the Respondents relying upon how *Eurosail SC* was applied by Zacaroli J in *Re Burnden Holdings (UK) Limited* (supra), see especially at [352].
379. S. 123(2) IA 1986 requires the company’s balance sheet position to be considered “*taking into account its contingent and prospective liabilities*”. This requires a commercial view to be taken in relation thereto. However, as identified in *Casa Estates CA* [27] by reference to *Eurosail*, the essential question is whether, making proper allowance for prospective and contingent liabilities, the company in question cannot reasonably be expected to meet its liabilities. Where a company has a reasonable (or valid) expectation that prospective (or contingent) liabilities will be met by another clearly solvent entity, then I consider that it might well, dependant on the facts, be possible to say that one could make proper allowance for prospective (or contingent) liabilities by making no provision for those liabilities in a s. 123(2) balance sheet.
380. That was the approach of Zacaroli J in *Re Burnden Holdings (UK) Limited* at [303] as referred to in paragraph 348 above. The company had a prospective liability for future rent, which the experts in that case treated as a contingent liability bearing in mind that the company would, in practice, only have to pay the rent if the occupying subsidiary company failed to do so. In that case there was reference to “*arrangements*” between the relevant companies. That suggests that there *may* have been more formal arrangements than in the present case. However, I do not consider that this matters in a situation where, as in the present case, the evidence demonstrates that the other group company has, in practice, borne the responsibility for defraying rent over a considerable period of time following the movement of the provision to that group company and the payment down of the intersociety loan representing the same.

Approved Judgment

381. I consider it to be implicit that, in this situation and without more, the other group company would continue to defray the rent, without necessarily being under any legal obligation to do so and that if the company reasonably (or validly) expected this to continue, then it would be right for the company to account for the onerous lease liability in the way that SSL did by making no provision for the latter. Further, I consider that, in this situation, it would be appropriate in considering balance-sheet solvency for the purposes of s. 123(2) to adopt the same approach on the basis that, in these circumstances, one could be reasonably satisfied that all of SSL's liabilities in respect of onerous leases would, in fact, be met.
382. However, I consider that the position must change where there can no longer be a reasonable expectation that the liability will be discharged by the other group company, and that in those circumstances it becomes necessary to look very much more closely as to the prospects of the other group company discharging the liability in question, focussing on the position as at the date at which solvency is in issue.
383. I will therefore consider firstly the question as to whether the Respondents can show that there was, in the present case, a present asset in the form of a valid legally enforceable claim as against CGL/Holdings in respect of the onerous lease liability, before going on to consider the position if there is not.

K.V Present asset/valid claim

384. Objection is taken by the Joint Liquidators that no such asset or claim is pleaded, and the point is made that whilst a draft pleading was produced setting out the basis for contending that SSL did have a claim against CGL/Holdings in respect of the onerous lease liabilities relating to the C Properties, an application to amend was not pursued. I do not consider it necessary to formally determine whether the pleading objection is a good one or not, noting that the Respondents take the point that if the pleading objection was going to be taken, then it should have been pressed at the commencement of the trial and a ruling sought at that point.
385. It is, however, relevant to note that the draft pleading that was produced referred to a series of arrangements without any particularisation. Coupled with this, as already touched upon, none of the Respondents' witnesses referred to, let alone explained what arrangements might have been in place so far as the liability for onerous lease obligations was concerned, the witness evidence merely dealing with the practical matters concerning the management of the properties, which Mr Hore, at paragraph 50 of his witness statement, says that to his knowledge there was no formality about.
386. Further, no arrangements regarding the liability for onerous rent are documented, at least in any formal way. Tim Harwood described the accounting arrangements in his email to Mr Crossland dated 17 September 2015, following on from the meeting that took place between the tCG project team and the SSL Directors on 16 September 2015. However, this merely explained the accounting treatment without considering the legal significance thereof, or whether SSL might have a claim for an indemnity if rent were not paid.
387. It is said by the Respondents that the lack of formality is to be expected as between group societies and, in essence, that it stands to reason that if SSL effectively paid Holdings/CGL to take on the onerous lease liabilities thereby giving good

consideration, then SSL must have had some sort of legally enforceable claim in the event that Holdings/CGL failed to meet the onerous lease liabilities. However, this is by no means the only legal explanation as to the position available, and the evidence suggests that, at the time, the parties proceeded on the basis that the liability for onerous leases could be isolated within SSL, so long as another tCG society was not directly liable to the relevant landlord. Thus, for example, there were omitted from the leasehold properties retained by SSL post Project Chicago properties where guarantees had been provided by other tCG societies. Consistent with this is also the fact that no release from liability for onerous leases was obtained by Holdings on the sale of the share capital of SSL, a point I return to below.

388. The minutes of the meeting on 16 September 2015 did record it being discussed that if the provision were to be moved back onto SSL's balance sheet, this would result in an intersociety debt being created, meaning that the net assets of SSL would not be affected "*assuming the intercompany (sic) debt was recoverable*". The Respondents suggest that, given that the relevant remarks came from Julian Heathcote of Deloitte, it was therefore Deloitte's position that SSL did have an asset in the form of the claim. However, the difficulty with this is that no witness from Deloitte was called on behalf of the Respondents to explain the position, and this is inconsistent with the position as disclosed in the EOSs that Deloitte prepared, which I comment upon further below. It is true that the balance sheets that Deloitte prepared at the time did not include anything in respect of onerous lease liabilities and did not include any claim that SSL might have had for an indemnity in respect thereof. However, this merely reflected the accounting treatment, and Deloitte's balance sheet provided no further explanation.
389. Ultimately, there is no evidence that, following the meeting on 16 September 2015, the possible existence of such an asset was subsequently clarified, notwithstanding the SSL Directors' concerns regarding solvency after the implementation of Project Chicago. To the contrary, rather than being reassured in this respect by the fact that an indemnity would be provided by another tCG society, the SSL Directors sought to gain comfort through Mr Crossland's balance sheet for SSL that included provision for the onerous lease prospective liability relating to the C Properties, and provided comfort through including the £50 million Deferred Consideration as an asset.
390. One would have thought that, if the existence of the claim was considered, at the time, to be an answer to the solvency question, then that is the answer that would have been provided and recorded. However, the obvious issue with such an approach is that it would have served to undermine the intended objective of Project Chicago, which was to distance tCG from the onerous lease liabilities in question. I consider that this likely explains why the SSL Directors gained comfort in the way that they did, rather than by being provided with any form of assurance in relation to the existence of an indemnity in respect of prospective rent from another tCG society consistent with what Julian Heathcote had said at the meeting on 16 September 2015.
391. Mr Bailey described the approach that the SSL Directors took with regard to the balance sheet and the £50 million Deferred Consideration as being out of "*an abundance of caution*", and Mr Lang described Mr Crossland's balance sheet as "*being the sanitised balance sheet ... in an absolute worst-case.*" However, neither Mr Bailey nor Mr Lang were able to explain the inconsistency between the balance

sheet prepared by Deloitte that did not contain any provision in respect of the onerous lease liabilities, and the EOSs that did. Further, the SSL Directors clearly did feel the need, at the time, to gain comfort through Mr Crossland's balance sheet. I consider that this is one of those situations where Mr Bailey's and Mr Lang's recollections are liable to be unreliable and tainted by the passage of time and the exigencies of litigation, and that the more likely explanation is that they did place considerable reliance upon Mr Crossland's balance sheet at the time, in circumstances in which it could easily have been explained at the time that an indemnity would be available for SSL if that had fitted the facts and the narrative.

392. With regard to the EOSs that showed the liability for the onerous leases without showing any corresponding claim for an indemnity, the Respondents, in their closing submissions, suggested that this must have been down to "*a mistake*". I find this to be a wholly unconvincing explanation. If such a claim for an indemnity reflecting the amount of the liability for onerous leases had been shown, then surely tCG would have concluded that there was little point in proceeding with Project Chicago because it would have failed to achieve the objective identified in Deloitte's original engagement letter dated 27 September 2013, namely to "*consider [tCG's] options in relation to SSL and whether it can be restructured to reduce or eliminate the on-going liability for closed and non-core properties.*"
393. Further, a specific point made by the EOSs produced by Deloitte in September and October 2015 was that landlords would benefit from an additional two years' rent, thus showing an improved position for creditors through Project Chicago over an immediate insolvency, in contrast to the position as shown by the EOSs produced earlier in the year that showed a better position for creditors on an immediate insolvency without any restructure.
394. I agree that this analysis by reference to an additional two years' rent was a flawed analysis bearing in mind that in the case of an immediate insolvency landlords would have been entitled to mitigate their position by getting their properties back and re-letting. However, the point is that this consideration as to the interests of landlords would be academic, or at least very different if SSL had had the benefit of a claim against Holdings/CGL that matched the liability to the landlords, which is what the Respondents are saying.
395. A further point made by the Joint Liquidators is that when, earlier in 2015, it came to analysing the creditors' position for the purposes of a potential CVA, the analysis was not carried out on the basis of SSL then having the sort of claim that it is now contended on behalf of the Respondents that it did.
396. Further, it is, I consider, highly significant as to what occurred when the Hilco SPA was completed, and Holdings took the £73,652,000 onerous lease liability to profit. In note 15 to Holdings' financial statements for the period ended 31 December 2016, it was, as we have seen, said that "*HUK (65) Limited agreed to take responsibility to pay the onerous leases.*" However, I was not taken to any document that reflected any such agreement, and in particular one to which SSL itself was a party. The Hilco SPA certainly does not deal with the position, albeit that it does deal with certain granular points relating to a number of the properties retained by SSL, and deals with certain employee claims.

397. Consistent with my understanding is the witness statement made by Victoria Frances Pool (“**Ms Pool**”), a Partner at AG, dated 19 December 2025. At paragraph 31(e) thereof, Ms Pool referred to having reviewed the terms of the Hilco SPA and to having concluded that it did not release Holdings from liability, not least because SSL was not a party thereto. At this stage this point was deployed by Ms Pool on behalf of the Respondents in support of an argument that Holdings’ accounts for the period ended 31 December 2016 had been mistaken with regard to HUK 65 Limited having agreed to take responsibility, and that SSL would still have had a claim against Holdings even after the completion of the Hilco SPA.
398. This was not an argument that was pursued at trial, and it was not at trial maintained that Holdings’ 2016 accounts had been wrong to take the onerous lease liability to profit. However, the fact that, as Ms Pool recognised, no provision was made on the share sale for any release of Holdings or CGL from liability does, I consider, serve to demonstrate that it was not perceived that SSL had the benefit of any claim against any other tCG entity that required to be released, and that it was perceived that once the share capital of SSL had been disposed of, there could be no question of any expectation on the part of SSL that Holdings (or any other tCG entity) would meet any such liability, hence justifying taking the provision to profit.
399. Having regard to all the above considerations, I do not consider there to be any sufficiently evidenced legal basis for being able properly to say that SSL had, as of 2 November 2015, a viable claim as against CGL and/or Holdings in the event that SSL was called upon to meet any onerous lease liability.
400. There is, I consider, a further short point. Any such claim, should it have existed, would, I would have thought, have been one for an indemnity in the case that SSL was called upon to meet an onerous lease liability. However, a claim for an indemnity is generally treated as a contingent claim, in that its existence depends upon a future event that might not occur, namely, in the present case, CGL not meeting an onerous lease liability. As the authorities referred to in paragraphs 332-335 above demonstrate, whilst contingent and prospective liabilities might be taken into account for the purposes s. 123(2) IA 1986, contingent or prospective assets cannot.
401. In the circumstances, I do not consider that the solvency of SSL as at 2 November 2015 can be supported by the existence of a claim as against CGL, Holdings or any other tCG society that constituted a present asset that could properly have been taken into account to offset a mitigated onerous lease liability in a balance sheet prepared for the purposes of s. 123(2) IA 1986 as of 2 November 2015.

K.VI Proper approach to the onerous lease liabilities

402. One must, I consider, start with the fact that SSL was unquestionably primarily liable to landlords for the onerous lease liabilities, and therefore that provision ought to be made on a mitigated basis for the same in any balance sheet prepared for the purposes of s. 123(2) IA 1986, unless one can say that, at the time that the question of solvency was being considered, SSL had a reasonable (or valid) expectation that the liability would ultimately be met by Holdings, CGL or some other tCG society, on the basis that the latter had no realistic alternative but to meet the same.

Approved Judgment

403. Before Project Chicago was carried into effect, as I have already indicated, I consider that SSL could properly be said to have had such an expectation, thus justifying the accounting treatment by reference to IAS 37 and a balance sheet prepared for insolvency purposes also reflecting such an approach. However, I consider that there is great difficulty in saying that SSL can have had any such expectation once the SSL Directors had agreed that Project Chicago should be carried into effect with the very purpose of distancing and excluding tCG societies other than SSL from the very liabilities that the Respondents say that Holdings/CGL had no realistic alternative but to settle. Indeed, that was the very reason for moving the “good bits” out of SSL.
404. In this respect, I consider it highly significant that it was envisaged at an early stage back in 2013, as ultimately carried into effect, that the onerous lease liability would be taken to profit by Holdings upon a sale of the share capital of SSL which, although not part of the transaction itself that is sought to be impugned, was always envisaged to follow on therefrom. Further, I consider it significant that it was, at all relevant times, envisaged that there was a real possibility, if not probability, that following the transaction that is sought to be impugned, SSL would enter into some form of insolvency process in which creditors would not be paid in full, hence the extensive reference to the two-year “look back” period, and the mechanisms that were put in place to seek to delay any insolvency.
405. Regarding the intention to take the onerous lease liability to profit, thereby recognising that the liability would not be met by Holdings, CGL or any tCG society apart from SSL, I note the following:
- i) The 2013 Deloitte Report recognised that a restructure followed by a solvent sale would generate a profit estimated at £79 million through the release of the provision for SSL’s onerous leases held in Holdings’ accounts.
 - ii) The briefing paper prepared for the meeting of tCG Executive and Board and the Food Executive on 10 September 2014 set out that the purpose behind Project Chicago was to mitigate onerous lease liabilities within SSL, that tCG would subsequently seek to dispose of its shares in SSL, and that the financial benefit to tCG would include the release of onerous lease liabilities from Holdings’ accounts, estimated at c. £80 million.
 - iii) In his email dated 13 October 2015 to tCG Finance, Mr Wormald described Phase 2 of Project Chicago as being the divestment of SSL “*where the significant NPV benefit arises.*”
 - iv) The release of onerous lease liabilities as anticipated throughout was carried into effect as noted in Note 15 to Holdings’ Accounts for the period ended 31 December 2016.
406. With regard to the intention that the share capital in SSL should be sold once Phase 1 of Project Chicago had taken place, I note by way of example the following references in the documentary evidence:
- i) The initial handwritten note of the meeting with Deloitte on 26 September 2013 listed as an option: “*Sale of business after moving ‘good bits’ out*”.

Approved Judgment

- ii) The 2013 Deloitte Report proposed a two-stage process under which Phase 2 would be “*a sale of the remaining loss-making stores and onerous leases to third party.*” Reference was also made to the payment of a dowry to facilitate a sale.
 - iii) Mr Cutting’s internal summary prepared in April 2014 referred to an intention to transfer “*good*”/profitable stores from SSL to a newly established corporate entity, with SSL retaining the “*bad*” assets, and the fact that “*SSL will be sold to third party.*”
 - iv) The paper provided to the Group Executive in June 2014, the presentations to the trustees of the SSL Pension Scheme in June 2014, and the June 2014 Deloitte Report all referred to the ultimate sale of SSL to a third party, as did the update provided to tCG Executive and Board in September 2014.
 - v) Instructions provided to AP (then Zolfo Cooper) in January 2015 referred to the desired option as being “*a sale of SSL which achieves our commercial objectives.*”
 - vi) The approval provided by tCG Board on 25 June 2015 included as “*phase 2*”, the pursuit of a solvent sale.
 - vii) In August and September 2015, well prior to 2 November 2015, there was early engagement with a least one potential purchaser, Greybull Capital, and information shared under an NDA.
 - viii) In his email dated 13 October 2015, Mr Wormald stated: “*Phase 2 of the Chicago project is the divestment of SSL ...*”.
 - ix) In his email dated 19 October 2015, Mr Hore discussed ensuring a “*window*” before any sale so as to mitigate litigation risk, the clear assumption being that a sale would occur.
 - x) Following 2 November 2015, as envisaged by the earlier contact with possible purchasers, prompt steps were taken to get on with a sale of SSL on the basis that a quick sale would maximise the financial benefit to be obtained by tCG from Project Chicago. This is evidenced by, for example, the email dated 6 November 2015 from Mr Hore to Mark Brewer, copying in Mr Wormald. I refer to the quote therefrom set out in paragraph 133 above, including “*the quicker we do it, the greater the NPV.*” Given how soon after 2 November 2015 this email was sent, it is reasonable to assume that it reflected tCG’s thinking on that key date.
407. With regard to what was anticipated so far as insolvency is concerned, I note, in particular, the following by way of example:
- i) The 2013 Deloitte Report warned that transferring the core stores away would leave SSL significantly loss-making (c. £14 million negative EBITDA) and flagged the risk of a “*subsequent failure*” through insolvency.

- ii) The June 2014 Deloitte Report advised that a potential purchaser of SSL was likely to be a trade buyer and/or a restructuring specialist, and that it was probable that any sale would require a payment to the purchaser (in the form of a dowry) to cover the cost of restructure and onerous leases for a specified period, albeit this payment could be expected to be significantly less than the liabilities for the remaining periods of the leases.
 - iii) In their “*Discussion Document*” dated 26 January 2015, AP advised that, in the event of a sale of SSL, there was “*a high risk of future insolvency event*”.
 - iv) In his email to Mr Cutting dated 20 March 2015, Mr Hulme referred to insolvency post a sale of SSL as being “*a high probability (certainty?)*”.
 - v) Mr Wormald’s “*Progress Update*” dated 27 October 2015 prepared for tCG Board flagged up the future insolvency of SSL as a “*key risk*” given that SSL would become loss-making after restructure.
 - vi) In his email dated 26 January 2016, Mr Wormald informed tCG Estates team that his expectation was that “*... by the end of 2016 SSL will enter into an insolvency process*”.
 - vii) In the context of a request from Hilco to start a CVA process “*imminently*”, in his email dated 22 December 2016 Mr Wormald indicated that: “*it was always anticipated that the endpoint for SSL would be an insolvency.*” I have already commented that I did not find Mr Wormald’s explanation that this does not accord with his recollection as to what he thought at the time to be convincing, and that I consider that this contemporaneous expression of his understanding is likely to be correct.
408. The Respondents’ economic reality argument is based upon Holdings’ accounts having been signed off on the basis that the latter had no realistic alternative but to meet the onerous lease liabilities on an ongoing basis. On that basis, the Respondents submit that, in order to reflect commercial reality for the purposes of the exercise of commercial judgment required in respect of SSL’s prospective liabilities identified by Zacaroli J in *Re Burnden Holdings (UK) Limited* at [352], one should not go behind the accounting treatment and the fact that Holdings continued to provide for the onerous lease liabilities after 2 November 2015.
409. However, I consider that in respect of any assessment of the likelihood of SSL having to meet those liabilities, the commercial reality significantly changed once the decision was taken to proceed with Project Chicago, and once Phase 1 thereof was put into effect on 2 November 2015.
410. It is said that Holdings’ auditors would not have signed off on its accounts for the period ended 4 January 2016 still recognising the onerous lease liability transferred from SSL unless Holdings was considered to have had “*no realistic alternative to settling the obligation*” (cf. IAS 37, at paragraph 17) in respect of the onerous leases. However, we simply do not know what the then auditors, KPMG, were told in relation to tCG’s intentions regarding Phase 2 of Project Chicago and what the effect of Phase 1 of Project Chicago had been. Perhaps more significantly, there are no audited accounts for SSL for any period after 3 January 2015. Such accounts, had they

existed, would, when taken together with the information which the auditors might have been expected to have been provided, have been more revealing.

411. Reliance is placed by the Respondents upon the fact that tCG had indicated that it would continue to support SSL following the Phase 1 restructure, as it did via the Deed of Support and Side Letter, and that this was the basis upon which the SSL Directors decided that agreeing to Project Chicago was in the interests of SSL.
412. However, a number of points should be borne in mind in this respect:
- i) Subject to issues as to whether the choice was a contrived one, or at least one which the SSL Directors knew and appreciated was contrived, to which I will return below, the binary choice as presented to the SSL Directors was as between going along with Project Chicago or, alternatively, tCG withdrawing its support from SSL altogether. As part of the process of persuading the SSL Directors as to the benefits of the former option, the SSL Directors were provided with a comparison between an EOS in the event of an immediate insolvency of SSL, and the event of a deferred insolvency following the entry into of Phase 1 of Project Chicago and the receipt thereafter by landlords of an extra two years' rent. Under neither option was any other tCG society to contribute towards the onerous lease liabilities.
 - ii) It is correct to say that the Deed of Support and Side Letter did provide for continuing ongoing support. However, this was only until a change of ownership on sale, and the support to be provided thereunder was on terms that SSL reimbursed CGL for it.
 - iii) There is an issue, turning upon the true construction of the terms of Deed of Support, as to whether its terms extended to cover the rent in relation to the C Properties that continued to be met after 2 November 2015 by CGL/Holdings. If the construction is as contended by the Joint Liquidators, then the rent that continued to be paid fell within the terms of the Deed of Support, under which SSL was liable to reimburse CGL in any event. Further, on the Joint Liquidators' construction, the entire agreement provision in the Deed of Support would have meant that the terms of the Deed of Support superseded any existing agreement with regard to the payment of rent.
 - iv) However, even if the Deed of Support is to be construed as contended by the Respondents, and the rent that CGL/Holdings continued to pay in respect of the C Properties fell outside its terms, there can have been no expectation that the rent would continue to be paid indefinitely or for any significant period of time bearing in mind the clear intention as at 2 November 2015 to proceed with the sale of the share capital of SSL, and to do so speedily. Further, bearing in mind the contents of Mr Hore's email dated 6 November 2015, it is reasonable to suppose that, as at 2 November 2015, tCG had in mind the advantages of proceeding with a sale as quickly as possible in order to limit the onerous lease costs and increase the NPV to be achieved on sale, subject to the dowry actually agreed in order to attract a purchaser.
413. In the event, I consider it unnecessary to determine how the Deed of Support ought to be construed as between the Joint Liquidators' and the Respondents' rival

contentions. Even if Holdings/CGL was to bear the ultimate cost in respect of the payment of ongoing rent pending the sale of the share capital in SSL, it is, I consider, reasonably clear that such support would cease on sale when it was plainly intended that the onerous lease provision would be taken to profit in a way quite inconsistent with any intention to meet onerous lease liabilities of SSL. This is, of course, reflected in what actually occurred.

414. As I have identified, Mr Davies accepted that if provision ought to have been made for the C Properties in a s. 123(2) IA 1986 balance sheet as of 2 November 2015, the appropriate figure would have been no less than £80 million. This is broadly consistent with Mr Rowley's figure of £89.4 million which is, in turn, not inconsistent with the amount carried to profit in July 2016 of £73,652,000 some eight months after 2 November 2015.
415. Even if one accepts that Holdings/CGL did assume responsibility for rent pending sale, which might have been anticipated to be a figure of some £13 million per annum, the amount to be taken into account in respect of the onerous lease liability in respect of the C Properties in a s. 123(2) balance sheet as at 2 November 2015 would, as I see it, inevitably have been significantly in excess of Mr Davies' estimated net asset figure of between £14.1 million and £26.3 million shown in the table referred to in paragraph 338 above. On this basis SSL was balance sheet insolvent.
416. Thus, in short, I am satisfied that, taking a commercial view of how matters stood at 2 November 2015, and having regard to what was intended with regard to Phase 2 of Project Chicago, there can have been no reasonable (or valid) expectation as at 2 November 2015, and once Phase 1 of Project Chicago had been carried into effect, that any tCG society would meet the prospective liability in respect of onerous leases save to a limited extent pending the anticipated sale of the share capital of SSL, and therefore of any tCG society contributing sufficiently to justify reducing the provision to be made in the s. 123(2) balance sheet to show anything but a significant net liability figure even accepting all of Mr Davies' other figures in relation to assets and liabilities to be correct.
417. In the circumstances, and in the light of the mathematics, I do not consider that it is necessary to make any formal determination so far as the provision to be made in relation to B Stores is concerned. I have highlighted the differences between Mr Rowley and Mr Davies in paragraph 354 above. I would just briefly say that the management figure of £5.3 million does seem on the low side. As I will return to in due course in dealing with the expert valuation evidence for the purposes of a wider consideration of the TUV claim, my conclusion is that Mrs Fellows, whom Mr Davies relies upon, has, if anything, overstated the negative value of leasehold interests. On the other hand, my primary concern in relation to Mr Rowley's approach is that he has started with figures provided by Ms Seal, who I consider has tended to over value, and he has then made adjustments without having property expertise as such. Overall, I would be more inclined to accept Mr Davies' figure of £17.5 million than any other as the easiest to justify.
418. The Respondents argued that the question of insolvency essentially turned on the terms that were ultimately agreed in and in relation to the Hilco SPA, a significant consideration being that the agreement to pay the dowry that was agreed with HUK

67 Limited rather than HUK 65 Limited, which enabled the former to lend the same to SSL on a secured basis that would rank ahead of the unsecured landlord creditors. Further, it was suggested that the ultimate failure of SSL was contributed to at least by its trading performance after the sale to HUK 65 Limited. It is said that none of these events can properly be said to have been in consequence of the transaction that is sought to be impugned, not least because they did not occur immediately thereafter.

419. I am not satisfied that these considerations provide any answer to the Joint Liquidators' case on insolvency. So far as the terms of sale are concerned, I consider that the key consideration is that the effect thereof was, as anticipated and planned, that Holdings felt able to take the onerous lease liability to profit on the basis of having no continuing responsibility, legal or constructive, in respect thereof. This is what ultimately affected the balance sheet position.
420. So far as post sale trading is concerned, I consider that the Respondents' reliance thereupon is undermined by the fact that it is common ground between the experts that SSL did become insolvent immediately upon the completion of the Hilco SPA.
421. Should I be wrong in my view that taking a commercial view in respect of the prospective liability in respect of onerous lease obligations as the position stood as at 2 November 2015 leads to the conclusion that SSL was then balance sheet insolvent, and that it cannot properly be regarded as having become balance sheet insolvent until Holdings ceased to recognise the provision for onerous lease liabilities upon taking the same to profit upon completion of the Hilco SPA, then I do not consider that this makes any difference to my overall conclusion.
422. In the circumstances, SSL would, as I see it, have become balance sheet insolvent at the very latest once Holdings ceased to recognise the provision upon the completion of the Hilco SPA. Although the sale itself represented Phase 2 of Project Chicago, the die had been cast by Phase 1 of Project Chicago and the disposal by SSL of the relevant property and assets to CFS to satisfy the Withdrawals of Share Capital by CGF in circumstances that clearly envisaged a subsequent prompt sale of the share capital of SSL, and Holdings ceasing to recognise the onerous lease provision upon the completion thereof. That, at the end of the day, was what Project Chicago was all about, getting tCG, except for SSL, which was to be disposed of, off the hook.
423. The Respondents argue that in order to satisfy the requirements of s. 240(1), the company/society alleged to have become insolvent in consequence of the relevant transaction must become insolvent immediately thereupon. However, I do not see why the wording of s. 240(2) should not be given its ordinary natural meaning, and that if there is a sufficient causal connection between the transaction and the company becoming insolvent, then that ought to be sufficient to satisfy the requirements of this subsection. The Respondents say that s. 238 is about protecting the interests of creditors, and that if the company is not actually insolvent at the time of the transaction, or immediately after it, then creditors are insufficiently interested in the consequences thereof. However, I consider that s. 238 and s. 240 IA 1986 must be taken to define the interests of creditors in this situation by reference to the relevant "*look back period*", in this case two years from the insolvency event.
424. The Respondents say that their position as to the need for immediacy is supported by observations made by Rix LJ in *Hill v. Haines* [2008] Ch 412 at [78] by reference to

Muir Hunter on Personal Insolvency (2007) at para 3-2263 where it was observed that in all but the most exceptional cases, a spouse or civil partner would have lost the benefit of any property adjustment order that took effect within two years before presentation of a petition leading to the bankruptcy of the other spouse or civil partner, which period would have increased to five years, unless the benefiting spouse or civil partner could have proved that the (prospective) bankrupt was solvent *immediately* after the order took effect. However, I consider that the force is somewhat taken out of this point by the fact that, in that case, the Court of Appeal held that a property adjustment order, absent fraud, would not be open to challenge as a TUV under s. 339 IA 1986.

K. VII Conclusion on insolvency

425. My overall conclusion on the question of solvency is that, for the reasons explained above, the Respondents are unable to show, the onus being upon them to do so, that as at 2 November 2015, immediately following the carrying into effect of Phase 1 of Project Chicago, the value of SSL's assets exceeded the amount of its liabilities, taking into account its contingent and prospective liabilities and according appropriate weight to the onerous lease liabilities that it was primarily liable for.
426. Further, I am satisfied that SSL became unable to pay its debts within the meaning of s. 123 IA 1986, on the basis that it was balance sheet insolvent pursuant to s. 123(2), in consequence of the transaction that is sought to be impugned as a TUV in the present case, the scope of which I have considered above.
427. Had SSL not transferred the property and assets that it did to CFS in order to satisfy, through the multilateral set-off arrangements, the Withdrawals of Share Capital by CGF, then it would have had a surplus of assets over liabilities, taking into account contingent and prospective liabilities, and would not have been balance sheet insolvent. Rather, as demonstrated by Deloitte's balance sheet as contained in its September and October 2015 Reports, it would have had some £535 million net assets, and prior to the decision to implement Project Chicago, could reasonably have expected Holdings/CGL to have continued to defray the lease liabilities in respect of the C Properties, even if it could not have managed to cover such liabilities out of its trading profits.
428. Having transferred away the property and assets that it did on 2 November 2015, SSL was left with a significant balance sheet deficiency that it had no reasonable expectation would be met, save on a temporary basis pending sale, by Holdings/CGL, and in respect of which it was not generating and was unlikely to generate sufficient profits to discharge, and which such deficiency it could not reasonably be expected to meet.
429. If contrary to my primary finding that the requirements of s. 238(4)(a) of the 1986 Act are not satisfied, I am wrong in relation thereto, and those requirements are satisfied and the TUV claim remains live, then I am satisfied that the requirements of s. 240(2) (b) are satisfied in relation to that claim.
430. I should add that although I have held that the Respondents have failed to prove solvency for the purposes of s. 240(2), the onus being on them in view of the presumption thereunder, I do not consider that this is a case that turns on the

Approved Judgment

presumption. I have had the opportunity of considering the evidence going each way on the point, and have been able to conclude that it demonstrates, on the balance of probabilities, insolvency at the relevant time. This is relevant to the alternative preference claim, where the burden of proof lies on the Joint Liquidators.

431. Of course, if I am wrong on this insolvency issue, then both the TUV and preference claims would fail.

L. Whether the transaction was at an undervalue?

L.I Introduction

432. Further consideration of the issue of whether the transaction was at an undervalue is only required if I am wrong that consideration in respect of the Withdrawals of Share Capital by CGF was provided by the original subscription made by CGF for the relevant shares. If I am right in respect of that issue, then, as explained above, the transaction at an undervalue claim must fail whether the relevant “*transaction*” is analysed in terms of simply the Withdrawals of Share Capital, or in terms of a wider transaction as pleaded in paragraphs 18 and 19 of the Amended Points of Claim.
433. If I am wrong in relation to this issue, and CGF’s subscription for shares in SSL did not, contrary to my finding, provide consideration for the Withdrawals of Share Capital, then it is the Respondents’ case that sufficient further consideration still was provided to SSL such that, compared with the value of the consideration provided by SSL, there was still no undervalue.
434. Of course, if I am wrong in relation to both the “*transaction*” issue and with regard to CGF’s subscription of shares providing consideration for the Withdrawals of Share Capital, then undervalue is established without the need to consider the further components that would have been included within a wider transaction with the consequence that all the expert evidence relating thereto becomes irrelevant. However, I now consider the position on the basis that I am wrong on the Withdrawals of Share Capital consideration issue, but right on the “*transaction*” issue.
435. In considering whether or not there was an undervalue, it is common ground between the parties that the correct approach is to make a comparison between the value of the consideration received by SSL for the transaction and the value of the consideration provided by SSL for the transaction, measured in money or money’s worth, in each case considered from SSL’s point of view – see *Re MC Bacon Limited* [1990] BCLC 324 at page 340, and *Re Thoars (No 2)*, *Reid v Ramlort* [2004] EWCA Civ 800, [2005] 1 BCLC 331⁶, (“**Re Thoars CA**”) at [105] per Jonathan Parker LJ.
436. However, there are fundamental differences between the parties as to how I should give effect to this comparison exercise, and what measuring the consideration from SSL’s point of view actually requires.

⁶ NB this report contains both the decision of HHJ Norris QC, sitting as a Judge of the High Court, at first instance (“**Re Thoars HC**”), and that of the Court of Appeal.

437. So far as consideration provided by SSL is concerned, it is common ground that SSL provided cash to the value of £14,989,540.50, and stock to the value of £54,375,376.50. The issues between the parties relate to the value of the freehold and leasehold properties and the equipment/fixtures and fittings transferred to CFS and Rochpion in respect of which there is a huge difference between the parties, in particular in relation to the properties.
438. The relevant figures are as follows:
- i) With regard to the properties, the Joint Liquidators place a value thereon of between £227,878,654 and £234,452,599 (the latter figure including also properties transferred to CGF). However, the Respondents place a figure of only £21.1 million thereon (also including properties transferred to CGF and including a 10% portfolio discount). The difference between the parties in relation to the value of the properties is therefore between £206,778,654 and £213,352,599.
 - ii) With regard to equipment/fixtures and fittings, the Joint Liquidators place figures thereupon of between £99,196,150 and £108,810,575 (depending on whether or not petrol filling stations are included, and whether or not properties transferred to CGF are included). This compares with a figure of £74,098,388 (excluding petrol filling stations, but including properties transferred to CGF) placed thereupon by the Respondents. There is therefore a difference between the parties in respect of fixtures and fittings of between £25,097,762 and £31,155,699.
 - iii) The total difference between the parties in respect of properties and fixtures and fittings is therefore between £231,876,418 and £248,064,786.
439. There are also fundamental differences between the parties in respect of the consideration received by SSL. There is common ground that the consideration provided to SSL included the release of the ISLA in an amount of £4.6 million. Further, it is agreed that there would be a credit in SSL's favour of £18.5 million if SSL had transferred certain properties to CGF outside of the Foodstores Sale Agreement and the Rochpion Agreement. However, there are the following significant differences between the parties:
- i) With regard to the value (if any) to SSL of its release from the SSL Pension Scheme, the Joint Liquidators contend that the appropriate figure is between £15 million and £45 million at most, whereas the Respondents contend that the appropriate figure is £372.5 million on the basis that that is the figure that would have been required to pay an insurer to take on the liability and secure SSL's release from liability.
 - ii) With regard to SSL's release from other contingent liabilities, i.e. as guarantor in respect of other tCG pension schemes, and bank and bondholder obligations, the Joint Liquidators contend that the appropriate figure is zero, alternatively between £1.9 million and £5.4 million at most, whereas the Respondents contend that the appropriate figure is £357.4 million.

- iii) There is therefore a difference between the parties in respect of the consideration provided to SSL of between £679.5 million and £714.9 million.
440. On the Joint Liquidators' case, excluding properties transferred to CGF, the difference between the consideration provided and the consideration received by SSL is such that there is an alleged undervalue of between £344,322,248.30 and £379,722,248.30. On the other hand, on the Respondents' case, the consideration provided to SSL exceeded that provided by SSL in an amount between £567,582,654.50 and £569,936,694.50 (even apart from the Withdrawals of Share Capital in an amount of £477.3 million).
441. Although the Joint Liquidators claim that there was an undervalue of between £344,322,248.30 and £379,722,248.30, they accept that the transaction at an undervalue claim should be subject to a "*creditor cap*" (their best estimate of which as at 1 March 2026 is £205 million), reflecting outstanding creditor claims in the liquidation of SSL, and the costs and expenses of the liquidation. Ordinarily, in considering a transaction at an undervalue claim, the Court should attempt to quantify the extent of the undervalue as precisely as possible, but it is not bound to do so – see *Re Thoars CA* at [103]-[105], per Jonathan Parker LJ. In the light of the fact that the claim is restricted to a creditor cap (the Joint Liquidators' best estimate of which as at 1 March 2026 is £205 million), I consider that my task must be to consider whether there was an undervalue of no less than that figure, thus relieving me of the necessity of arriving at a precise figure of any undervalue in excess thereof which on the evidence before me would have been an extremely difficult if not impossible task.
442. In relation to remedy, if appropriate, it is relevant to note that in seeking for the purposes of s. 238(3) IA 1986 to put the company/society in the position that it would have been in had the impugned transaction not taken place, the Court would be entitled to take into account quantifiable benefits obtained by the company/society that did not amount to consideration for the purposes of s. 128(4) IA 1986 – see *TAQA CA* at [92] et seq, per Falk LJ. Had I not concluded that the release of the other contingent liabilities did amount to consideration for the purposes of the relevant transaction, then it would, I consider, have come into the equation at the remedy stage with the same result. Consequently, even if I am wrong to include the latter as consideration provided to SSL, my approach referred to in the previous paragraph ought still to lead to the same result if I can be satisfied that there had been an undervalue simply considering what properly might be consideration under the "*Transaction*".
443. It is a notable feature of the Respondents' case that, including consideration provided in respect of the Withdrawals of Share Capital, the consideration provided to SSL is said to have totalled £1.23 billion. This is as against, on the Respondents' case, consideration provided by SSL of only £164,563,305.
444. The valuation figures that the parties respectively rely upon are, broadly speaking, supported by their own respective expert witnesses in the fields of actuarial evidence, covenant evidence, property valuation evidence, and fixtures and fittings valuation evidence. The very significant differences between the experts have resulted from the fact that the experts have adopted a number of principled positions with regard to how their valuations ought to be arrived at. These include the following:

Approved Judgment

- i) In relation to the release of SSL from liability under the SSL Pension Scheme, where the Respondents argue that the value thereof is to be arrived at by reference to the cost of paying an insurer to take on the liability and thus of obtaining a full release from liability from an insurer, rather than the liabilities that might otherwise have been expected to arise in ordinary course;
 - ii) A somewhat similar argument in relation to the release of other contingent liabilities as guarantor for other tCG pension liabilities and tCG bank and bondholder obligations;
 - iii) Whether, as contended by the Respondents, it was appropriate for Mrs Fellows to arrive at negative valuations for a significant number of properties even though the business carried on therefrom was not loss-making, and where the properties would not have been sold had they not been transferred to CFS and Rochpion as part and parcel of Project Chicago;
 - iv) Whether, in arriving at a profit rent for the purposes of valuing leasehold properties, and also the appropriate rent to use for the purpose of valuing freehold properties by reference to leaseback arrangements, it was appropriate for Ms Seal to use a formula of 5% of turnover, or whether a simple market rent should have been used for the purpose as applied by Mrs Fellows in her leasehold valuations.
 - v) Whether, as contended by the Respondents, in valuing freehold properties, it was appropriate for Mrs Fellows to exclude, or, as contended by the Joint Liquidators, appropriate for Ms Seal to include, by way of valuation exercise, a consideration of the price that may have been obtained on a sale and leaseback of the relevant property, and the basis thereof.
445. I will return to a consideration of these, and other issues raised by the respective experts' reports, insofar as it is appropriate to do so, in due course. However, I will first consider the general principles to be applied in relation to the issues of valuation that arise in the present case, and how I consider that these principles ought to be applied to a number of the above issues.

L.II Principles to be applied regarding valuation of consideration

Common Ground

446. I do not understand the following principles to be in dispute:
- i) As Millet J put it in *Re MC Bacon Limited* (supra) at 92D, the determination as to whether the consideration provided by SSL was significantly less than the value which it received for entering into the relevant transaction:

“requires a comparison to be made between the value obtained by the company for the transaction and the value of consideration provided by the company. Both values must be measurable in money or money's worth and both must be considered from the company's point of view.”

- ii) The critical issue is whether the value of the incoming consideration is “*significantly less*” than the outgoing consideration – see *Re Thoars CA*, at [104], per Jonathan Parker LJ.
- iii) Any consideration passing between the parties requires to be valued as at the date of the transaction – *Phillips HL*, at [26], per Lord Scott.
- iv) However, this does not mean that the Court is precluded from having regard to events subsequent to the date of the transaction, and consideration of subsequent events may be of particular utility in resolving valuation ambiguities in circumstances where the consideration moving each way at the time of the transaction is uncertain, at least to the extent that subsequent events help to clarify the position as at the date of the transaction. As Lord Scott put it in *Phillips HL*, at [26]:

“Where the events, or some of them, on which the uncertainties depend have actually happened, it seems to me unsatisfactory and unnecessary for the court to wear blinkers and pretend that it does not know what has happened.”

- v) Where the value of the consideration sought to be relied upon by a party is speculative, then the onus is on the party seeking to rely thereupon to establish its value. As Lord Scott put it in *Phillips HL*, at [27]:

“Where the value of the consideration for which a company enters into a section 238 transaction is as speculative as is the case here, it is, in my judgment, for the party who relies on that consideration to establish its value. [the respondents] are, in the present case, unable to do so.”

447. The principal difference between the parties is as to whether, in seeking to value the respective items making up the consideration provided by and the consideration provided to SSL, from SSL’s point of view:

- i) The focus should be upon the value of the benefit to SSL as contended by the Joint Liquidators; or
- ii) Alternatively, the focus should be upon ascertaining the “*market value*” of the respective assets and liabilities viewed independently, in the case of liabilities this necessarily being a figure equivalent to the cost of paying a third party to take the same on thereby wholly relieving SSL from liability.

The Respondents’ case on valuation principles

448. In their written opening submissions, the Respondents submitted that looking at the value of the consideration from SSL’s point of view meant that the Court must ignore any special value which the asset may have to the purchaser. As they put it: “... *It is the market value of the asset which is relevant.*” Particular reliance was placed upon what was said in *Phillips HL* by Lord Scott at [30], a passage that I return to below.

Approved Judgment

449. Further, it was contended that value was to be determined objectively by reference to what the company/society receives and not what the counterparty gives up, reliance being placed on *Delaney v Chen* [2011] BPIR 39 at [14] – [15], per Lord Neuberger MR, applying *Re Thoars CA*.
450. In their written closing submissions, the Respondents emphasised that looking at the consideration from SSL’s point of view meant ignoring any special value which the asset may have to the actual purchaser, on the basis that what mattered was the market value of the asset.
451. I was addressed on behalf of the Respondents in oral closing submissions by Mr Short KC in the specific context of the value to be placed upon SSL’s release from liability in respect of the SSL Pension Scheme resulting from its entry into the FAA (dated 9 October 2015), the latter having become unconditional on 3 November 2015. Mr Short KC’s submission was that this consideration provided to SSL should be valued by reference to what it would have cost to go into the insurance market and to pay for an insurer to take over the liability, thereby allowing SSL to be released from liability in respect of the SSL Pension Scheme. It was submitted that this is the proper way of reflecting what actually occurred, namely SSL’s complete discharge from liability.
452. However, although Mr Short KC’s submissions were directed at the release from the SSL Pension Scheme, and the release from other contingent liabilities, the same principles are said by the Respondents to apply to a consideration of the value of the other items constituting consideration, either provided by SSL or received by SSL.
453. So far as authorities are concerned, Mr Short KC began by referring to what Millet J had said in *Re MC Bacon Limited* (supra) at 92D, observing that there was no suggestion in that passage that value was to be equated with benefit.
454. Mr Short KC then took me to *Phillips HL* at [24], [26], and [27], but his particular emphasis was upon what Lord Scott said at [30], namely that:
- “The value of an asset that is being offered for sale is, prima facie, not less than the amount that a reasonably well-informed purchaser is prepared, in arms’ length negotiations, to pay for it.”*
455. In relation to this passage, Mr Short KC identified that, in the context of the SSL Pension Scheme, one is dealing with the release of a liability rather than a disposition concerning an asset, but he submitted that there was no basis upon which to take a different approach. He submitted that the proper enquiry was as to what SSL would have needed to pay to obtain the benefit it obtained, namely a complete release, which the expert evidence suggests would have been c. £370 million.
456. Mr Short KC also referred to, and relied upon *Re Thoars CA*. In this case, Mr Thoars had a life insurance policy that was due to pay out £180,000 in the event of his death. He was an alcoholic and had a somewhat chaotic lifestyle. He died, somewhat unexpectedly, shortly after a liver transplant operation. However, before his death, he had assigned the benefit of the policy for a relatively nominal consideration. He was insolvent and, following his death, a judicial factor was appointed. The assignment was challenged as a TUV. The evidence was that the policy had a surrender value of only £71 on the basis that that was what the relevant insurer would have paid on

surrender. The respondent to the application argued that this represented the value of the policy, and that there was no undervalue.

457. The judge at first instance, HHJ Norris QC (as he then was), heard evidence to the effect that the policy could have been worth between £25,000 and £35,000 as at the date of the assignment, and he concluded that it must have had an absolute minimum value of £10,000, which he considered to “*suffice for the purposes.*” Commerzbank had, at the relevant time, been owed £440,000 by Mr Thoars. Judge Norris rationalised that if the latter had been asked to reduce its indebtedness by £10,000 in return for obtaining the policy, then he had not the slightest doubt that it would have taken that course. This was sufficient to establish a value of the policy of at least £10,000 which was significantly less than Mr Thoars had received.
458. This approach was endorsed by the Court of Appeal on appeal. Both Judge Norris [101], and Jonathan Parker LJ in the Court of Appeal at [117], relying upon what had been said by Neuberger J in *Craven (Builders) Limited v Secretary of State for Health* (28 October 1999, unreported), rejected the proposition that, in the absence of direct evidence of the existence of a special purchaser for the policy, the conclusion must follow that its value was no more than its surrender value of £71.
459. Reliance is placed by Mr Short KC on the fact that Judge Norris valued the policy not on the basis of the surrender value, but on the basis of what Mr Thoars could have obtained in return for the policy, i.e. on the basis of its market value.
460. Mr Short KC submitted that, for present purposes, one has to assume that there was a transaction in which SSL received a complete release. In reliance upon what was said by Judge Norris at [101] and by Jonathan Parker LJ at [117] in *Re Thoars CA and HC*, Mr Short KC submits that it is not necessary, and indeed that it is inappropriate for the Court to determine what would have happened if the transaction did not take place. This is on the basis that in the latter case it had not been necessary to prove that Mr Thoars, had he not died after assigning the policy, would likely have sold the policy for £10,000. As Mr Short KC put it: “*The right approach is to say what he could have sold this for on that date.*”
461. Mr Short KC concluded by identifying that in the present case, various elements said to comprise consideration had been identified and that the Court’s task was “*... to put a value on each of them on the assumption that the transaction took place, not on the assumption that the transaction didn’t take place, either in its entirety or in relation to the pension scheme.*” Dealing specifically with the release from the SSL Pension Scheme, he observed that the “*complete release*” was the “*quid pro quo for the various things they gave to the Respondents ... And that is something that has independent effect, has an independent value which can be measured on the open market.*”
462. Thus, in short, Mr Short KC submitted that it was necessary to look at the various items said to constitute consideration moving either way and to ascribe to them “*an independent value which can be measured on the open market.*”
463. It is on this basis that it is submitted that the correct approach to valuing the consideration received by SSL is to determine the cost of obtaining a complete release from liability in respect of the SSL Pension Scheme and other contingent liabilities as

guarantor for other tCG pension liabilities and tCG bank and bondholder liabilities, by going into the market and paying somebody to take them on, without reference to the particular impugned transaction. A similar approach is contended for in respect of onerous leases where it is said that the consideration received by SSL represented the negative premium that would have been required to be paid to persuade a third party to take an assignment of the relevant lease.

The Joint Liquidators' case on valuation principles

464. Again, the Joint Liquidators' position was addressed primarily by reference to how the release from liability under the SSL Pension Scheme should be valued, the relevant oral submissions being made by Mr Curl KC. However, the relevant principles to be applied were also touched upon by Mr Smith KC in dealing with the valuation of leasehold properties transferred to CFS and Rochpion in those instances where Mrs Fellows had ascribed to them a significant negative value.
465. Questions of principle were only dealt with fairly briefly in the Joint Liquidators' written closing submissions where, at paragraph 295, it was asserted that the Respondents were driven by their valuations to submit that it would have made commercial sense for SSL, a solvent, profitable and cash generative covenantor, to hand over more than the net value of its entire undertaking to obtain the release of contingent liabilities that were costing it only £2.6 million a year and were most unlikely ever to crystallise. This was said to "*fly in the face of reality and common sense*", to quote from Sir Christopher Slade in *Agricultural Mortgage Corporation plc v Woodward* [1995] 1 BCLC 1 at page 11f, cited in *Re Thoars CA* at [57], per Jonathan Parker LJ.
466. Mr Curl KC criticised the Respondents' approach, suggesting that what they were seeking to do, certainly in relation to the valuation of the releases, was to value them as if the relevant transaction with its various components had not happened as it did, and that, instead, SSL had gone out into the market and sought to negotiate the releases with unconnected third parties. He suggested that, rather than this approach, the relevant enquiry was as to what was the value of the benefit to SSL in money or money's worth at the time of the releases and in the context of the particular transaction as a whole. As he put it, the releases only happened because the transaction as a whole happened, and the transaction as a whole only happened because the Respondents wanted it to happen for their own commercial ends.
467. So far as those commercial ends are concerned, I have already considered the same in the context of my analysis above of what the relevant "*transaction*" actually comprised – see paragraph 239(iv). As I have found, an important factor is that, whilst the releases were plainly of some advantage to SSL in that they removed the risk (however marginal) of the various liabilities being called upon, SSL's release was essential from the point of view of the other relevant tCG societies, including CFS, which was to step into SSL's shoes in relation to the various liabilities. It was essential in order to prevent the difficulties that were liable to arise in relation to matters such as the crystallisation of pension fund liabilities, and default in respect of the bank and bondholder liabilities, in the event, which was seen at the time as at least a real possibility, of SSL failing and going into a formal insolvency process after Phase 1 of Project Chicago had been carried into effect.

468. With regard to authority, Mr Curl KC placed particular reliance upon *Agricultural Mortgage Corporation plc v Woodward* (supra). In that case the husband was significantly indebted to the claimant, which had security over the family farm which included the matrimonial home, and which was in the name of the husband. The husband granted a protected agricultural tenancy of the property to the wife at a full market rent. Whilst the tenancy had been granted at a market rent, the fact that the wife gained security of tenure resulted in a significant reduction in the value of the husband's interest in the property, and thus of the claimant's security. Further, apart from providing the wife with security of tenure, it effectively placed her in a ransom position so far as any question of the realisation of the property was concerned. The claimant alleged that this amounted to a transaction defrauding creditors within the meaning of s. 423(1) IA 1986 under which the issue of undervalue arose. The husband and wife argued that there was no transaction at an undervalue because the tenancy had been granted for a proper market rent. However, the claimant successfully argued that there was a transaction at an undervalue as a result of, amongst other things, the wife being placed in a ransom position with the benefit of surrender value.
469. The Joint Liquidators rely upon what was said by Sir Christopher Slade in dealing with the submissions of the husband and the wife at page 11d-g, a passage subsequently referred to and applied in *Re Thoars HC and CA* at [58]:

“Persuasively though these submissions were advanced, I am not persuaded by them. In applying s 423(1)(c) to the facts of the present case, one must look at the transaction as a whole; the tenancy agreement cannot be considered in blinkers. Due weight must be given (inter alia) to the facts not only that the agreement was entered into by the first defendant with his wife for the purposes outlined above, but that the land in question was mortgaged and that the wife, through the grant of the tenancy, would be placed in the “ransom” position described above. Accepting that she agreed to pay for her yearly tenancy which was the best rent reasonably obtainable for that tenancy viewed in isolation, and that she undertook the other tenant's obligations imposed by the tenancy agreement, it seems to me nevertheless clear that, when the transactions are viewed as a whole, the benefits which the first defendant thereby conferred on her were significantly greater in value, far greater in value, in money or money's worth than the value of the consideration provided by her. To hold otherwise would seem to me to fly in the face of reality and common sense. No further evidence was, in my judgment, required to establish that the transaction was one falling within s 423(1)(c); the agreed facts speak for themselves. On the facts of this case, the substantial detriment incurred by the first defendant under the transaction was largely matched by a substantial benefit conferred on the second defendant beyond the rights specifically conferred on her by the tenancy agreement.”

470. Mr Curl KC sought to draw out of this that if one looked at the tenancy granted to the wife in isolation, then there was no apparent undervalue because the tenancy was for the best rent reasonably obtainable in the market, but once one looked at the transaction as a whole and what was really going on, one could see that the wife had

had conferred on her far greater value, because of the ransom position that was accorded to her, than the consideration that she provided.

471. Mr Curl KC submitted that something similar had happened in the circumstances of the present case where, analysing the transaction as a whole in its context, one could see, it was submitted, that the Respondents were gaining a huge benefit, to the dis-benefit of SSL. The effect of the transaction, if anything, was to improve the overall tCG covenant in respect of the relevant liabilities and was essential for the purposes of Project Chicago given the serious consequences of SSL subsequently failing whilst still liable in respect of the relevant pension scheme and other guarantee liabilities and thereby occasioning a default.
472. Mr Curl KC submits that, in obtaining the releases that it did, SSL got something that would never have occurred without the impugned transaction as a whole, and that to compare what did actually happen with what would have happened in the case of a stand-alone transaction results in a completely meaningless comparison, rather like, he suggested, the £71 cost to surrender in *Re Thoars CA*. In that case, it was held that Mr Thoars would never have surrendered his policy for that sum. It is said that, in just the same way, SSL would never have gone out into the market and paid £250 million odd to an insurer to secure a release from liability.
473. With regard to *Re Thoars CA*, Mr Curl KC relied upon what was said by Jonathan Parker LJ at [117]:

“In particular, I do not accept the proposition that, in the absence of direct evidence of the existence of a special purchaser for the policy, the conclusion must follow that its value was no more than its surrender value of £71. With all respect to Mr Moss, his submission to that effect seems to me, to adopt Slade LJ’s words in Woodward (in the passage from his judgment quoted in para [58] above) to fly in the face of reality and common sense. As the judge correctly pointed out (in para [106] of his judgment, quoted in para [60] above), the surrender value was the sum which Skandia was contractually obliged to pay on the surrender of the policy. It does not follow that it represented the value of the policy as at 26 July 1996 in money or money’s worth, from Mr Thoars’ point of view.”

474. Mr Curl KC submitted that the present case is the converse to *Re Thoars CA*, in that in the present case the Respondents are trying to maximise the value of a contingent liability rather than minimise the value of a contingent asset, but that the approach must be the same. In short, what might have been capable of being achieved in the market in respect of an asset or a liability taken on its own cannot be the only answer if the relevant company/society would never have gone into the market to dispose of the asset, or obtain the release of a liability without it being part of the particular transaction taken as a whole.
475. Mr Smith KC, on behalf of the Joint Liquidators, made a similar point in relation to the negative valuations given by Mrs Fellows in relation to leasehold properties that continued to trade that were transferred to CFS, and would not have been disposed of other than under the terms of the particular transaction effected pursuant to Project

Chicago. The complaint is that Mrs Fellows' valuation proceeds on the basis of SSL having sought a third party to take on the relevant leasehold interests, making provision for such things as rent-free periods etc. The point is that this is something different from what occurred and results in a negative valuation of around £135 million being attributed to the relevant properties where, in what Mr Smith KC described as the real world, rather than disposing of the properties on these terms, SSL would simply have retained them. As Mr Smith KC put it, "... *It is fanciful to think that SSL would have paid out well over £134 million in order to rid itself of these leases. No one has suggested that, if Project Chicago hadn't proceeded [that is what would have happened]*".

476. Thus, in short, it is the Joint Liquidators' case that, in the circumstances of the present case, valuing the consideration either provided by SSL, or received by SSL, from SSL's point of view, as required, requires one to value the benefit to SSL, rather than being tied to what might have been achieved in the market when that bears no true relation to the value of the benefit to SSL and what actually happened.

Conclusions regarding valuation approach

477. The starting point clearly is *Phillips HL*, and Lord Scott's observation at [30] in that case that the value of an asset that is being offered for sale is, *prima facie*, not less than the amount that a reasonably well-informed purchaser is prepared, in arms' length negotiations, to pay for it.
478. However, it is to be noted that determining the value by reference to what a well-informed purchaser in arm's length negotiations was prepared to pay was expressed by Lord Scott to be the "*prima facie*" position, and therefore not necessarily the determinative position. This was emphasised by Judge Norris in *Re Thoars HC*, at [101], in the context of there being no ready market for a particular asset. Judge Norris considered that, in such a situation it might, for example, be appropriate to value an asset by reference to its replacement cost.
479. Further, in my view it is clear from what was said by Sir Christopher Slade in *Agricultural Mortgage Corporation plc v Woodward* (supra) at 11d-g that it is necessary to apply the relevant provision, here s.238 IA 1986 rather than s. 423 IA 1986 as in that case, to the facts of the particular case, which requires looking at the transaction as a whole, without considering any particular component of the transaction "*in blinkers*". Otherwise, as demonstrated by the facts of *Agricultural Mortgage Corporation plc v Woodward*, one is liable to "*fly in the face of reality and common sense*" – as Sir Christopher Slade put it.
480. Further, if the question of valuation requires to be determined by looking at the transaction as a whole, then where the transaction involves distinct elements that each separately amount to consideration going one way or the other as part of the overall transaction, one does, I consider, need to be careful not simply to have regard to what a well-informed purchaser might be prepared to pay in arms' length negotiations in respect of one element as if it had been the subject matter of some different transaction that involved just that element. To do so would be at risk of applying blinkers to the transaction as a whole.

481. The present impugned transaction did not involve obtaining a release by going into the insurance market and obtaining a discharge from liability in respect of the SSL Pension Scheme in isolation. Rather, it involved the entry into of the FAA and the Deed of Alteration on 9 October 2015, with the FAA coming into effect on 3 November 2015 once other components of Project Chicago had been carried into effect the previous day as part of the same overall transaction.
482. As described in paragraph 239(iv) above, the entry into the FAA and the Deed of Alteration on 9 October 2015 was an essential part of the transaction as a whole for the benefit of CFS as much as, if not significantly more than, that of SSL. This is because Project Chicago required SSL to be taken out of the picture in the light of the significant risk of future insolvency, and the effect thereof on the efficacy of Project Chicago having regard to the consequences of any subsequent crystallisation of the SSL Pension Scheme, and default in respect of banking and bondholder covenants.
483. Further, from SSL's perspective, as commented upon further below, there was no real disagreement between the parties that the SSL Pension Scheme was well funded, run on a prudent basis (gilts + 0.5%), heavily de-risked by 2015 (only c. 7-8% equities), and highly hedged against interest and inflation. Consequently, but for the imposition of Project Chicago, there was no significant real risk so far as the SSL Pension Scheme was concerned, of liability crystallising on the s. 75 Basis, particularly given that SSL was trading profitably prior to Project Chicago.
484. One can, I consider, draw a comparison not only with the facts of *Agricultural Mortgage Corporation plc v Woodward*, but also those of *Re Thoars HC and CA*. As I have mentioned, Judge Norris rationalised that if Commerzbank had been asked to reduce its indebtedness by £10,000 in return for obtaining the policy, then he had not the slightest doubt that it would have taken that course. In reaching this conclusion, which was endorsed by Jonathan Parker LJ in the Court of Appeal at [117], Judge Norris took into account that, at the relevant time, Mr Thoars was facing a liver transplant with severely impaired mortality. It was having regard to all the circumstances, including the latter, that Judge Norris concluded that it was inconceivable that Mr Thoars would have been stuck with the £71 surrender figure.
485. In these circumstances, considering the value to be attached to the release of the SSL Pension Scheme, I consider that it does indeed fly in the face of common sense and reason, and would, valuing the same from SSL's point of view, result in a wholly unrealistic valuation, if one were to value the release from liability achieved by the FAA by reference to what SSL would have had to pay had it gone out into the insurance market to agree with an insurer for the latter to take on the liability.
486. Whilst I consider this in more detail below, I consider a more realistic assessment, consistent with the evidence of the Joint Liquidators', covenant expert, Mr Jennings, to be the value that might properly have been ascribed to the release (from the point of view of SSL) as part of an intergroup reorganisation giving effect to the relevant "transaction" and assuming a degree of arms' length negotiation within the group. This, I consider, more properly reflects the transaction, considering the same as a whole from SSL's point of view, that actually occurred. Rather than what I consider to be a wholly unrealistic figure of £372.5 million for a release negotiated with an insurer, I consider the appropriate figure to be somewhere between £15 million and

£45 million reflecting the cost to SSL of funding the SSL Pension Scheme on an ongoing basis by reference to the outstanding deficit repair contributions (“DRCs”) and the technical provisions (“TP”) deficit in respect thereof at the relevant time, which I consider further below.

487. The crux of the argument advanced by Mr Short KC on behalf of the Respondents was, as I have identified, that a “complete release” was the “*quid pro quo for the various things they gave to the respondents ... And that is something that has independent effect, has an independent value which can be measured on the open market*”. However, this approach does, I consider, fly in the face of the approach required by *Agricultural Mortgage Corporation v Woodward* of looking at the transaction as a whole, and the effect that a particular element of the transaction might have upon the wider aspects of the transaction as a whole and having regard to the full circumstances.
488. Further, I do not consider that the Respondents are correct in suggesting that what the Joint Liquidators are seeking to do is to invite the Court to value various aspects of the transaction on the basis that the transaction never occurred. Rather, what I consider that the Joint Liquidators are inviting the Court to do is to value the various components thereof on the basis of the transaction as a whole that actually occurred, and to do so otherwise than by reference to valuation methods that involve the valuation of various components of the transaction as if the relevant component was being dealt with by way of a separate transaction unrelated to the wider Project Chicago transaction.
489. As considered in more detail below, I consider that a similar approach is required in relation to other valuation questions such as the leasehold properties transferred to CFS and Rochpion, and the very large negative valuations arrived at by Mrs Fellows in relation thereto. My concern is that, again, these particular transfers ought to be considered in the context of the impugned transaction as a whole, and that valuing the leasehold properties in isolation without proper regard to the fact that they were being disposed of as part of the transaction as a whole has resulted in valuations that reflect sums of money that SSL might have had to pay to get rid of properties by transfers that it would never, in fact, have ever entered into.
490. It is necessary to say a little more about the position of a special purchaser. Parry, *Transaction Avoidance in Insolvencies*, 3rd edn (2018), at para 4.96 suggests that it is difficult to argue that it is a TUV for a debtor to sell an asset to a person who has a special reason for purchasing that asset if the price paid is not greater than the market price. Goode, *Principles of Corporate Insolvency Law*, 5th edn (2018) at para 13-26 adopts the same approach, giving the example of a painting which completes a purchaser’s collection. It is suggested that the special value to the purchaser in this sort of situation is to be ignored, and what is to be compared is the consideration received by the company in the market value of the asset rather than its ransom value. This is, essentially, the Respondents’ position in the present case. However, I consider that it is necessary to distinguish this type of transaction from the present. The transaction in the example given is a simple transfer of an asset that has a market value for a monetary sum. So long as the market value is obtained, there is no problem. The position is, I consider, different when one is concerned with a transaction involving non-monetary consideration on both sides of the transaction

with a number of elements said to comprise consideration involved. I consider that, in this situation, rather greater analysis is required as to benefits obtained by the respective parties through the consideration passing each way. To this extent, I consider that the present transaction under consideration, with the various elements amounting to consideration involved, is very much more akin to *Agricultural Mortgage Corporation v Woodward* (supra), so as to require the holistic approach to valuation that I have set out above, rather than an approach that simply involves trying to arrive at an independent market value for each particular element of the consideration, however artificial and unrelated to what actually happened that might be.

491. At the end of the day, I consider that the key question is as to whether SSL benefited sufficiently from the transaction that it entered into. This requires a consideration of value by reference to the transaction as a whole from SSL's point of view, rather than determining the market value, to the extent that there is one, of the various components of it as if they were not part of the transaction as a whole. I thus prefer the approach of the Joint Liquidators to valuation. The important consideration is, in my judgment, that the consideration as to what might have been negotiated between the parties as willing buyer and seller has to be by reference to the full facts of the case and the transaction as a whole if it consists of various components.
492. These are the principles that I shall therefore apply, so far as necessary to do so, in determining the value of the consideration provided by SSL, and the value of the consideration received by SSL.

L.III Release of the SSL Pension Scheme and other contingent liabilities

Issues

493. The issue is as to what value (if any) is, for the purposes of s. 238(4) IA 1986, to be attributed to consideration provided to SSL by the assumption by CFS of SSL's liabilities under the SSL Pension Scheme and other contingent liabilities in respect of other tCG pension schemes, and tCG's liabilities to banks and bondholders ("**the Group Obligations**").
494. With regard to the SSL Pension Scheme, the issue between the parties boils down to a dispute as to whether it is appropriate to value the release by reference to:
- i) As contended by the Joint Liquidators, the cost to SSL of funding the SSL Scheme on an ongoing basis, namely the cost of future DRCs payable by SSL to the SSL Pension Scheme; or
 - ii) As contended by the Respondents, the s.75 Basis, i.e., by reference to what would have been needed to meet the deficit in the SSL Pension Scheme that would have arisen if, at the relevant date, the latter was required to be wound up (which ought to be the same as the amount that would have been required to pay an insurer to take on the liability).

495. It was Mr Jennings' evidence that, in determining the cost of future DRCs payable by SSL to the SSL Pension Scheme, it was appropriate to take the higher of the remaining committed cash contributions due under the then operative recovery plan, and the TP deficit at the relevant time. The relevant figures were: (i) £19.7 million, if one took Mr Gibson's TP deficit of £14 million, or (ii) £45 million, if one took Mr Scott's TP deficit of £45 million. In closing, the Joint Liquidators contended that I should take as the appropriate figure £15 million, representing a generous estimate of the DRCs actually paid in respect of the SSL Pension Scheme.
496. Regarding the deficit arrived at on the s.75 Basis, the difference between the parties is between Mr Gibson's figure of £357 million, and Mr Scott's figure of £375 million. I have already determined that I do not consider that this basis is the correct basis to apply for the reasons that I have set out in § L.II above (see in particular paragraphs 481-486). Consequently, the dispute in relation to the value attached to the release of the SSL Pension Scheme liability boils down to whether I should accept Mr Gibson's TP deficit figure, or that of Mr Scott. I should add that, should I be wrong, and should the s.75 Basis provide the correct basis for determining value, then although Mr Gibson and Mr Scott might have used different routes to arrive at their respective figures, the difference between them is only £18 million, representing approximately 5% of their respective figures. This is, as I see it, well within any reasonable margin of error, and so I would have taken a midway figure between these two figures of £366 million.
497. With regard to the contingent liability in respect of Group Obligations, it was Mr Squires' evidence that the appropriate course is to apply so-called "*expected loss principles*", i.e. to apply a formula to arrive at what SSL's expected loss might have been had not CFS stepped into SSL's shoes as guarantor in respect of the Group Obligations. This essentially depended upon a multiplication of a percentage figure representing the (a) probability of default, (b) an estimation of loss given default, and (c) an estimation of exposure at default, to arrive at what is said to be the value of the benefit to SSL. This is how the figure of £357.4 million relied upon by the Respondents has been arrived at.
498. Mr Jennings also applied a mathematical formula. In broad terms, it is similar to Mr Squires' approach, but with two key differences. Firstly, there is an additional multiplicand representing the likelihood of a default leading to enforcement against SSL. Secondly, there is a further multiplicand to arrive at a figure representing what the return on the relevant figure would be in an insolvency of SSL.
499. Despite Mr Jennings' approach, it is, as I understand it, the Joint Liquidators' primary case now that the release of these liabilities was bound up with the transaction as a whole such that no value from SSL's point of view can be attributed thereto. To the extent that it is appropriate to look at the application of arithmetic formula, then it is the Joint Liquidators' case that the approach taken by Mr Squires is wholly inappropriate, and that if any approach is appropriate, then it is that of Mr Jennings which leads to a figure of £1.9 million, rising to a possible £5.4 million, but no more than that.

The experts

Approved Judgment

500. With regard to actuarial expert evidence, as identified in paragraph 18 above, I have the benefit of the experts' reports in the form of the reissued report of Mr Gibson, the supplemental report of Mr Gibson, the reissued report of Mr Scott, the supplemental report of Mr Scott, Mr Gibson's and Mr Scott's joint statement and supplemental joint statement. Mr Gibson and Mr Scott were each extensively cross-examined on their reports.
501. I found Mr Gibson to be a good witness, who stood up well to cross-examination and came across as measured and persuasive.
502. I found Mr Scott to be a less persuasive witness, upon whom I feel less able to place significant reliance. It is unfortunate that he had to retract and replace section 14 of his original report dated 23 April 2025 that had projected that the SSL Scheme would inevitably incur a liability on the s. 75 Basis upon becoming insolvent by 2052 at the latest. As has been pointed out by the Joint Liquidators, this resulted from Mr Scott having applied a number of assumptions that ultimately could not be supported that led to the SSL Scheme being projected to run off comparatively more slowly than other tCG pension schemes, despite being the best funded and most de-risked of all tCG pension schemes. The Respondents have explained that Mr Scott decided to retract section 14 of his original report having considered Mr Gibson's supplemental report dated 4 August 2025. It is, I consider, a fair criticism that no cogent explanation had been provided for the significant delay before Mr Scott retracted and replaced his original evidence as contained within his original section 14 with his further report dated 17 October 2025.
503. With regard to the covenant experts, I have the benefit of Mr Jennings' report, Mr Squires' report, Mr Squires' supplemental report, and Mr Jennings' and Mr Squires' joint statement and supplemental joint statement. Again, they were extensively cross-examined on their reports.
504. I am not wholly convinced that this, a supposed expertise in respect of covenants, is an appropriate subject matter for expert evidence. As I see it, once one has the benefit of the actuarial evidence with regard to deficits arrived at on the s. 75 Basis and on the TP basis respectively and in relation to the position in respect of DRCs, it is well arguable that what one then does with this actuarial evidence then touches upon what are, essentially, questions of law, or matters of common sense in relation to business practice. However, a direction was given in the present proceedings for such "*expert*" evidence, and no party has taken a new point in relation to the admissibility of such evidence as such, albeit that there have been objections to elements of Mr Jennings' and Mr Squires' evidence.
505. Notwithstanding the above qualification as to appropriateness of this expert evidence, I found Mr Jennings to be a good and helpful witness. He provided reasoned and measured answers to most of the questions that were put to him. It is a fair criticism of his evidence that it did, in parts, seek to deal with matters that, ultimately, I consider that it is for the Court to decide, as a matter of law, as I have done in § L.II above. This is particularly so in relation to the issue as to whether valuation by reference the deficit arrived at on the s. 75 Basis is or is not appropriate. Further, it might be said that Mr Jennings' evidence made certain assumptions in relation to matters upon which I will have to make findings of fact. The point was also made that Mr Jennings

was unable to provide any example of having advised in relation to a transfer or release in relation to a defined benefit scheme at or near the relevant time.

506. However, it was clear from Mr Jennings' evidence that he has extensive experience of transactions involving the release and transfer of liabilities in respect of pension schemes that has helped to inform him as to the commercial considerations behind the present transaction and the question of the value to be attributed to the taking on by CFS of the liabilities that it did in the present context. Thus Mr Jennings was, for example, able to explain some of the commercial considerations involved in such transactions, including expressing the cogent and persuasive view that, in considering the value of the release or transfer of pension scheme liabilities, a key consideration is not what might occur on an insolvency, but how much it is going to cost to continue to run the pension scheme going forward, which will very much depend on the deficit position in relation to the particular scheme. Further, in relation to release of guarantee liabilities in respect of the Group Obligations, Mr Jennings cogently and persuasively referred to the position in relation to transactions between group companies, where one company is taking over liability from another company against the background of some wider transaction, where Mr Jennings made the point that little if any value is likely to be attributed by the parties to the release of liabilities in that situation.
507. A number of specific criticisms were made by Mr Curl KC on behalf of the Joint Liquidators in respect of Mr Squires as an expert witness:
- i) The first and principal criticism was that Mr Squires had included in his first report material that he knew to be wrong and unsupportable, yet he did not correct it until after Mr Scott had initiated the process by correcting his own report. It was put to Mr Squires in cross-examination that he had included in his first report an irrational and unreal set of assumptions. Mr Squires agreed that he had. He was then asked if he should have spotted this at the time. He replied by saying that he had spotted it at the time. It was then put to him that, in the circumstances, he should have formed his own view and identified these irrational and unreal assumptions in his own report. Mr Squires accepted that he "*might have pushed the point harder*". He was subsequently asked if he had interpreted his instructions as being that he should swallow anything that Mr Scott said. He responded that this was not his thought process at the time, but that he could: "*see why you would say that.*" The overall criticism made is that Mr Squires was not discharging his duties properly, and was consciously including material in his report, and signing off thereupon as his full and complete expert opinion, when he was aware that it was based upon unsupportable material. I consider that there is force in this criticism, which does serve to undermine his evidence.
 - ii) The second criticism is that Mr Squires was specifically instructed to use the deficit determined on the s.75 Basis as the starting point, and that he exercised no independent judgment as to whether or not this was the appropriate starting point rather than, for example, outstanding DRCs or the TP deficit. However, as I have indicated, I consider that this issue is more a matter of law than one for experts to opine upon, and Mr Squires' report did deal with the valuation issue in relation to the SSL Pension Scheme on the basis of the deficit

determined on both the s. 75 Basis and the TP basis. I therefore do not consider that this criticism is made out as such. However, once Mr Squires had arrived at particular figures for the two bases, he might have considered how realistic they were from a commercial perspective given the transaction to which they related. Significantly, however, under cross-examination Mr Squires gave evidence that, although not necessarily helpful to the Respondents, was helpful to the Court in relation to commercial aspects of the transaction.

- iii) A third criticism is that Mr Squires mechanically applied various calculations to three examples provided to him by AG, the Respondents' solicitors, where at least two of the examples did not fit the facts of the case. The response to this was that rather than leaving Mr Squires, as an expert, to essentially decide questions of fact that are more properly left to the Court, it was thought that the appropriate course was to provide a number of examples for Mr Squires to work from in order to cover the most likely possibilities in relation to findings of fact. Whilst this may be the case, I am concerned that this has resulted in there being a degree of inflexibility in the product of Mr Squires' endeavours. Thus, there has been very limited evaluation, or judgment or professional scepticism exercised over the outputs produced. As pointed out by the Joint Liquidators in closing, at one point under cross-examination Mr Squires accepted a comparison put to him by Mr Curl KC between what he had done and pulling a lever.
- iv) A fourth criticism is that Mr Squires paid limited regard to and did not evaluate the particular characteristics of the SSL Pension Scheme. Thus, it is said that he did not have regard to the fact that the SSL Pension Scheme was well funded, significantly de-risked and well hedged. I consider that these are fair criticisms of Mr Squires' evidence.

508. In short, therefore, I found Mr Jennings to be the more cogent of the covenant expert witnesses, better able to explain and justify his methodology, than Mr Squires. To the extent relevant, I therefore consider that I should place considerably more weight upon Mr Jennings' evidence than that of Mr Squires.

Value of release of SSL Pension Scheme liability

509. I have indicated that the core issue between the parties is as to whether the value of the consideration passing to SSL upon the assumption by CFS of the liabilities under the SSL Pension Scheme should be based upon the deficit determined on the s.75 Basis or, alternatively, based on the outstanding DRCs and the TP basis. For the reasons given under § L.II above, I consider that, of the two, it should be the latter, not least because the application of the s. 75 Basis leads to a result that flies in the face of reality and common sense when one considers SSL's release from liability in the context of the "*transaction*" as a whole rather than simply looking at the release on its own.

510. However, further consideration of the evidence going to the point demonstrates, as I see it, that the TP basis provides not only the better of the two options, but a realistic assessment of what might have been negotiated at arm's length in circumstances such as the present.

511. I note, in particular, the following:

- i) Significantly, in a contemporaneous email dated 8 September 2015 from Mr Barnes of AG to a number of interested parties, Mr Barnes, when commenting on the value of the release of the liability relating to the SSL Pension Scheme said: “*in reality the true value will be closer to the technical provision liability of £35m*”. There are, clearly, issues as to the quantum of the TP deficit, but the fact that Mr Barnes should contemporaneously have aligned himself with a valuation based upon the TP deficit does lend support to the argument that this represents the sort of figure that might have been expected to have been negotiated between parties at arm’s length having regard to the terms of the “*transaction*” as a whole.
- ii) Mr Jennings’ evidence was to the effect that, looking at the matter from a transactional point of view, i.e. what might have been negotiated between the parties to a similar transaction, an important consideration would have been the cost of continuing to hold the SSL Pension Scheme if the transaction as a whole did not proceed. It was his view that a realistic estimate of the cost of continuing to run the SSL Pension Scheme was, as I have said, the higher of the outstanding TP deficit and outstanding DRCs. This does, to my mind, makes a great deal of sense particularly in the context of a well-funded, and significantly de-risked and hedged pension scheme. As to the latter, I would note that the experts were broadly agreed that the SSL Pension Scheme was well funded, run on a very prudent basis (gilts + 0.5%) and was significantly de-risked and hedged, although Mr Squires questioned the effect of hedging in the longer term. Further, both were agreed that, certainly in the short term, a crystallising event was unlikely.
- iii) Mr Jennings also gave evidence to the effect that, in his experience, in the context of a transaction between group companies, one would not necessarily regard there being value attached to the release of a liability and/or the assumption by another party of the liability, as part of an overall transaction. In this respect, I consider it not without significance that when the parties did express their intentions with regard to consideration for the assumption by CFS of the liabilities under the SSL Pension Scheme, it was expressed as being in consideration for the transfer of the relevant property and assets to CFS – see in this respect, the minutes of the SSL board meeting held on 8 October 2015, and recital (D) to the Deed of Alteration (dated 9 October 2015). In essence, the liability as statutory employer under the SSL Pension Scheme necessarily went with the property and assets bearing in mind the importance to CFS and other tCG societies of SSL being released in order to prevent crystallisation etc. in the event of the subsequent insolvency of SSL (which was always anticipated to be at least a real possibility).
- iv) The EOSs prepared by Deloitte in anticipation of Phase 1 of Project Chicago including, in particular, that showing the position in the event of an insolvency before the implementation of Project Chicago, made no provision for contingent liabilities in respect of the SSL Pension Scheme, or indeed the other contingent liabilities in respect of Group Obligations. In this respect, it is relevant to note that the point, at least in respect of other Group Obligations,

was considered at the meeting with the SSL Directors on 16 September 2015. Mr Wormald is recorded in the minutes as having commented that: “*the banking syndicate, bondholder and pension scheme guarantees could be classed as contingent liabilities. A discussion took place around the reasonableness of the directors valuing such guarantees at £nil given that there would likely be a call upon these guarantees by stronger Group entities, prior to SSL.*” Further, it is to be noted that in preparing the balance sheets for the purposes of s. 123(2) IA 1986, neither Mr Rowley nor Mr Davies made any provision therein for any liability in respect of the SSL Pension Scheme liability or other Group Obligations notwithstanding that SSL remained subject to the Replacement Guarantee (from which it was released on 3 February 2016), and that it was yet to be released from the Group Obligations.

- v) PricewaterhouseCoopers in reviews in 2014 and 2015 described the relevant covenants as “*tending to weak*”. However, Mr Jennings cogently commented that they had not used up to date actuarial evidence. Further, I regard it as highly significant that DRCs had reduced to £2.6 million per annum, and that although in March 2016, after the events of 2 November 2015, the TP deficit was expressed to be £48 million, it was not considered that any adjustment to the DRCs of £2.6 million per annum was required, something justified by subsequent events. Whilst there is an element of hindsight involved here, I consider this consistent with the approach of Lord Scott in *Phillips HL* at [26].
- vi) The following exchange in the cross-examination of Mr Squires is, I consider, somewhat revealing:

“Q. The conclusions in your report, in terms of the benefit to SSL of these releases. If you had been advising SSL at the time in November 2015, are these the values that you would have advised SSL that these releases were worth?”

A. It wouldn't be usual to value them because the release was a consequence of the transaction. The reason that it now needs to be valued is because of the dispute that has arisen as a result of the transaction. But that doesn't mean there wasn't a benefit.

Q. I see. So if you had been advising SSL at the time, you wouldn't have expected to have to attribute value to them because it wouldn't have been relevant at that time?

A. Well, there would have been a qualitative point to make which is that you are being released from significant contingent liabilities. But in the circumstances, but for this dispute, it would have been fairly academic.

Q. So if you were a seller then, these figures don't reflect the amount that you would be prepared to reduce your selling price for to reflect these benefits?

A No, because as I have said, the cost -- the risks are asymmetrical ... ”

- vii) This extract from Mr Squires’ cross-examination demonstrates to me that Mr Squires was considering the value of the release in isolation for litigation purposes rather than in the real world of the transaction as a whole that actually happened. I note that Mr Squires accepted under cross-examination that he did not take on board, in producing his reports, that the releases were necessary for the purposes of Project Chicago, that CFS and the other counterparties to SSL were motivated to ensure that SSL was released from liability for the reasons explained above, and other Group societies stood to benefit significantly from Project Chicago. This all, to my mind, demonstrates that Mr Squires’ valuation figure based on a deficit determined on the s. 75 Basis has little to do with reality, whereas a valuation based upon the outstanding DRCs and the TP deficit does.
512. It is thus appropriate to consider what the TP deficit figure was as at 2 November 2015. The difference of approach as between Mr Gibson on the one hand, and Mr Scott on the other hand, can be summarised as follows.
513. Mr Gibson based his calculations on the 2016 triennial actuarial valuation of the SSL Pension Scheme, adjusting backwards to the transaction date of 2 November 2015. Mr Gibson did not change the underlying assumptions, but simply adjusted results to reflect market conditions (e.g. gilt yields) as up to November 2015. In his opinion, rolling back five months from March 2016 provided a more reliable basis than rolling forwards from the earlier 2013 triennial actuarial valuation. Using this approach, he arrived at a TP deficit of £14 million as at 2 November 2015. He explained large shifts between March 2015, November 2015 and March 2016 as being due to gilt yield volatility. He accepted that his deficit figure is lower than the valuation of £48 million in the 2016 triennial actuarial valuation referred to above and explained this on the basis of there having been more favourable financial conditions as at November 2015. However, as further referred to above, the increased TP deficit figure as at March 2016 did not necessitate an increase in the DRCs of £2.6 million per annum payable under the then operative recovery plan given how well funded etc. the SSL Pension Scheme was, as evidenced by subsequent events.
514. As already identified, Mr Jennings’ evidence was that the appropriate valuation figure was the higher of the TP liability figure, and outstanding DRCs. At the time of his report, Mr Jennings understood this to be £19.7 million, hence the figure referred to in his report. However, at trial, the evidence was to the effect that the outstanding DRCs that were in fact required to be paid were no more than £15 million. Hence it is this figure that the Joint Liquidators put forward as being the proper valuation of the release from the SSL Pension Scheme.
515. Mr Scott’s approach uses the 2013 triennial actuarial valuation as his starting point, which he then rolled forward for two years and seven months to November 2015. He accepted that this required the adoption of assumptions regarding interest rate paths, asset performance and the evolution of discount rates. He accepted that a long roll forward was liable to add uncertainty, but he maintained that, in fact, it allowed a more complete picture of changes across the triennial cycle. He further benchmarked

his results to the 2016 triennial valuation. He did not accept that Mr Gibson's approach of rolling back over some four months was liable to be more accurate and he stood by his own approach under cross-examination.

516. When cross-examined regarding Mr Scott's and his own respective approaches, Mr Gibson provided what I considered to be a very cogent explanation as to why his approach was liable to be more accurate. When it was put to Mr Gibson that Mr Scott had taken into account more points of data in his calculation, Mr Gibson responded as follows:

A. I don't think that is the case. I would describe Mr Scott's approach as more complicated than my approach. I'm sure we may come on to appendix 4 of my report where I set out what I have done quite clearly over the five months between March 16 and November 15. Mr Scott has started from the 2013 report. He has then evolved that position on his own modelling, taking into account, yes, necessary data in the interim because he's covering such a long period of time, two years and seven months. Because he then re-benchmarked the 2016 report, I would propose he loses quite a lot of benefit of those additional data items. They are negated by the fact that he has re-benchmarks (sic) 2016

Q. You disagree then as to which is the more robust approach but you accept both of them are typical?

A. So both what Mr Scott and I have done are recognised actuarial approaches. He has done a roll forward with benchmarking, I have done a roll backwards, effectively. I would say my approach is more credible because I have only had to roll back five months. It is a shorter period of time, there is more visibility, it is easy to see what is going on over that period compared to the two years and seven months over which Mr Scott has needed to move – ...”

517. Mr Scott was not able to provide anything approaching as reasoned an analysis as Mr Gibson in explaining why his approach is to be preferred. This factor, taken together with my general preference for the reliability of the evidence of Mr Gibson over that of Mr Scott, leads me to prefer the evidence of Mr Gibson on this issue.

518. Further support for this approach is provided by the DRCs that were actually required, which the evidence suggested were no more than £15 million. I consider that this is subsequent evidence that can be relied upon to support the valuation as at 2 November 2015, albeit relating to subsequent events, applying *Phillips HL* at [26], per Lord Scott. As Lord Scott put it in the relevant passage: “*where the events, some of them, on which the uncertainties depend actually happened, it seems to be unsatisfactory and unnecessary for the court to wear blinkers and pretend that it does not know what has happened.*”

519. There were other criticisms of Mr Jennings' approach and calculations. However, they do not persuade me that any adjustment is required to the figure that Mr Jennings arrived at, particularly bearing in mind the DRCs that were required to be paid as referred to above. I do not consider that these additional factors ought to lead to any

different figure representing a hypothetical negotiated figure as between willing buyer and seller based upon the cost of retaining the SSL Pension Scheme as at 2 November 2015. The particular points put to Mr Jennings were the following:

- i) The suggestion that Mr Jennings had not considered future risk over a sufficiently long period of time. As to this, for the purposes of the present exercise at least, I consider that Mr Jennings sufficiently explained that his view was that the relevant period for assessment was until the scheme reached self-sufficiency, with support for his position being provided by what actually occurred so far as the payment of DRCs was concerned.
- ii) That he had insufficiently taken into account variations in gilt yields. As to this, he convincingly explained that hedging should have meant that gilt yields would not materially affect the TP deficit.
- iii) That he had made no explicit allowance for longevity risk. As to this, I consider that he convincingly played down the longevity risks.
- iv) It was said that he had made no allowance for GMP equalisation cost, which the actuarial material suggested could be c. 1.5% of liabilities. As to this, the evidence was of varying practices as to whether that should have been brought into account at the relevant time. In any event, the percentage in question does not significantly move the dial so far as quantification is concerned.

520. In all the circumstances, preferring the evidence of Mr Gibson and Mr Jennings as I do, I find that the value from the point of view of SSL of its release from liability as statutory employer under the SSL Pension Scheme, and any contingent liabilities relating to the SSL Pension Scheme, was no more than £15 million. I have taken this figure rather than Mr Jennings' original figure of £19.7 million because the actual DRCs paid total only £15 million.

Value of release of contingent liabilities of SSL as guarantor for Group Obligations

521. As referred to in paragraph 497 above, it was Mr Squires' evidence that, with regard to the contingent liabilities in respect of Group Obligations, the appropriate course is to apply so-called "*expected loss principles*", i.e. to apply the formula that I have described in that paragraph to arrive at a figure representing what SSL's expected loss might have been had not CFS stepped into SSL's shoes as guarantor in respect of the Group Obligations.

522. While such principles may be of assistance in a banking context to estimate credit risk and how much a bank might expect to lose over a given period of time, I do not consider that this provides a proper measure of the value, from SSL's point of view, of the release from liability as guarantor for the Group Obligations in the circumstances of the present case. I consider that this approach is somewhat akin to the application of the deficit determined on a s. 75 Basis in the case of the release from liability in respect of the SSL Pension Scheme. In essence, it reflects an estimate of the price to be paid to be entirely de-risked from the liability in question without any proper consideration of how the release fits in with the transaction as a whole.

Approved Judgment

523. Mr Squires' application of expected loss principles produces the £357.4 million figure that the Respondents assert represents the value, from SSL's perspective, of the release. Again, having regard to the significance or otherwise of the release in the context of the "*transaction*" taken as a whole, for the same reasons as apply in relation to release from the SSL Pension Scheme liability, I consider that such a figure flies in the face of reality and common sense.
524. I consider that many of the factors that I have identified in paragraphs 511(i)-(vii) above apply equally in respect of this valuation exercise, and serve to undermine its credibility.
525. However, I also have a number of difficulties with Mr Jennings' approach on this issue. As I understand it, his underlying rationale remains to seek to arrive at a figure, reflective of the value of the release from SSL's perspective, that relates to the cost (if any) to SSL of continuing without an immediate release of the relevant guarantee liabilities. As Mr Jennings put it at paragraph 4.6 of his report: "*My approach therefore involves an assessment of the potential cost to SSL (if any) of the contingent liabilities under the Guarantees.*"
526. He then identified at paragraph 4.7 that this involved a consideration of three key areas, namely:
- i) The likely scenarios in which the contingent guarantee liabilities under the relevant guarantees might crystallise against SSL;
 - ii) The probability of such contingent guarantee liabilities crystallising against SSL; and
 - iii) The actual cost to SSL of meeting these crystallised contingent guarantee liabilities in such scenarios.
527. At risk of simplification, what Mr Jennings did is to apply a variation of Mr Squires' expected loss model, but with the following variations:
- i) He applied S&P's European default probability table rather than S&P's Global table used by Mr Squires.
 - ii) He applied a 10-year horizon, in contrast to Mr Squires' use of perpetuity.
 - iii) Whilst Mr Squires assumed that default would cause enforcement/insolvency, Mr Jennings predicted that there was only something between a 1/3rd and 1/6th chance of it doing so, having regard to the potential for negotiation to avoid enforcement/insolvency following an event of default. There is some support for this approach in the light of Mr Wormald's observations at the meeting on 16 September 2015 referred to in paragraph 511(iv) above.
 - iv) Mr Jennings then sought to express the figure arrived at as an expected dividend in an insolvency of SSL with a return of c. 5p in the £1 or less, using Deloitte's EOS.
528. The principal difficulties that I see in Mr Jennings' approach are the following:

- i) I can see that Mr Jennings' approach works in the case of the SSL Pension Scheme liability where one can identify an actual liability in the form of the TP deficit, and a specific actual obligation to make DRCs, in the context of a pension scheme that was investing prudently, was well funded, and was significantly de-risked and hedged. This provides a more obvious basis for identifying a specific figure. However, we are here concerned with an assessment in relation to contingent liabilities, and how they might be dealt with between parties to a transaction akin to that in the present case.
- ii) There are, as I see it, a number of difficulties with an approach based on the amount that SSL might actually have to pay by way of a dividend on liquidation. Firstly, this bears no relation to what the party taking on the liability, here CFS, might, in practical terms, have to pay out in respect of the liability taken on. There is force in Mr Squires' observation under cross-examination that: *"if you valued a debtor's obligations by reference to its own resources, it could never be insolvent, which would be ridiculous."* Further, I consider that the Respondents have a good point that the approach suggested is inconsistent with the approach of Zacaroli J in *Re Burnden Holdings (UK) Limited* (supra) at [504], where he said:

"Considered from the point of view of BHUK, the grant of security involved no transfer of value from BHUK. If a company uses an asset worth £100 to repay a debt of £100, there is no question of the transaction being at an undervalue. From the company's perspective the value received equals the value given. It may well be that, looking at it solely from the creditor's point of view, the debt had a value less than £100 because of [sic] the company was unable to pay the full amount, so it received more than it gave. But that is irrelevant as value is to be assessed from the point of view of the company."

529. In short, I do not consider that Mr Jennings' approach meets the objective identified in paragraph 4.6 of his report, but this is perhaps unsurprising bearing in mind that one is here concerned with purely contingent liabilities.
530. Having rejected the approach of both experts in providing a proper assessment of the value of the release of the Group Obligations from SSL's point of view, it is necessary for me to seek to do the best I can to arrive at a valuation figure by reference to the evidence before me, having regard to the fact that, consistent with what was said by Lord Scott in *Phillips HL* at [27], the onus is essentially on the Respondents to establish significant value.
531. In all the circumstances, and having regard, in particular, to the following factors, I do not consider that there was anything significantly more than nominal value from SSL's point of view in its release from liability in respect of Group Obligations, in the context of the relevant *"transaction"* taken as a whole.
532. The key factors that lead me to this conclusion are the following:

- i) The necessity of the release of SSL from liability in respect of Group Obligations for the purposes of Project Chicago given the risk of default on insolvency of SSL if it were to remain as a guarantor, and thus the benefit to be gained by CFS and other tCG societies in procuring such release upon the transfer of the “good” properties and assets to CFS pursuant to Project Chicago.
 - ii) The fact that such release was, in effect, described by Mr Wormald as having no intrinsic value at the meeting on 16 September 2015 referred to in paragraph 511(iv) above when he recognised the appropriateness of the SSL Directors placing a value of “nil” thereon.
 - iii) The fact that, although I have found the release of liability for the Group Obligations did form part of the “*transaction*”, unlike in the case of the release from liability in respect of the SSL Pension Scheme, at no point is such release expressed as forming part of the consideration received by SSL. As we have seen, there was documentation that referred to the release from liability in respect of the SSL Pension Scheme as being in consideration for the transfer of the property and assets to CFS, namely the minutes of the SSL board meeting on 8 October 2015 and recital (D) to the Deed of Alteration referred to in paragraph 511(iii) above.
533. I will therefore take as the appropriate nominal value figure the lower of Mr Jennings’ figures, namely £1.9 million, which I find was the value, from SSL’s perspective, of its release from the Group Obligations.

L.IV Properties transferred by SSL

Introduction

534. I now turn to the issues that arise concerning the value of the consideration provided by SSL by the transfer, pursuant to the Foodstores Sale Agreement and the Rochpion Sale Agreement, of the “*Properties*” the subject matter thereof, being the “*Freehold Properties*” and the “*Leasehold Properties*” the subject matter thereof. An issue may also arise as to the value of properties transferred by SSL to CGF prior to 2 November 2015.
535. With regard to the transfer of properties to CGF, as I understand it, these transfers took place ahead of 2 November 2015, and the Respondents’ position is that consideration was provided to SSL by way of credit to the ISLA. I consider that the better view is that the transfer of such properties falls outside the scope of the impugned transaction and that as the effect thereof will not affect the overall result, not least in view of the recognition that there is a creditor cap, it is unnecessary for me to make any formal findings in respect thereof. As I understand it, the Joint Liquidators’ property valuation figures increase by some £6,573,943 if the properties transferred to CGF are brought into account. The Respondents’ property valuation figure includes the properties transferred to CGF.

536. Clause 6.1 of the Foodstores Sale Agreement provided that of the total consideration of £496,334,262 the subject matter thereof, £173,811,333 represented the “*Properties (including the Fixtures)*”. This reference to “*Fixtures*” is plainly a reference to fixtures that form part of the respective Properties, rather than “*Equipment*” to which the Foodstores Sale Agreement ascribed a separate figure of £111,422,535. The Rochpion Sale Agreement provided that the consideration for “*the Properties*” was £4, and for “*Equipment*” was £1.
537. As will be apparent, the Joint Liquidators’ primary position is that one does not need to get into the question of the actual value of the properties because the relevant transaction ought simply to be taken to be the Withdrawals of Share Capital. However, they also say that even if they are wrong, as I have held that they are, in saying that the relevant transaction simply related to the Withdrawals of Share Capital, and involved a wider transaction, one is still not concerned with the actual value of the properties (or the equipment) because the present case is not a case where the relevant assets were sold at an undervalue under the terms of the relevant sale agreements, rather they were sold at book value under the Foodstores Sale Agreement and the Rochpion Sale Agreement, and SSL’s right to receive payment of the consideration under those agreements was principally discharged through the Withdrawals of Share Capital. On the Joint Liquidators’ case, the only difference is that if the relevant transaction was, as I have found, wider than they principally submitted, then one might potentially take into account any consideration provided by the assumption of the relevant pension and other liabilities. Consequently, a preliminary issue arises as to whether the expert evidence as to the value of the properties is relevant in any event.
538. Subject to this preliminary issue, as I have identified in paragraph 438(i) above, the Joint Liquidators, supported by their expert evidence, place a value on the properties transferred by SSL of between £227,878,654 and £234,452,599 (the latter figure including also the properties transferred to CGF), and the Respondents, supported by their expert evidence, place a value of only £21.1 million thereon (also including properties transferred to CGF and including a 10% portfolio discount). The difference between the parties in relation to the value of the properties is therefore between £206,778,654 and £213,352,599.
539. The Joint Liquidators rely upon the report of Ms Seal (of JLL) dated 15 July 2025 (revised on 8 October 2025), and the Respondents rely upon the report of Mrs Fellows (of Savills) dated 15 July 2025, and a supplemental report prepared by Mrs Fellows dated 13 October 2025. In addition, I have had the benefit of a Joint Statement prepared by Ms Seal and Mrs Fellows dated 30 October 2025. Ms Seal and Mrs Fellows were both extensively cross examined at the trial.
540. Amongst other issues that arise between the parties that go to the valuation question, the main drivers for the differences in valuation between the parties, which I consider further below, are the following:
- i) Firstly, whether it is correct to attribute significant negative valuations, in particular to transferred trading leasehold properties, and to bring these negative valuations into account in assessing the overall value of properties transferred by SSL.

- ii) Secondly, in considering the valuation of leasehold properties:
 - a) Whether it is appropriate, as maintained by Ms Seal, to apply a target rent formula of 4% of turnover to be compared with the passing rent in arriving at a profit rent figure, or, alternatively, as maintained by Mrs Fellows, to determine the market rent at the relevant time, and to compare that with the passing rent; and
 - b) Whether and to what extent to allow for void periods and/or rent free periods.
- iii) Thirdly, in respect of the valuation of freehold properties transferred:
 - a) Whether it is appropriate, as maintained by Ms Seal, to determine value by reference to a sale and leaseback of the relevant properties, rather than simply to look at the value on the basis of a sale with vacant possession as done by Mrs Fellows;
 - b) Whether, in valuing by reference to a sale and leaseback, it is appropriate, as contended by Ms Seal, to use her target rent of 5% of turnover for the purposes thereof, or a market rent; and
 - c) As to the yield to be applied.

Preliminary issue

541. As I have identified, it is the Joint Liquidators' position that even if, as I have found, the transaction in question is properly to be regarded as wider than simply the Withdrawals of Share Capital by CGF, the properties, having been transferred for book value, they should not be regarded as having been transferred at an undervalue. Rather, in determining the consideration provided to, and that received by SSL, one should simply take the book value provided for by the respective sale agreements as being the consideration provided in respect of the properties. This would, it is submitted, render irrelevant and redundant the expert evidence as to property valuation, and as to equipment, that has been obtained.
542. I do not consider this approach can be correct. One has, in the present case, the multilateral set of arrangements, recorded in the Funds Flow Letters, that I have described above, whereunder, at least so far as the assets the subject matter of the Foodstores Sale Agreement were concerned, they were transferred to CFS under set-off arrangements providing for them to be paid for by way of the Withdrawals of Share Capital by CGF, and through the repayment of the ISLA. If I am wrong as to my finding that consideration was provided in respect of the Withdrawals of Share Capital, then in considering the question of TUV, I consider that it is necessary to consider the actual value of what was both provided and received by SSL pursuant to the arrangements as a whole that were in place, and that if the actual value of the properties transferred was significantly less than the consideration attributed thereto by the Foodstores Sale Agreement, then that is something that is required to be taken into account in considering whether, overall, there has been a TUV.

Approved Judgment

543. Consequently, to the extent that, contrary to my finding, consideration was not provided in respect of the Withdrawals of Share Capital, I consider it necessary to consider the actual value of the properties transferred by SSL in order to determine whether there has, in the circumstances, been a TUV.

Further preliminary considerations

544. The present valuation exercise does, I consider, raise a number of particular difficulties that require to be borne in mind in considering the approach that the respective experts have taken.

545. Firstly, the Foodstores Sale Agreement provided for the sale by SSL to CFS of “*the Business and Assets*”, where “*Business*” was defined as being the “*retail and petrol sales business carried on by [SSL] at the Properties ...*”. “*Properties*” was included within the definition of “*Assets*”.

546. At an early stage in the present case, directions were given providing for property valuation evidence to be adduced. The Joint Liquidators subsequently, last year, took the view that, as the Foodstores Sale Agreement had provided for the transfer of the properties and the business carried on therefrom, a direction should be sought to allow for expert evidence in the field of “*business valuation*”, in order to value the business transferred as one business, in contrast to a valuation of the individual properties transferred.

547. On 4 March 2025, Fancourt J dismissed an application dated 3 February 2025 seeking such a direction – see [2025] EWHC 526 (Ch). The primary ground for rejecting the application was that this was not how the case had been pleaded.

548. This prompted an application dated 25 April 2025 for permission to re-amend the Points of Claim and to rely upon expert evidence in the field of business valuation once the Amended Points of Claim had been re-amended. In support of the application, it was maintained on behalf of the Joint Liquidators that to refuse permission would be liable to result in the case being determined on a false basis if the valuation evidence were restricted simply to the value of the individual properties transferred which would, it was said, undervalue the Joint Liquidators’ claim by hundreds of millions of pounds. The application to amend was dismissed by HHJ Hodge KC sitting as a Judge of the High Court, by order dated 29 July 2025 – see [2025] EWHC 1892 (Ch). The primary basis for rejecting the application to amend was that the amendment amounted to a “*very late*” amendment that was liable to threaten the trial date. Judge Hodge dismissed the application notwithstanding the concerns raised by the Joint Liquidators, even though it “*may seem harsh*”.

549. On 29 October 2025, I determined an application brought by the Respondents to strike out a number of paragraphs of Ms Seal’s report. The particular focus of the application was on paragraph 1.20 of Ms Seal’s report where she had stated that she was instructed to opine on the open market value of the subject matter of the Foodstores Sale Agreement on the basis that they were “*marketed for sale/assignment as part of a going concern sale with the above additional assets, rather than only the property/lease itself being sold/assigned.*” The additional assets were referred to in paragraph 1.19, and included the business carried on at the properties.

Approved Judgment

550. I declined to strike out the relevant paragraphs of Ms Seal's report. I did so on the basis that it was necessary to consider what Ms Seal had actually done in her report, and that it was by no means clear that Ms Seal had, in the assumptions that she had applied, gone beyond the Joint Liquidators' pleaded case, or adopted assumptions that she was not entitled to adopt, and that whilst particular discrete issues might arise for determination at trial, there was no proper basis for striking out any part of Ms Seal's report.
551. However, as the Respondents point out in their closing submissions, I must be careful to ensure that the expert evidence that I rely upon does not extend beyond the Joint Liquidators' pleaded case, and that Ms Seal's evidence is not being used as a backdoor attempt to rely upon a valuation of the business operated from SSL's stores rather than the individual properties.
552. A further consideration is that the case concerns the valuation of a large number of properties by reference to their value as at November 2015, i.e. over 10 years ago. So far as numbers are concerned, prior to 2 November 2015, SSL had some 639 properties (including 137 petrol filling stations ("PFSs")). It retained 99 of the properties and transferred 425 to CFS and 70 to Rochpion. 45 properties had previously been transferred to CGF. The numbers of properties in question, and the fact that it has been necessary to consider the value thereof as long ago as over 10 years ago, has plainly presented the valuation experts with a difficult exercise to perform.

The experts

553. The experts, Ms Seal and Mrs Fellows, have each adopted a significantly different approach to the very formidable valuation exercise with which they were confronted.
554. Ms Seal, in her evidence on behalf of the Joint Liquidators, has sought to draw conclusions across the portfolio of properties by reference to broad objective industry standards and her own experience and expertise as a property valuer. Thus, she has not, for example, visited the properties nor sought to identify the specific competitive considerations in each location which might have affected the value of a specific property in November 2015. Her position is that, in many instances, information to this level of detail is not available, or is unreliable 10 years after the event, hence her reliance on what she maintains are objective criteria.
555. Mrs Fellows, in her evidence on behalf of the Respondents, has on the other hand adopted a significantly more granular and subjective approach to the analysis. She (in many instances through individuals in her team) opted to visit a significant number of the properties in question and sought to understand the specific competitive dynamics as applicable to each, in order to reach a judgment as to the market value for each as at November 2015. Many of the factors that she has taken into account are more qualitative than those of Ms Seal.
556. Despite the differences between them, I am satisfied that both Ms Seal and Mrs Fellows have both sought to do their best to assist the Court in the difficult task that they were required to perform.

557. By way of general observation, I do have a concern as to the reliability of a number of the objective criteria that Ms Seal has relied upon, and a concern that this has resulted in an overvaluation of the properties in question.
558. On the other hand, so far as Mrs Fellows is concerned, I have a concern as to the reliability of the comparable evidence relied upon in relation to the various properties after this length of time, and as to the reliability of judgments exercised in reaching valuation figures, in particular where certain large negative figures have been arrived at.
559. Mrs Fellows, and to a lesser extent Ms Seal, have both found that a number of properties had a negative value, and have brought these negative values into account in arriving at overall property valuation figures. In the light of my findings above as to the correct approach to the valuation of consideration for the purposes of s.238(4) IA 1986, this does raise a question of law as to how the same ought to be brought into account for present purposes.
560. The considerations that I have identified above are best dealt with in the context of a consideration of the separate classes of property transferred, and the expert evidence that has been adduced in relation thereto. Likewise, a number of specific criticisms made by each party in respect of the other party's expert.
561. I will therefore consider in turn each of the respective categories of property, namely: (i) Transferred trading leaseholds, (ii) Freeholds, (iii) Trading long leaseholds, (iv) Trading mixed tenures, (v) Non-trading properties and (vi) PFSs.

Transferred trading leaseholds

562. So far as figures are concerned, Ms Seal valued the trading leaseholds transferred to CFS at £15,823,055, whereas Mrs Fellows valued the same at a negative £69,848,274, a difference of £85,671,329. No trading leaseholds were transferred to Rochpion. To the extent relevant, Ms Seal valued the properties transferred to CGF at £5,130,792, whereas Mrs Fellows valued the same at £12,865,624, a difference of £17,999,415.
563. The valuation experts both accept that there are limited transactions in which a leasehold interest of the present kind is sold, on its own, in the open market, otherwise than as part of a sale including the business carried on thereat. It was Mrs Fellows' evidence that potential operators, as opposed to investors, would typically prefer to negotiate their own fresh lease. This is said by the Respondents to support Mrs Fellows' overall low valuations for what they describe as a relatively unattractive category of property interest.
564. Ms Seal's approach can, broadly speaking, be summarised as follows:
- i) Ms Seal treats these trading leasehold interests, where SSL was actually trading from the relevant premises as at 2 November 2015, as being capable of being either an asset, a liability, or as neutral (i.e. as having zero value) from a valuation perspective.
 - ii) She identifies value by reference to a profit rent, calculated as being the difference between 4% of annual turnover achieved from the premises in

question, minus the passing rent. So far as this 4% figure is concerned, this is said to be based upon her experience, although she had not valued an occupational leasehold for a grocery store prior to the present exercise. However, she places reliance upon an article published by Atrato, a European focused, multi-asset investment group, called “*Supermarket Rents 101*” taken from the research section of the latter’s website. This suggests that a supermarket would look to pay rent representative of 4% of turnover.

- iii) Having arrived at a figure for the profit rent, this is first capitalised over the remainder of the term and then discounted annually by 20% to reflect risk and erosion of value over time.
- iv) Where there is no profit rent, Ms Seal considers a lease to amount to a liability where the passing rent exceeds 4% of turnover and the store in question makes a trading loss exceeding 5% of turnover. The 4% of turnover figure derives from the Atrato article, and its combination with the 5% of turnover figure represents Ms Seal’s assessment of where the relevant lease is properly to be regarded as amounting to a liability. Where, applying these criteria, the lease is not to be regarded as a liability, then it is treated by Ms Seal as having a neutral value (i.e. zero).
- v) Where the relevant lease is properly to be regarded as amounting to a liability, then Ms Seal arrives at a liability figure by reference to rent, rates and mitigation assumptions.

565. In contrast, Mrs Fellows’ approach can be summarised as follows:

- i) Mrs Fellows, or a member of her team based locally and subject to her supervision, valued each lease on a property-by-property basis, reflecting local market conditions and comparables.
- ii) Mrs Fellows also seeks to arrive at a profit rent, but in her case representing the difference between what is determined to be the market rent at the relevant time and the passing rent, consistent, she says, with conventional leasehold valuation principles. The profit rent is then capitalised, but only to the next lease event, i.e. a rent review, break or expiry of the relevant term.
- iii) In arriving at a market rent for the relevant properties, Mrs Fellows and those assisting did not rely upon turnover, considering the same to be an inappropriate reference point for the purposes of arriving at a market rent. However, where a particular property was considered to have been particularly attractive, or as having had some scarcity value, then, as a matter of judgment, a figure representing “*key money*” was added to the equation to reflect the same.
- iv) Mrs Fellows treats a lease as a liability where she, or the relevant valuer at Savills assisting her with the exercise, considered that the relevant lease would not be assignable without the payment of a reverse premium. This required an exercise of judgment both as to whether the lease would be assignable without the payment of a reverse premium, and as to what that reverse premium might be in order to establish the negative value. In practice, this would be the

reverse premium thought likely to have to be paid to an investor prepared to take on the lease in return for the reverse premium. The amount of the likely premium, in each case, depends upon a consideration of a number of factors including a judgment as to likely void and rent-free periods.

566. In the light of the respective submissions that were made, I have a number of concerns regarding the approach of each of the experts, as follows.

567. With regard to Ms Seal's evidence:

i) I am not convinced that the Atrato article provides a sound basis for the proposition that the operator of convenience stores such as those operated by tCG would consider 4% of turnover to be a "*target rent*". This article is just one article with no empirical evidence as such to support it. Further, as the Respondents point out, the article related to a "*supermarket*" of a size greater than most of the stores in question, and Atrato's metric was based on what might be paid at a "*strong trading site*", which would certainly not apply to the whole SSL portfolio. Thus, I consider it likely that, viewed in the round, the application of this 4% of turnover figure to arrive at a profit rent is liable to result in an overvaluation.

ii) I consider that there are similar difficulties with the formula applied by Ms Seal in order to determine whether or not a particular lease might have a negative value, namely a passing rent of more than 4% of turnover and a trading loss of more than 5% of turnover. The same problem arises in respect of the passing rent in excess of 4% of turnover figure. So far as the trading loss in excess of 5% of turnover figure is concerned, Ms Seal was unable to provide any cogently reasoned basis for her approach and accepted that it was not based upon an industry standard, but was a figure adopted based on unspecified and unexplained conversations. I can see that there might be scope for the application of some formula to determine, based upon what level of business might be capable of being achieved at a particular property, whether there was any intrinsic value in the leasehold interest. Further, if a properly reasoned formula could be found, this might be more reliable than the approach adopted by Mrs Fellows. However, I am not satisfied that the particular formula relied upon by Ms Seal has been adequately justified. Again, I have a concern that the application of this formula is liable, if anything, to lead to an overvaluation.

568. With regard to Mrs Fellows' expert evidence, apart from the negative valuation issue that I consider separately below, I have the following particular concerns:

i) Mrs Fellows' determination as to whether there was a profit rent, and more generally as to whether the relevant property was either under rented or over rented, turned upon her determination, or that of the relevant person assisting her in the exercise, as to the market rent to be compared with the passing rent. Although Mrs Fellows and those assisting have no doubt conscientiously, using their granular approach, sought to do their best to determine the market rent by reference to comparables and local, and more general, market conditions, I am not satisfied that this can be regarded as a particularly accurate or satisfactory exercise this length of time after the relevant date of 2

November 2015. Further, it is evident that a number of comparables relied upon in many instances related to very different premises with no clear narrative or explanation as to how they assist so far as arriving at a market rent for a convenience store in the particular locality concerned.

- ii) Although adjustments were made in respect of what was said to be strongly performing stores so as to increase what was said to be the market rent by reference to the inclusion of “*key money*”, this appears to be a subjective exercise of judgment rather than a process determined by any objective criteria. The concept of “*key money*” was not, really, cogently explained. It appears to recognise that it might be appropriate to take into account the inherent profitability of a business carried on from the property in question, but without applying any objective criteria for determining how that ought to be taken into account.
 - iii) Likewise, in respect of the determination as to whether a particular leasehold property was regarded as being readily assignable. This was, again, largely down to subjective judgment. I consider that the Joint Liquidators have a fair point that the exercise conducted by and on behalf of Mrs Fellows has resulted in a significant number of negative valuations that appear difficult to support, including, by way of example a property at Malmesbury occupied by SSL under a lease with an unexpired term of nine years.
 - iv) The Joint Liquidators refer to the store at Malmesbury having made an annual profit of £832,000, from a turnover of £6,740,652. This figure of £832,000 is, perhaps, more accurately described as a contribution to SSL’s profits without there being any real analysis as to how this was arrived at and what was taken into account. Nevertheless, this appears to have been a store at which a successful business was being conducted. Even Mrs Fellows’ report referred to the property as being rack rented, i.e. it was neither under rented nor over rented. Nevertheless, Mrs Fellows attributed to it a negative value of £550,000 on the basis that it was not readily assignable without the payment of a reverse premium to an investor who would suffer a void period and a rent free period in order to get a grocer subtenant. However, not only was SSL using the property for the purposes of a successful business, but it was common ground on the evidence that there would have been demand from other supermarket occupiers for this store. In reality, SSL would only have disposed of this leasehold property as part of the disposal of the business carried on therefrom. It is, I consider, difficult to see that this leasehold property should, for the purposes of the present exercise, be regarded as having been, in effect, a liability of SSL from which it was relieved by the transfers that took place on 2 November 2015.
 - v) Further examples are provided by other properties including those at, for example, Ledbury, and Clavering Centre Whickham.
569. On the question of the negative valuations that Mrs Fellows has arrived at, there is, I consider, a clear analogy with the position in respect of the liabilities as statutory employer in respect of the SSL Pension Scheme. It may have cost upwards of £350 million odd to go into the market and obtain a complete release from liability, but this

reflects a transaction that SSL would never, in practice, have entered into. Likewise, I consider, the idea of a sale, and in particular one that was trading, to an entrepreneurial investor purchasing the leasehold interest for a negative premium, effectively to relieve SSL of the liability associated therewith. Even Mrs Fellows accepted that this was not something that she had seen occur in practice, lending support to the Joint Liquidators' contention that this is a wholly unrealistic scenario that would never occur in real life.

570. Applying the valuation principles that I have considered in some detail above, my concern is that the transfers of the trading leasehold properties require to be considered in the context of the impugned transaction as a whole, and that valuing them in isolation without proper regard to the fact that they were being disposed of as part of the transaction as a whole has resulted in valuations that reflect sums of money that SSL is unlikely ever to have had to pay to get rid of the properties in question by transfers that it is unlikely ever to have entered into. The position may be different in respect of non-trading premises that were contemporaneously regarded as onerous, as to which see paragraph 595 et seq below, but we are here concerned with "good" stores that were trading.
571. Further, as I have identified in paragraph 478 above, in *Re Thoars HC* at [101], Judge Norris emphasised that Lord Scott had, in *Phillips HL* at [30], referred to the amount that a reasonably well-informed purchaser was prepared, in arms' length negotiations, to pay for the asset as being the *prima facie* position, but no more than that, and thus that where there was no ready market for a particular asset, some different approach to valuation may be required. Likewise, I consider, where one is concerned with an asset that could only be disposed of by some hypothetical transaction that would never, in practice, have occurred as I consider is the case in relation to the idea of a transfer to an entrepreneurial investor for a substantial negative premium.
572. It is necessary to consider where my findings above take matters so far as the figures are concerned. As I have indicated, for the reasons set out above, I am concerned that Ms Seal's approach has led, if anything, to an overvaluation. On the other hand, I am concerned that Mrs Fellows' approach has led to an undervaluation, not only because she has arrived at negative valuations that cannot be supported on the evidence and as a matter of principle, but also because of her approach with regard to the assessment of the market value of properties and the subjective process of identifying where an addition in respect of "key money" is appropriate.
573. The transfer of the trading leaseholds was required in order to give effect to the transaction as a whole. Having rejected Mrs Fellows' valuation approach that has led to the negative valuations in respect of individual properties that she has arrived at, and in the light of my concerns as to other aspects of each of the experts' valuation approach, including those that I consider are liable to have led to overvaluations by Ms Seal, I consider that the appropriate course is, for present purposes, to proceed on the basis that the transferred trading leaseholds had a neutral (zero) value for the purposes of s. 238(4)(b) IA 1986 considered in the context of the impugned transaction as a whole.
574. I do not consider that this approach is, in any way, inconsistent with the Joint Liquidators' pleaded case, nor do I consider that it undermines the decision to refuse

the Joint Liquidators' application for permission to amend in order to plead a case based on a disposal of the business of SSL as a whole, and to adduce expert evidence relating thereto. It simply recognises that there was an overall transaction that has resulted in CFS taking on SSL's "good" stores and leaving behind the bad stores, which has always been the Joint Liquidators' case, and seeking to ascribe a value to the leasehold interest in the relevant properties, and not the business carried on thereat, in that context. Further, and perhaps most importantly, it is, I consider, an approach that more accurately reflects the realistic value of the leaseholds from SSL's point of view. This does, I consider, amply justify the neutral (zero) valuation that I have arrived at.

Freeholds

575. In respect of the transfer of freehold properties and Scottish heritable properties, Ms Seal valued the properties transferred to CFS at £178,552,507, and Mrs Fellows valued the same at £79,341,800, a difference of £99,211,507. So far as properties transferred to Rochpion were concerned, Ms Seal valued the same at £3,175,623 and Mrs Fellows valued the same at £1,808,055, a difference of £1,367,568. The total difference between the parties is therefore £101,578,278.
576. By way of summary as to valuation approach, Ms Seal valued these properties on an investment basis assuming a sale and leaseback to tCG, and using her target rent formula of 4% of turnover. She applied a uniform yield of 5.5% and, given that sale and leaseback was involved, no provision was made for voids or re-letting assumptions. Vacant possession was not assumed on the basis that the seller would remain in occupation.
577. Mrs Fellows also valued these properties on an investment basis, but on the basis of a market rent achievable from a third-party tenant granted vacant possession. Her model therefore allowed for letting voids and rent-free periods. Her approach assessed the market rent on a property-by-property basis, rather than by application of a uniform formula relating to turnover. Further, rather than applying a uniform yield, she determined a bespoke yield for each property dependent upon local conditions.
578. The first objection taken by the Respondents to Ms Seal's approach is that valuing by reference to a sale and leaseback is said to be inconsistent with the RICS Red Book definition of "market value" and should be excluded on that basis. "Market value" is thereby defined in accordance with IVS102 as:

"The estimated amount for which an asset and/or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion."

579. Further, reliance is placed by the Respondents upon paragraph A10.02 of IVS102 as providing that market value:

"... specifically excludes an estimated price inflated or deflated by special terms or circumstances such as atypical financing, sale and leaseback arrangements, special considerations or concessions granted"

by anyone associated with the sale, or any element of value available only to a specific owner or purchaser.”

580. The Respondents submit that this specifically excludes a sale and leaseback arrangement from any consideration of “*market value*”, and that the Court should therefore only entertain Mrs Fellows’ valuation.
581. I agree with the Respondents that a valuation conducted by reference to a sale and leaseback would be inconsistent with the application of the definition of “*market value*” provided by the provisions of the Red Book that I have referred to. I do not consider that a reasonable reading thereof permits a construction that would limit the exclusion of such a valuation to the situation where atypical financing was involved. I consider that this is supported by the fact that paragraph A10.02 of IVS102 goes on to provide that there should be excluded: “*any element of value available only to a specific owner or purchaser.*”
582. However, in the present context, as the authorities demonstrate, we are specifically concerned for the purposes of s. 238(4) IA 1986 with value from the company’s/society’s position. In this context, I consider it must be relevant that it would have been open to SSL, as an alternative to entering into the impugned transaction, to have realised the value of the freehold interest in the relevant properties by entering into a sale and leaseback arrangement. If that is the case, then I can see no good reason why a valuation for the purposes of s. 238(4) IA 1986 should not, as contended by the Joint Liquidators, have regard to what might have been achieved through such an arrangement. Nothing said by Lord Scott in *Phillips HL*, at [130], leads, in my view, to a different conclusion.
583. Plainly, the capital value arrived at through a valuation on an investment basis is going to be highly dependent upon the accuracy of the rent figure used for the purposes of the exercise. Given the concern that I have already expressed in relation to leasehold trading properties in respect of the use by Ms Seal of her target rent of 4% of turnover, I am concerned that the use of such formula is liable to have produced an overvalue of the freehold interest. I prefer Mrs Fellows’ approach of seeking to arrive at a market rent on an individual basis for the individual properties, although this will, again, be subject to the difficulties that I have already identified in having confidence in an exercise requiring the assessment of market rents dating back to November 2015. However, to the extent that a market rent was used for the purposes of a sale and leaseback valuation exercise, bearing in mind that vacant possession is not required, and that there will be no void period, I do not consider it to be necessary to include provision for letting voids or rent-free periods within the model applied.
584. With regard to the issues concerning yield:
- i) I agree that there are difficulties with the application of a standard yield of 5.5% as applied by Ms Seal. On a proper analysis, I do not consider that Ms Seal’s Appendix 8, and the chart included at paragraph 12.5 of her report provide a sufficiently solid basis for adopting a standard yield of 5.5%.
 - ii) Further, as the Respondents point out, whilst JLL’s table of “*Prime Retail Yields*” for December 2015 shows a figure of 5.5% for “*Foodstores-*

Convenience”, and 4.5% for *“Foodstores - Supermarkets”*, it is stated that: *“Prime yield relates to well-specified, well configured Grade A stock let rack rent on 10-15 year lease in a prime location to a strong covenant.”* I agree that this cannot fairly be applied to every transferred freehold in the present case.

- iii) On this basis, whilst not perfect given the length of time since the relevant transactions were entered into, I prefer Mrs Fellows’ approach of considering yield on an individual basis for the respective properties.

585. My overall conclusion therefore is that by excluding sale and leaseback, Mrs Fellows has undervalued the freehold properties. On the other hand, by the use of her target rent of 4% of turnover, and a standard yield of 5.5%, I consider it likely that Ms Seal has overvalued the freehold properties, and that the valuation lies somewhere between the two figures. Unfortunately, on the materials available to me I am in no position to determine where exactly, between the two figures, the correct valuation lies. I will return to consider the effect of this conclusion in monetary terms below.

Trading long leaseholds

586. The only transfers made by SSL of trading long leasehold properties were to CFS. In relation thereto, Ms Seal arrived at a valuation of £18,666,383, and Mrs Fellows at a valuation of £12,544,400, a difference of £6,121,983.

587. Ms Seal and Mrs Fellows adopted respectively essentially the same approach as they adopted in relation to freeholds, although Ms Seal did not apply a uniform yield to each property, but rather adopted a bespoke approach. This is demonstrated by, for example, the property at Harpenden, where she capitalised the net rent at 8% to reflect the shortening long leasehold. Further, I note that in relation to the property at Harpenden, Ms Seal referred to assuming a sale and leaseback or a letting to another grocer. Each such assumption made no provision for a void or rent-free period.

588. Thus, subject to Ms Seal’s different approach to yield, I consider that essentially the same considerations apply as to the reliability of Ms Seal’s and Mrs Fellows’ respective valuations, and that the true valuation figure lies somewhere between their two respective valuation figures.

589. However, the Respondents identify an additional consideration in relation to Harpenden. Although Ms Seal’s original valuation for this property was £3,744,000, a figure consistent with Mrs Fellows’ valuation figure of £3.7 million, Ms Seal subsequently revised the valuation upwards to £6.015 million as appears in the *“Master Spreadsheet”* of figures to which I was referred. Ms Seal was cross examined about the reason for this increase. She was frankly unable to come up with any properly reasoned basis for having increased the original valuation and I can only but conclude that, so far as the final figures are concerned, she has overstated the value of this property by some £2.3 million. There must be a concern that she has done likewise with other properties.

590. In the circumstances whilst the true valuation figure may lie somewhere between Ms Seal’s and Mrs Fellows’ respective figures, I consider that it is likely to be closer to that of Mrs Fellows.

Trading mixed tenures

591. This category of transfer concerns transfers involving a mixture of tenures, i.e. where what was transferred in relation to a particular store included both a freehold and a leasehold interest. An example is provided by Blackfen, which concerned a freehold supermarket with a long leasehold car park.
592. In respect of this category, Ms Seal valued the properties transferred to CFS at £17,878,124 as against Mrs Fellows' valuation figure of £7,805,871, a difference of £10,072,253. So far as relevant, Ms Seal also valued properties transferred to CGF at £140,000, as against Mrs Fellows' figure of £430,000, in this instance, Mrs Fellows' valuation exceeding that of Ms Seal's by £290,000.
593. I consider that, again, much the same considerations apply as apply in relation to the other categories considered above to the respective interests in relation to these hybrid transfers. Thus, again, I consider that the true valuation figure is likely to lie somewhere between Ms Seal's figure and Mrs Fellows' figure.
594. The Respondents do make a further point so far as the reliability of Ms Seal's evidence is concerned by reference to the Blackfen property. In her original valuation, Ms Seal erroneously treated this property as being simply long leasehold, rather than as mixed freehold and leasehold as described above. However, after Ms Seal had completed her evidence the Joint Liquidators' solicitors wrote to the Respondents to state that Ms Seal wished to revise the valuation in respect of this property upwards from £3 million to £4.4 million. The Respondents, with some justification, point to a lack of care and transparency in relation to the way that Ms Seal dealt with this particular property.

Non-trading properties

595. Some 61 non-trading properties were transferred by SSL as part of Project Chicago. 48 were leaseholds, and 13 were long leaseholds, freeholds or heritable. Most of them were transferred to Rochpion.
596. Of the properties that were transferred to CFS, Ms Seal placed a value thereupon of £1,119,402, and Mrs Fellows placed a value thereon of £645,000, a difference of £474,402. With regard to the properties transferred to Rochpion, Ms Seal has placed a negative value thereon of some £25,210,354, and Mrs Fellows has placed a negative value of £48,572,581 thereupon, a difference between the two experts of £23,362,227.
597. In respect of these transfers to Rochpion, each valuer therefore placed a significant net negative value thereupon. Taken on their own, the transfers to Rochpion for a consideration of £4 do not amount to a transaction at an undervalue, given the nominal consideration provided. However, I consider that the Respondents are entitled to say that as part of the wider transaction that I have held took place, these negative valuations can potentially be taken into account as consideration provided by Rochpion for taking on the liabilities associated with these particular properties, as part of an overall assessment of the consideration provided to, and the consideration provided by SSL.

Approved Judgment

598. Further, I have considered whether, considering the position from SSL's point of view, it might be said that some different approach consistent with that that I have taken in respect of the trading leaseholds is appropriate in the context of a wider transaction in which tCG societies had an interest in distancing SSL from the liabilities associated with these properties given the potential effect of a subsequent insolvency of SSL resulting therefrom. In other words, that, looking at the position from SSL's point of view, it had no good commercial reason for entering into a transaction that passed these liabilities onto another tCG society, and only did so for the real benefit of other tCG societies.
599. However, one does, in relation to these leasehold properties and the liabilities associated therewith, have an actual liability on the part of SSL which it was unable to service by trading from the relevant properties. To this extent the position is, as I see it, somewhat analogous to the actual, rather than contingent, liabilities that SSL had in respect of the SSL Pension Scheme regarding the DRCs and the TP deficit. Thus, I am satisfied that it is appropriate to bring into account the appropriate negative value reflecting the liability as consideration provided to SSL for the purposes of s.238(4) IA 1986.
600. This begs the question as to whether I should accept either of Ms Seal's or Mrs Fellows' figures, and if so, which.
601. Ms Seal and Mrs Fellows were agreed that non-trading leasehold properties should generally be valued using the investment method of valuation. Under this method, the difference is established between the rent being paid under the head lease to which SSL was party, and that received by SSL from a subtenant, or where there was no subtenant, the rent that might be anticipated to be received. The difference is then assessed on an annual basis and discounted in order to present the Net Present Value ("NPV") of the future income stream translating to the market value of the property. A broadly similar approach was taken in relation to non-trading freehold, long leasehold and heritable properties.
602. Unfortunately, given the limitations of the trial, there was only a limited extent to which the different approaches of the experts could be explored at trial. However, the Respondents do rely upon the approach taken by Ms Seal in relation to the Johnstone property. This was the non-trading example with the largest difference between the experts, of some £7.5 million. Ms Seal accepted in evidence that she may have made a mistake in failing to ascribe a non-insolvency liability thereto, and after the conclusion of her evidence she sought to revise her valuation so as to include a non-insolvency liability of £2,569,000. However, the Respondents make the point that even this revision did not deal with this property in the way that Ms Seal said, at paragraph 19.7 of her report, that she would deal with non-trading non-sublet leasehold properties, namely, to take the same approach as for mitigating liabilities. As to mitigating liabilities, her approach was set out in paragraphs 18.11 and 18.12 of her report and involves treating the rent and rates liability as continuing for the remainder of the term of the lease. Using this analysis, so the Respondents suggest, Johnstone ought to have been valued at a negative figure of £4,698,225. The Respondents speculate that Ms Seal's new figure of £2,569,000 may be the £4,698,225 mitigated liability, discounted to reflect the time value of money. However, the Respondents fairly point out that the position is opaque.

Approved Judgment

603. Overall, in this instance, I consider that Mrs Fellows' more granular approach is more likely to have arrived at a more accurate figure and so I will proceed on the basis that her negative value figure of approximately £48 million should be applied to this category of property.

PFSs

604. Mrs Fellows valued the PFSs (including the equipment used there with) at a net £54.068 million, made up as follows:

- i) 111 trading and one non-trading PFSs transferred to CFS - £50.18 million;
- ii) 9 PFSs transferred to CGF - £7.035 million; and
- iii) 16 non-trading PFSs transferred to Rochpion - £3.147 million pounds.

605. On the other hand, Ms Seal valued the PFSs at somewhere between £21.696 million and £22.997 million.

606. Notwithstanding that Mrs Fellows' valuation significantly exceeds Ms Seal's valuation, the Respondents, in my judgment quite correctly, invite me to accept Mrs Fellows' valuation. The Joint Liquidators did not cross examine Mrs Fellows on her valuation, and, unsurprisingly, do not suggest otherwise than that I should accept Mrs Fellows' valuation.

607. Given that there was effectively no contest at trial on this issue, I consider that I should accept Mrs Fellows' valuation. In any event, I would observe that it was clear from the evidence that Mrs Fellows and/or members of her team had very much more considerable experience in the valuation of PFSs than did Ms Seal or anyone in her team. I note that when asked whether she had personally carried out a valuation of a PFS, Ms Seal somewhat deftly replied: "*I have not carried out a number of them*". Later she was asked the question again, when she confirmed: "*I am more than happy to answer no to that question if it is clear for you*". She did not identify anybody else who had assisted who had any relevant experience.

608. I shall therefore proceed on the basis that the value of the PFSs transferred (inclusive of the Equipment thereat) was £54.068 million.

Conclusion

609. I shall come back to the question of the value in monetary terms, for the purposes of s. 238(4) IA 1986, of the consideration provided by SSL by the property transferred pursuant to Project Chicago in my conclusion below regarding the overall consideration provided to and provided by SSL pursuant to the impugned transaction.

L.V Equipment transferred by SSL

610. Although sometimes referred to as fixtures and fittings, we are presently concerned with the item described as "*Equipment*" in the Foodstores Sale Agreement.

611. Clause 1 of the Foodstores Sale Agreement defined "*Equipment*" as meaning: "*... All fixed and loose plant and machinery, racking, tools, petrol pumps, furniture, trade*

utensils and other chattels fixtures and fittings and the fixed plant and machinery owned or used or held for use by the Seller and used in connection with the Business, but excluding the Fixtures.”

612. “*Fixtures*” were defined by Clause 1 of the Foodstores Sale Agreement as having the meaning given by clause 16.1 thereof, i.e., by reference to ss. 33A and 173 of the Capital Allowances Act 2001, essentially including items like electrical/lighting systems, heating and air conditioning systems, and other plant and machinery that is part of the relevant building.
613. The Joint Liquidators again rely upon the expert evidence of Ms Seal. Although a Chartered Surveyor, Ms Seal recognised under cross-examination that she had no experience in the valuation of plant, machinery, furniture and/or equipment in the context of food retail, and that her firm did not have a specialist department dealing with the valuation of equipment, plant and machinery. She therefore based her expertise on her experience of what a purchaser of a freehold or leasehold would be willing to pay for in situ fixtures and fittings.
614. Mr Wignall is also a Chartered Surveyor. Again, although he has no experience in relation to the food retail sector that we are presently concerned with, he does have some 45 years’ experience in valuation of plant and machinery and fixtures and fittings. The Joint Liquidators suggested that his experience related to the conduct of auctions, and the sale of plant and machinery and fixtures and fittings removed from premises. However, it is fair to say that Mr Wignall’s CV refers to him carrying out a “*wide range*” of services including extensive valuation and advisory work.
615. Ms Seal arrived at a valuation figure of £105,254,087, excluding PFSs, but including properties transferred to CGF. Mr Wignall arrived at a figure of £74,098,388, excluding PFSs, but including properties transferred to CGF. The difference between the two is, again, very significant.
616. A difficulty confronting both the experts and the Court is that, save as referred to below, there are no contemporaneous records available as to the Equipment at the various properties as at November 2015, nor as to the condition thereof. The experts have therefore each estimated the value of the Equipment by arriving at a figure for the cost of fitting out each store (by reference to a £/square foot figure) as conducted prior to November 2015, and then depreciating the costs as from the date of fit out or assumed fit out to November 2015.
617. Ms Seal’s approach relied on the Building Costs Information Service (“**BCIS**”) fit-out data, which she explained is “*the industry standard for construction data*” and is “*relied upon by almost every firm in the country*”. BCIS prepares its datasets by collating and analysing cost data from real-world costs of construction projects, before adjusting for factors including inflation and location to benchmark the figures.
618. In respect of each property, Ms Seal considered the date of the most recent fit-out and type of fit-out (full fit-out refit or EVO, i.e. a partial fit-out). For those 55 trading stores where no refit information was available, Ms Seal assumed a full refit in 2008 (the year predating the earliest listed refit date). She then took the BCIS price per square foot for the relevant year and multiplied it by the floor area of the property, applying depreciation on a straight-line basis over 13 years (for a full fit-out) or five

years (for a partial fit-out). Where Ms Seal had valued the underlying property at either zero or negative, she assumed that the fixtures and fittings therein also had no value.

619. The Respondents' key criticism of Ms Seal's approach is that they challenge the appropriateness of using the selected BCIS category labelled "*344 – Fitting out new building – Hypermarkets, Supermarkets*", rather than actual tCG refit data. The Respondents submit that this is not an appropriate proxy, primarily because:
- i) Hypermarkets are very different from SSL's small format supermarkets/convenience stores;
 - ii) BCIS's fit out costs include items such as partitions, doors and electrical installations, which fall outside the category of Equipment which is the subject matter of the current valuation exercise;
 - iii) New building fit out costs consistently exceed the cost of refitting existing buildings; and
 - iv) There are only four datapoints used by BCIS for its "*new building*" category, at least one of which dates back to 1972.
620. A further criticism made by the Respondents is that Ms Seal does not seem to use her evaluative judgement in any way to value the Equipment, but simply mechanically applies the £/square foot new building fit out costs as derived from the relevant BCIS category.
621. In contrast, Mr Wignall sought to use actual tCG refit costings data to determine an appropriate price per square foot for each of the properties. He used data for nine properties as available from a GVA valuation exercise conducted in 2014. At the time, GVA had carried out a physical inspection and inventory at 14 stores (save for restricted staff-only areas) and had requested further cost and finance information from tCG to supplement the inspection. Mr Wignall requested the underlying data obtained through this exercise, for which he received data for ten stores. He excluded one property (Penkridge) on the basis that the costings appeared to be far too low, leaving him with nine data points from which to base his valuation.
622. From these data points, Mr Wignall prepared a table of the value of the fixtures and fittings per square foot for the sales areas of the stores by (in summary) (i) increasing the historic fit-out cost by inflation to give a 2015 figure, (ii) reducing this figure by 30% for costs associated with contractor profit, delivery and installation, and a further 20% to remove costs associated with ancillary areas, and (iii) depreciating this on a 20% reducing balance from the date of the last fit-out.
623. The key criticism levelled by the Joint Liquidators against Mr Wignall's approach is what is said to be the paucity and unreliable nature of the data underlying his analysis. It is said against him that the nine properties for which data is available are not representative of the wider set of 639 properties, and, further, that the steps he applied to reach his final £/square foot figures arbitrarily depress the value of the fixtures and fittings by (for example) rounding figures down rather than up and applying percentage reductions without, it is suggested, any objective basis. The Joint

Liquidators also query the accuracy of GVA's data, as it does not, it is said, align with the Savills information on when properties were last refit, and for 2013 there was no data available at all.

624. In addition to conducting their own analysis, both parties also make reference to valuations that are available in contemporaneous documents for the fixtures and fittings by way of cross-reference:
- i) CFS's audited accounts as at 2 January 2016 recorded a net book value for its plant and machinery of £113.5 million.
 - ii) The Foodstores Sale Agreement attributed £111.4 million to the Equipment that CFS received from SSL.
625. Whilst these figures only relate to the properties received by CFS (and not Rochpion), the Joint Liquidators contended that the fact that these figures are broadly consistent with (if not higher than) Ms Seal's valuations provides a useful "*sense check*". Against this, the Respondents submitted that no weight can be placed on the contemporaneous figures given that they reflect book value, which was well above the market value at the time.
626. I consider that the criticisms made by the Respondents of Ms Seal's use of BCIS category labelled "*344 – Fitting out new building – Hypermarkets, Supermarkets*" are well made. As with the use of her target rent of 4% of turnover applied in the case of the properties, I have a concern that the mechanistic use of the formula that she has used on this occasion is also liable to reach a valuation that is too high, and one the accuracy of which is very much open to question. The key factors that cause me concern are that the particular BCIS category used was concerned with new builds where one can anticipate that fit-out costs are likely to be more than in the case of a refit. Further, this category was concerned with a different type of trading entity, i.e. hypermarket or larger supermarket, and included other costs, e.g. of partitions.
627. Further, I am concerned about the limited number and age of the datapoints used by BCIS in respect of the figures in question, and also about the fact that Ms Seal has not sought to introduce any other expertise or evaluative judgment over and above simply mechanistically applying the particular formula.
628. I also share a concern regarding the reliability of the underlying data used by Mr Wignall, and in particular as to whether the nine data sets actually used by Mr Wignall were representative of all the properties in question where the value of the Equipment in situ at as at 2 November 2015 was being determined.
629. However, I consider the criticism of Mr Wignall that he referred to 10 data sets when he had only used 9 is overstated given that he provided a cogent reason for not using one of them. Further, whilst it would have assisted to have had further worked examples in Mr Wignall's report relating to other years, I was impressed by the way that he explained, under cross-examination, the worked example in paragraph 27 of his report relating to 2011 during the course of his evidence.
630. Despite the criticism made in respect thereof, he did explain the various deductions that he made, and I consider that there was logic in them. Thus, one can see why there

might be a 30% reduction to reflect contractors' installation costs and profit, in that these would not necessarily be reflected in the value of the Equipment in question. Further, I can see sense in the explanation given with regard to the 20% reduction attributable to fit-out costs in relation to ancillary areas.

631. So far as depreciation is concerned, the difference between Ms Seal and Mr Wignall was that Ms Seal used a straight-line depreciation, whereas Mr Wignall applied a depreciation rate of 20% on a reducing balance basis resulting in a sharp drop in value in the first few years after installation. However, again, I was impressed by Mr Wignall's response to cross-examination on this point. It may be that, from an accounting perspective, it is appropriate to depreciate on a straight-line basis. However, we are here concerned with the value of the Equipment from SSL's perspective as at 2 November 2015. It was Mr Wignall's evidence, based on his experience that is not matched by Ms Seal, that when it comes to the value of items such as the present, then there is a more rapid depreciation in early years. I accept Mr Wignall's evidence in this respect.
632. In short, I consider that of the two experts, whilst there are inherent factors that make it difficult to say that either of them is particularly reliable, I consider that Mr Wignall's valuation is more likely to be reliable than that of Ms Seal. Further, I cannot be satisfied that the valuation of the equipment is likely to be significantly more than as determined by Mr Wignall.
633. In the circumstances, I propose to take Mr Wignall's valuation of £74,098,388 (excluding the PFSs) as being the value as determined.

L.VI Conclusion in respect of undervalue

634. Drawing together all of the above, if I am wrong in my primary finding that there was consideration for the Withdrawals of Share Capital by CGF for the purposes of s.238(4) IA 1986, then I consider that the consideration provided to SSL in respect of the relevant impugned transaction totalled c. £40 million (if one includes the CGF Properties), or otherwise c. £21.5 million, comprising the following:
- iii) Release of the ISLA - £4.6 million;
 - iv) Release from SSL Pension Scheme - £15 million;
 - v) Release from other contingent liabilities - £1.9 million; and
 - vi) Increase in ISLA from transfer of properties to CGF (if relevant) - £18.5 million.
635. With regard to the consideration provided by SSL, my findings as set out above are as follows:
- i) Trading leasehold properties - £0 (neutral);
 - ii) Freehold properties - between £81,149,855 (Mrs Fellows) and £181,728,129 (Ms Seal), but in any event significantly in excess of Mrs Fellows' figure;

Approved Judgment

- iii) Trading long leaseholds - between £12,544,400 (Mrs Fellows) and £18,666,383 (Ms Seal), but closer to Mrs Fellows' figure;
 - iv) Trading mixed tenures - between £8,235,871 (Mrs Fellows) and £18,108,124 (Ms Seal);
 - v) Non trading properties - (£47,927,581) (Mrs Fellows' figure);
 - vi) PFSs - £54,067,581 (Mrs Fellows' figure);
 - vii) Equipment - £74,098,388 (Mr Wignall's figure);
 - viii) Cash - £14,987,514.50; and
 - ix) Stock - £54,375,376.50.
636. The total consideration provided by SSL as set out in the previous paragraph amounts to £251,531,405, giving the Respondents the benefit of the doubt and Mrs Fellows' valuation in those instances where I have found that the true value lies somewhere between Ms Seal's valuation and Mrs Fellows' valuation. In contrast, taking Ms Seal's valuations in respect of those properties would have got one to a total of £368,103,915.
637. If one then deducts from the figure of £251,531,405 the total of £21.5 million representing the consideration provided to SSL, one gets to a balance of approximately £230 million. This is significantly in excess of Joint Liquidators' best estimate, as at 1 March 2026, of the creditor cap figure of £205 million that I have referred to above that represents the maximum extent of the Joint Liquidators' claim.
638. Bearing in mind my finding that the valuation figures in respect of freeholds, trading leaseholds and mixed tenure properties lie somewhere between Mrs Fellows' and Ms Seal's valuation figures, I am provided with further comfort that the creditor cap has been significantly exceeded in the circumstances of the present case.
639. Further, albeit limited, support for the conclusion that I have reached is, I consider, provided by the figures provided for in the Foodstores Sale Agreement, and the valuation placed on assets in CFS's and SSL's audited accounts, and in SSL's management accounts.
640. It follows from the above that if I am wrong with regard to the consideration and the Withdrawals of Share Capital issue, then, subject to the statutory defence under s. 238(5), the TUV claim would succeed to the maximum extent claimed within the scope of the accepted creditor cap (the Joint Liquidators' best estimate of which, as at 1 March 2026, is £205 million).
641. I turn therefore to consider whether the statutory defence has been established, to the extent that it might, contrary to my primary finding, be relevant.

M Is the statutory defence under s. 238(5) IA 1986 made out?

M.I Introduction

Approved Judgment

642. If the Joint Liquidators' case on TUV is, contrary to my finding with regard to consideration and the Withdrawals of Share Capital, otherwise made out, then the question arises as to whether the Respondents are entitled to rely upon the statutory defence provided for by s. 238(5) IA 1986.
643. As set out in paragraph 165 above, s. 238(5) provides that the court shall not make an order under s. 238 in respect of a TUV if it is satisfied:
- “(a) that the company which entered into the transaction did so in good faith and for the purpose of carrying on its business, and
- (b) that at the time it did so there were reasonable grounds for believing that the transaction would benefit the company.”
644. There are thus two limbs to the defence, namely that the company/society, i.e. the company/society acting by its directors, must have:
- i) Acted in good faith and for the purposes of carrying on its business; and
- ii) At the time of the transaction, had reasonable grounds for believing that the transaction would benefit the company/society.
645. It is common ground between the parties that limb (i) is subjective whereas limb (ii) is objective, and that the burden of proof rests in each case on the Respondents. That the test combines a subjective limb and an objective limb was emphasised at an earlier stage of the present proceedings by Fancourt J when he determined the Joint Liquidators' application to rely upon “*business valuation*” evidence at [2025] EWHC 526 (Ch) at [38].
646. I shall first consider the further legal principles involved, before considering the parties' respective cases, and then determining factual issues that arise in order to reach a conclusion as to whether the statutory defence is made out by the Respondents.

M.II Legal principles

647. The general principles relating to the statutory defence can be summarised as follows:
- i) The limbs of the statutory defence are cumulative, and all must be satisfied for the defence to apply - *Whitestar Management* [2018] EWHC 743 (Ch) at [82], per HHJ Hodge QC.
- ii) Robust evidence is required to make out the defence – *Barton Manufacturing Co Limited* [1999] 1 BCLC at [743f], per Harman J, as applied in *Re City Build (London) Limited (in Liquidation)* [2022] EWHC 364 (Ch) at [32], per ICCJ Burton.
- iii) In respect of each limb, the test is to be considered from the perspective of the company/society entering into the transaction – see *TAQA CA* at [72] per Falk LJ, and *TAQA HC* at [254], per Dias J.

- iv) With regard to the first, subjective, limb, the Court is not concerned with the state of mind or circumstances of “*a counter party or third party*” (*TAQA HC* at [254], per Dias J) or “*the person receiving the benefit from the company*” (McPherson and Keay on the Law of Company Liquidation, 5th edn, at para 11-041).
 - v) With regard to the second, objective, limb, the question: “*must be answered from the perspective of [the company/society], and not anyone else. That is the correct, and only, lens through which the transaction must be viewed. This reflects the fundamental principle that, as a separate legal entity with its own creditors, the company’s interests must be considered separately from that of other members of the group ...*” – *TAQA CA* at [59], per Falk LJ).
 - vi) It is trite that in the case of a corporate entity, the relevant state of mind is that of its directors. Thus, with regard to the present proceedings, the test is to be applied from the perspective of SSL acting through its directors, and not from the perspective of the wider tCG.
648. With regard to the first subjective limb under s. 238(5)(a):
- i) “*Good faith*” essentially means that there must be no intention to circumvent the purposes of the laws of insolvency, and the person who is to act in good faith must not intend to act or collude so as to prejudice other creditors – see *TAQA HC* at [255], applying McPherson and Keay on the Law of Company Liquidation, 5th edn, at para 11-042.
 - ii) The question raised: “*is not necessarily the same question as whether [the company’s directors] were in breach of their fiduciary duties in failing to act in the best interests of the company, although there is plainly an overlap*” – see *TAQA HC* at [255]. I would note that, as already identified, it forms no part of the Joint Liquidators’ case that the SSL Directors did act in breach of their fiduciary duties as directors of SSL, but that does not necessarily mean that they did not.
 - iii) In considering whether a company/society entered into a transaction for the purposes of carrying on its business, it is not a requirement that the transaction was “*necessary*” for its business - see *TAQA HC* at [260] – [261], and *TAQA CA* at [72] – [73].
 - iv) In so far as the Joint Liquidators suggested that the transaction was required to be in the ordinary course of the company’s business, I do not consider that this can be correct. The original wording of the Bill enacted as the IA 1986 did refer to “*ordinary course of business*”, but this was deleted in the s. 238(5) as enacted. This change was explained by the Minister to Parliament as being: “*so that it is clear that one-off transactions in genuine special circumstances – are not automatically caught by the undervalue transaction provisions.*” This makes perfect sense in that if it has already been found that a transaction at an undervalue has been entered into by a company which is insolvent, or becomes insolvent in consequence, then the transaction is unlikely to have occurred in the ordinary course of its business.

- v) I accept the point made by the Respondents that the fact that the transaction might have involved the disposal by the company/society of part of its business is not inconsistent with the transaction being entered into for the purpose of carrying on its business. I note that in the context of the more extreme position of a company closing down its business, Goode, Principles of Corporate Insolvency Law, 5th edn (2018), at para 13-39 comments that: *“Transactions entered into by the company in the course of closing down its business should, it is thought, be considered to be ‘for the purpose of carrying on its business’ within the above statutory provision”*.

649. With regard to the second objective limb under s. 238(5)(b):

- i) The assessment as to whether there were reasonable grounds for believing that the transaction would benefit the company must be made as at the date of the transaction, and not with the benefit of hindsight – *TAQA HC*, at [264].
- ii) As the Respondents point out, the question is not whether the relevant transaction did, in fact, benefit the company, but whether the company had reasonable grounds for believing that it would. Thus, as Goode, Principles of Corporate Insolvency Law, 5th edn (2018), observes at para 13-40: *“whether the transaction in fact benefits the company is not the question, although there may be a temptation to apply hindsight.”* Consequently, the objective test does not require perfection, or the transaction to have been the best or only way to proceed, merely that those directing the company should have had reasonable grounds for believing that the transaction would benefit the company.
- iii) Irrespective of the scope of the *“transaction”* that is sought to be impugned, the wider circumstances are to be taken into account in determining whether there were reasonable grounds for believing that it would benefit the company. As it was put by Falk LJ in *TAQA CA* at [57]:

“... it would be wrong to adopt a blinkered approach that would require the surrounding circumstances to be ignored. Indeed, it is very difficult to see how, taken in isolation, a transaction at an undervalue could ever reasonably be believed to benefit an insolvent company. What s.238(5)(b) must require is a consideration of all the relevant circumstances in order to determine whether there were in fact reasonable grounds for the belief”.

- iv) The fact that the transaction might involve the company or society disposing of some of its assets is not inconsistent with it being for its benefit. In *TAQA CA* at [58], Falk LJ referred to the example of *“a company being driven to sell a valuable asset at speed in order to stay afloat.”*

650. The Respondents referred to Parry, Transaction Avoidance in Insolvencies, 3rd edn (2018), at para 4.160, as having described the statutory defence as an *“important defence”* which companies who enter into transactions in good faith and properly document the commercial reasons for the transaction are *“likely to find ... easy to satisfy.”* However, the parties have been unable to identify any case in which the statutory defence has succeeded, and it is to be noted that the finding that the statutory

defence had been made out in *TAQA HC* was reversed on appeal. The Court of Appeal, in that case, also rejected Dias J's view that there was an equivalence between s. 238(5) and s. 423(3) IA 1986, holding, at [37], that the defence under s. 238(5) was narrower. As Falk LJ put it:

“The fact that s. 238(5) contains different and more challenging tests from the perspective of a defendant than s. 423(3) reflects the fact that insolvent companies should not, as a general rule, enter into transactions that deplete assets available for creditors, undermining the pari passu principle by instead preferring the interests of their shareholders. It is unsurprising in those circumstances that the defence under s. 238(5) is relatively narrowly targeted. In contrast, s. 423 is not restricted to cases of insolvency.”

M.III The Respondents' case

651. It is the Respondents' case that the two limbs of s. 238(5) IA 1986 are satisfied on the evidence, and therefore that they are entitled to the benefit of the statutory defence.
652. As to the requirements of s. 238(5)(a), it is the Respondents' case that the SSL Directors did act in good faith and for the purpose of carrying on SSL's business:
- i) With regard to good faith, it is said that the SSL Directors genuinely believed that tCG would withdraw support if they failed to cause SSL to comply with the Transaction Demand (dated 27 October 2015). Thus, faced with this existential threat, it was the SSL Directors' genuine perception that this was the least worst option in order to avoid an immediate insolvency of SSL with the inevitable consequence thereof for creditors. In respect thereof, it is the Respondents' case that:
 - a) That such was the perception of the SSL Directors is supported by what was said by Mr Bailey and Mr Lang in their witness statements, and that the evidence was not undermined under cross-examination. The Respondents deny that the Transaction Demand was, in any sense a sham or a contrivance, but in any event submit that it was certainly regarded and treated as genuine by the SSL Directors.
 - b) The fact that the transaction may have benefited tCG as a whole does not mean that it was not entered into in good faith.
 - c) Whilst the Joint Liquidators seek to undermine the Respondents' case as to good faith by alleging that the SSL Directors were in conflicting positions as directors of other tCG societies, the law does not treat any such conflicts as automatically fatal to the case as to good faith. Further, the conflicts were disclosed and understood, and the SSL Directors considered that they were acting in the interests of SSL, which they considered aligned with those of tCG.
 - d) Further, whilst the Joint Liquidators seek to undermine the Respondents' case as to good faith by relying upon the fact that tCG provided a wide indemnity to the SSL Directors in relation to their

actions, the provision of such an indemnity does not, in itself, support a case of lack of good faith.

- ii) With regard to the transaction being for the purpose of SSL's business, the Respondents maintain that it was. They say that, from the perspective of the SSL Directors, it was entered into to avoid the existential threat made by the Transaction Demand, and to enable SSL to continue to trade for the time being with the support provided by the Deed of Support and Side Letter reinforced by advice from Deloitte, even if flawed, that creditors would be better off in a subsequent post-Project Chicago insolvency than an immediate insolvency.
653. As to the requirements of s. 238(5)(b), it is the Respondents' case that, at the relevant time rather than with the benefit of hindsight, there were reasonable grounds for believing that the transaction would benefit SSL, certainly when compared with the perceived alternative threatened by the Transaction Demand. The Respondents submit that it is the overall decision-making process of the SSL Directors which ought to be the focus of the objective test in question, and that the question is not whether there is an issue with one part of the SSL Directors' analysis, but whether hypothetical reasonable directors with the experience of the SSL Directors, exercising their commercial judgment and having regard to all relevant matters, would have been objectively justified in concluding that the relevant transaction was capable of conferring a benefit on SSL.
654. In this respect, the Respondents emphasise, in particular, the following:
- i) The SSL Directors took legal advice from PM and had the benefit of restructuring and financial analysis provided by Deloitte and AP, all of which, so it is alleged, they were entitled to rely upon noting that the duty of care owed was extended to some extent to SSL.
 - ii) So far as the analysis provided by Deloitte is concerned:
 - a) Deloitte is a leading international firm with restructuring experience, and reliance by the SSL Directors thereupon, as with reliance on the advice provided by AP, was in no sense irrational.
 - b) As to the flaws in Deloitte's advice that the Joint Liquidators have sought to attach significance to, even if there is substance in them, they were not apparent at the time and were only identified by the Joint Liquidators some considerable way into the current dispute. However, even taking the same into account, a director acting reasonably, viewed objectively, might still have concluded that SSL was better off entering into the transaction.
 - c) It was in no sense irrational or unreasonable at the time for the SSL Directors to rely on this advice rather than taking their own restructuring/financial advice, even though with hindsight that might have been the better course.
 - iii) In the circumstances, and in view of the threat contained in the Transaction Demand, refusing to "*play chicken*", as Mr Bailey and Mr Lang put it, with

tCG, and deciding to go along with Project Chicago was a perfectly rational and reasonable response to the position that the SSL Directors found themselves in.

655. The statutory defence is, the Respondents say, therefore clearly made out.

M.IV The Joint Liquidators' case

656. As to the requirement in s. 238(5)(a) to act in good faith, the essence of the Joint Liquidators' case is as follows:

- i) The Transaction Demand was a contrivance to which the SSL Directors were, to all intents and purposes, party as demonstrated by, amongst other things, Mr Bailey's recognition at the meeting between SSL and tCG's project team on 14 May 2015 that it might be better for the SSL Directors to be "*backed into a corner*", and correspondence between AG and PM ahead of the sending of the Transaction Demand that is said to show coordination.
- ii) There was no real danger of tCG carrying out the threat contained in the Transaction Demand as recognised by Mr Pennycook under cross-examination, when he accepted that the latter did not reflect what he believed would actually have happened. This was because it was plainly not in tCG's interest to place SSL into administration given not only the reputational effect thereof, but the serious harm that that was liable to cause as recognised by several of the Respondents' witnesses under cross-examination. Further, a CVA had, as the SSL Directors knew, been ruled out as an option earlier in the year. In the circumstances, the SSL Directors had no basis for any belief that the threat contained in the Transaction Demand would be carried out, and nor did they have any such belief. The Court should not accept their evidence to the contrary.
- iii) The Respondents' case as to good faith is said to be further undermined by the manifest conflict of interest between the position of Mr Bailey, Mr Lang and Mr Crossland as SSL Directors (in the case of Mr Lang and Mr Crossland through their directorship of CWS), and their respective positions as directors of other tCG societies and senior tCG executives owing fiduciary duties as such. It is said that these conflicts were identified at an early stage, never properly remedied and, if anything, exacerbated by amendments made to SSL's Rules. It is pointed out that the SSL Directors' remuneration, career prospects and daily working environment were tied in with tCG, and Project Chicago was about advancing tCG's "*True North*" strategy.
- iv) The case as to good faith is said to be further undermined by the provision to the SSL Directors of the indemnity in respect of their involvement in Project Chicago. It is suggested that this removed a critical restraint on risk-taking and was provided by SSL's counterparty to the relevant transaction. It is further submitted that the evidence suggests that the SSL Directors would not have proceeded without this indemnity.
- v) In addition, reliance is placed upon the fact that whilst the appointment of an independent director was recommended (including by PM) on a number of

occasions, and was recognised by the SSL Directors as being beneficial, none was ever appointed in circumstances in which concern was expressed by AG that this might serve to “*derail*” Project Chicago.

- vi) Further reliance is placed upon the fact that the SSL Directors were parties to arrangements that recognised that Phase 1 of Project Chicago might be open to challenge as a TUV, and that it was recognised that it would be desirable to seek to mitigate the risk by keeping SSL trading for two years following the relevant transaction (the so-called two-year “*look back*” period). Viewing the matter subjectively, this is said to be an attempt to circumvent the purposes of the laws of insolvency.

657. As to whether, for the purposes of s. 238(5)(a), the relevant transaction was carried out for the purposes of SSL’s business, the following points are made:

- i) It is submitted that SSL was, itself, profitable, cash generative and solvent pre-transaction, and not in need of restructuring;
- ii) The effect of Project Chicago was to strip SSL of its most valuable and profitable stores, leaving it weak, loss-making and dependent upon tCG support; and
- iii) Project Chicago therefore primarily served tCG’s strategic and accounting objectives, and the only reason that the SSL Directors proceeded therewith was the Transaction Demand, rather than a belief that the transaction furthered SSL’s own business.

658. As to the objective requirements of s. 238(5)(b), the essence of the Joint Liquidators’ case is as follows:

- i) The Transaction Demand was not a real alternative because there were no *reasonable* grounds for believing that refusal to comply therewith would lead to immediate insolvency. The Joint Liquidators’ primary case is that the Transaction Demand was coordinated between tCG, its advisers, and SSL, as part of the arrangements for facilitating Project Chicago, and that such should have been accepted by Mr Bailey and Mr Lang under cross-examination. Further, the Joint Liquidators invite me to reject the suggestion that the SSL Directors thought it likely that tCG would immediately force SSL into insolvency if they did not go ahead with Project Chicago in response to the Transaction Demand. If I accept the Joint Liquidators’ submissions in this respect, the SSL Directors can have had no reasonable basis for acting upon the Transaction Demand.
- ii) In any event, as understood, it is the Joint Liquidators’ case that, objectively considered, there were no reasonable grounds for believing that refusal to comply with the Transaction Demand would lead to an immediate insolvency of SSL given, in particular:
 - a) The evidence to the effect that the insolvency of SSL would have had potentially catastrophic consequences for tCG, and would have been irrational, for reasons previously explored in this judgment, including

- the potential for default in respect of SSL Pension Scheme liabilities, and as guarantor for other tCG pension scheme, bank and bond liabilities, and general reputational considerations. The Joint Liquidators point to a number of witnesses identifying that insolvency would have amounted to “*self-harm*”.
- b) Contemporaneous documentation showing that administration and a CVA were not options favoured by tCG in the light of advice received, and Mr Pennycook’s recognition under cross-examination that the threat made by the Transaction Demand did not reflect what he considered would actually have happened, namely a reconsideration of the CVA option in due course.
 - iii) The Joint Liquidators submit that the Respondents’ case as to objective reasonableness is further undermined by the above considerations relating to conflict of interest, and the provision of an indemnity to the SSL Directors.
 - iv) Insofar as the Respondents seek to rely upon the restructuring and financial analysis of Deloitte and AP, the Joint Liquidators point to the fact that both firms acted for tCG, and not SSL, were involved in devising Project Chicago, and that only selected, edited and tailored material was provided to the SSL Directors who did not have unfiltered or face-to-face engagement with representatives of these firms. Further, the SSL Directors did not see the earlier reports prepared by Deloitte that formed the basis of Project Chicago.
 - v) Further, in challenging the Respondents’ reliance upon advice provided by Deloitte, the Joint Liquidators rely upon what they say are a number of deficiencies in the advice provided by Deloitte, including the inclusion in balance sheets of non-realizable assets (such as deferred consideration and deferred tax) and incorrect property valuations, as well as there having been internal inconsistencies between balance sheets and EOSs as reflected by what was recognised by the Respondents to be an “*error*” made by Deloitte in a relevant EOS in relation to the treatment of onerous leases. Further, the Joint Liquidators specifically point to what they say is a distortion in the EOS prepared to compare the post Project Chicago position with an immediate insolvency. It is submitted that the EOS showing the post Project Chicago position was distorted by assuming that the position of landlords was improved by the receipt of two years’ rent post transaction, ignoring the re-letting advantages that might have been available to landlords from an immediate insolvency.
 - vi) Further, the Joint Liquidators submit that the Respondents’ case as to objective reasonableness is undermined by a failure to obtain independent financial or restructuring advice notwithstanding that the need for such advice had been recognised by the SSL Directors. The need for such advice is said to have been particularly evident given the scale and unusual structure of the transaction comprising Project Chicago, and that the risk, at least, of insolvency had been identified as a potential consequence thereof. A further consideration is said to be that the SSL Directors, themselves, did not have the necessary expertise.

- vii) It is the Joint Liquidators' case that independent advice would have been likely to have addressed the following issues:
- a) The validity of Deloitte's solvency analysis purporting to show that SSL was solvent post Project Chicago;
 - b) The validity of Deloitte's EOSs purporting to show that Project Chicago was in the interests of SSL's creditors;
 - c) The likelihood of tCG in fact withdrawing support and forcing SSL into insolvency if the SSL Directors refused to go along with Project Chicago;
 - d) The other options available to the SSL Directors (including "*doing nothing*");
 - e) The risk of SSL subsequently going into an insolvency process (which AP had advised tCG was "*high*"); and
 - f) The appropriateness of relying on the £50m Deferred Consideration as an asset when considering SSL's solvency shortly prior to the transaction.
- viii) In the circumstances, so it is submitted, there were no objectively reasonable grounds for believing that the relevant transaction would benefit SSL.

M.V The key issues

659. I consider that the key questions that arise, in considering whether the Respondents can show that the requirements of s. 238(5) are satisfied in the circumstances of the present case, are the following:

- i) Whether the SSL Directors did genuinely believe that they faced a binary choice in the face of the Transaction Demand between a prompt withdrawal of support by tCG for SSL, or to go along with Project Chicago believing that, in those circumstances, that was the better choice for SSL and its creditors. If I can be satisfied as to this, then for the reasons explained below, I consider that the Respondents will have satisfied the subjective requirements of s. 238(5)(a). If not, then I consider that the Respondents' attempts to rely upon s. 238(5) will have failed without the necessity to go on to consider the objective requirements of s. 238(5)(b);
- ii) If the Respondents can show that the requirements of s. 238(5)(a) are so satisfied, whether, for the purposes of s. 238(5)(b), the Respondents can show that, at the relevant time, the SSL Directors had *reasonable grounds* for believing that the transaction would benefit SSL. As to this question, for the reasons set out below, I consider that a significant issue is as to whether, in the circumstances, it was reasonable for the SSL Directors to proceed as they did without seeking independent restructuring/financial advice, and/or without first insisting upon the appointment of an independent director with restructuring/financial experience.

660. It is therefore first necessary to consider whether, as contended by the Joint Liquidators, the Transaction Demand was coordinated between tCG, its advisers and SSL as part of the arrangements for facilitating Project Chicago, and whether I should reject the evidence of Mr Bailey and Mr Lang to the effect that they thought that it was likely that tCG would immediately force SSL into insolvency if they did not go along with Project Chicago in response to the Transaction Demand.

M.VI The Transaction Demand

661. I consider that the origins of the Transaction Demand probably go back to the briefing pack that Mr Cutting, on 6 November 2014, sent to the SSL Directors setting out an indicative analysis of the restructure that was proposed by Project Chicago. This foreshadowed the Transaction Demand in that it set out that: “*Group is no longer willing to unconditionally support SSL and requires a restructuring to address future liabilities.*” The future liabilities were, clearly, the onerous lease liabilities for which SSL was liable, some of which had been guaranteed by other tCG societies. This, clearly, put down a marker to the SSL Directors that, unless a restructuring along the lines of Project Chicago took place, then tCG might well remove its support.

662. In this context, it is relevant to note the financial turmoil that tCG had been through, albeit that Mr Pennycook’s evidence was to the effect that matters had stabilised somewhat by 2014, as the “*True North*” strategy was being pursued.

663. The Joint Liquidators describe SSL as having been in a financially strong position before the implementation of Project Chicago, being solvent, profitable, generating significant cash and having net assets of around £500 million. They rely upon Mr Bailey’s evidence to the effect that SSL was making a profit before tax of £20-30 million in the years leading up to Project Chicago, and the evidence of Mr Davies who agreed that SSL was heavily cash generative. Further reliance is placed upon Mr Bailey having accepted that SSL did not itself require any restructuring, as Mr Bailey put it, “*in financial terms at that time.*”

664. As against this, it is fair to say that when it was put to Mr Davies by Mr Smith KC that SSL was “*very profitable*”, Mr Davies did not accept that it was. As he put it: “*I wouldn’t say very. 1.5% margin isn’t very profitable. It was profitable. It was made on £2 billion, roughly of revenue, so it was profitable. I will leave it there.*” Further, the Respondents rely upon the evidence of Mr Hore (who was not cross-examined on this) and Mr Davies to the effect that SSL’s revenue was shrinking and absorbing working capital, that historic underinvestment in capital expenditure had created a problem for the future over and above the onerous lease liabilities, and that a number of stores did not fit with tCG’s core strategy.

665. In the circumstances, I do not consider that one can simply say that, based upon the apparently profitable trading position of SSL, the prospect of tCG withdrawing its support from SSL was something that the SSL Directors could not have taken seriously from when the prospect of Project Chicago was introduced to them. Indeed, I consider that it is something that they needed to and did take seriously.

666. Further, I am satisfied that once Project Chicago had been introduced to the SSL Directors, they considered themselves in something of an invidious position and somewhat put on by tCG as evidenced by email correspondence and the minutes of a

number of the meetings in late 2014 and early 2015 that I have referred to in the factual narrative at paragraphs 55-66 above.

667. I consider it also important to bear in mind that, as explained in some detail above, information, and most of the advice that tCG received from Deloitte and AP, was deliberately kept from the SSL Directors, with a view to restricting what might be available to a future liquidator of SSL, and that what was provided to the SSL Directors was carefully tailored and managed. Thus, with regard to tCG's thinking regarding insolvency options such as administration, or a CVA, the SSL Directors were not, in any proper sense, party to tCG's thinking in respect thereof.
668. The Joint Liquidators place particular reliance upon what may have been said at the meeting between the SSL Directors and tCG project team on 14 May 2015 in respect of which the original notes produced of the meeting record Mr Bailey as having: "*stated that it almost seemed like the SSL directors would be better off to be backed into a corner by the actions of the Group*", and Mr Barnes as having suggested that: "*it was in the SSL directors' interests to have limited options.*" Reliance is placed by the Joint Liquidators upon the fact that Mr Cutting later removed the relevant sentences from the notes, likely it seems to me, based upon how Mr Cutting explained matters under cross-examination, because all relevant documentation was being vetted by AG, and this was removed on legal advice as being potentially damaging.
669. The Joint Liquidators maintain that this supports their case that the SSL Directors and their own advisors, PM, were party to a scenario being choreographed under which the SSL Directors were held out as having no option but to go along with Project Chicago when, in reality, there were other options available to them.
670. The Joint Liquidators rely upon Mr Bailey having accepted that the approach suggested by the minutes of the meeting on 14 May 2015 was not consistent with the acts of a director of SSL trying to get the best result for SSL and its creditors, and to Mr Bailey also having accepted that the minutes suggested that the SSL Directors and tCG were discussing how to choreograph the transaction so that it appeared that the SSL Directors were been given no choice. It was pointed out that Mr Lang similarly agreed under cross-examination that there was a: "*collective understanding that the SSL Directors needed to be pushed into a corner and for everyone to be able to present the position as one where [they] had no good option and Project Chicago was the least worst option.*"
671. The Respondents refer to Mr Bailey having said under cross-examination, by way of explanation with regard to his comments about the SSL Directors having been better off being backed into a corner, that this was a "*loose, off-the-cuff comment*". They highlight that this remark was made in the context of Mr Barnes having said that although tCG would "*currently*" continue to support SSL, they could look to review this and that that would put SSL and the SSL Directors "*in a more disadvantageous position*".
672. In this context, I do not read Mr Bailey's statement with regard to being backed into a corner as him going along with the choreographing of a narrative, and in particular a false one, in relation to tCG's likely actions. From his perspective, Mr Barnes, a partner in a leading law firm, had stressed the disadvantages of the position that the SSL Directors would be placed in if tCG were to withdraw support from SSL. Given

the difficult position that the SSL Directors had been placed in, I can understand how Mr Bailey might contemporaneously have considered that the position would be rather easier to deal with if, effectively, they were backed into a corner and had no options.

673. With regard to Mr Bailey having accepted the approach suggested by the minutes of the meeting on 14 May 2015, I read his evidence as merely accepting that this is what the minutes might tend to show, rather than that he had consciously or deliberately been party to any choreographing exercise as suggested. I consider that Mr Lang's response requires to be viewed in the same way.
674. I note that Mr Barnes' own comment about it being in the SSL Directors' interests to have limited options followed on from Mr Cutting having explained that without tCG support, there was really no other proposal that the SSL Directors could pursue. In other words, it was being laid on fairly thick at this meeting by both Mr Cutting and Mr Barnes that the withdrawal of support by tCG from SSL was a real option that tCG had in mind should Project Chicago not be proceeded with.
675. Earlier on in the meeting on 14 May 2015, Mr Cutting had explained the decision of the Group Executive to abandon the CVA option due to reputational risk. The Joint Liquidators rely upon this, and also upon a letter from AG dated 10 June 2015, as having "*explicitly informed*" the SSL Directors that tCG was not in favour of SSL being placed into administration due to reputational concerns, and the risk of loss of the core, profitable stores. However, whilst such letter may, at one point, have indicated that tCG was not in favour of administration, the appendix to the letter, which was headed "*Project Chicago – Options*", concluded by saying that, in tCG's view, "*the only two possible options for the directors of SSL to consider are the solvent restructure [i.e. Project Chicago] and Administration with the solvent restructure providing the better outcome for the creditors of SSL.*" To this extent, the letter dated 10 June 2015 did leave the SSL Directors with a binary choice, and it did not identify as an option that of simply doing nothing.
676. Certainly, looking at the matter with the benefit of hindsight, one can well see how, at least viewed objectively, there were a variety of reasons as to why tCG would not have withdrawn its support from SSL, in particular by forcing it into administration, at this particular point. I have already referred, amongst other things, to the potentially catastrophic effect this might have had with regard to liabilities in respect of the SSL Pension Scheme and other tCG pension schemes and tCG bank and bondholder covenants. However, the SSL Directors had been excluded from much of the decision making in relation to Project Chicago, and the advice that tCG was receiving in respect thereof. Consequently, the SSL Directors did not necessarily know what arrangements, such as obtaining covenant waivers etc., might have been reached in relation to such matters, even if they had given thought thereto.
677. As Mr Bailey explained in his evidence:

" ... We felt there was sufficient value tied up in Project Chicago for the group to see their threat through and manage the situation because we knew that they had concerns about reputational impact and so on. We assumed they would be able to manage

that, manage their relations with their bondholders and funders to bring it all about.”

678. In the circumstances, I do not consider that it could properly be said that the SSL Directors must have known that the threat contained in the Transaction Demand was a hollow one, or that it was some sort of pretence as suggested by the Joint Liquidators.
679. Correspondence between AG and PM relating to the Transaction Demand does suggest that there was a degree of choreography that PM, as solicitors acting for the SSL Directors (or SSL itself), were party to. However, I do not consider this demonstrates that either PM or the SSL Directors were party to this choreography with a view to presenting a false narrative as to the options available to the SSL Directors. Rather, I consider it more likely to be a recognition of the fact that it was considered desirable that the SSL Directors should have the cover of the Transaction Demand in order to support their actions, not because it was perceived that the threat contained therein was false, but because they wanted clear evidence of the fact that the SSL Directors had, indeed, been backed into a corner.
680. The position of the SSL Directors essentially turns on whether or not I accept their evidence with regard to their belief in the reality of the threat contained within the Transaction Demand.
681. So far as Mr Lang is concerned, it was put to him by Mr Curl KC under cross-examination that Mr Pennycook, in relation to the Transaction Demand, had said: *“The letter as written is not what would have happened.”* It was put to him that this cannot have come as a surprise to him. He responded as follows:

“It does, actually. Given all of the previous information that you have shared and the expert evidence or information that has been provided by other people from an SSL board director point of view. Certainly I was of the belief that Group might carry through its threat. So I'm surprised that Mr Pennycook said that.”

682. It was then put to Mr Lang that Mr Pennycook said that if the SSL Directors had refused to implement Project Chicago, then tCG would have asked the SSL Directors to propose a CVA and would have supported SSL to do that. It was further suggested that it was *“blindingly obvious”* that tCG would not have tipped SSL into an insolvency process. To this, Mr Lang responded as follows:

“That is surprising to me because that was never put to us as directors. Withdrawing the support services would have led to it going into administration. Yes, you have presented various bits of evidence that suggest that Group might not have done that, we weren't party to that. Maybe we should have asked harder but we always felt that threat was credible.

The credibility of the threat was supported by the fact that we believed that Mr Pennycook and others that had come into the Group for the rescue phase were prepared to do things inside and outside the Group that may be perceived as really ruthless and therefore that is why we believed that they would carry through

on that threat. The fact that they had prior knowledge and all that supporting information and still put the Transaction Demand to us I think evidences how ruthless the Group Executive were in its rescue bids.”

683. This evidence struck me, at the time that I heard it, as truthful evidence as to Mr Lang’s state of mind and that of his fellow directors of SSL (in the case of Mr Lang and Mr Crossland, of course through CWS). Mr Lang realistically accepted that the SSL Directors could have asked more questions but significantly provided a reasoned explanation as to why the SSL Directors considered the threat to be credible. I have considered whether the more likely explanation is that Mr Lang, whilst coming across as truthful, had, in fact, falsely recalled events when reconstructing events in his own mind thus leading to the unreliability identified in *Gestmin* (supra). However, I do not believe this to be the case in respect of this evidence in contrast to that referred to in paragraph 391 above. This is primarily because Mr Lang provided a reasoned explanation with regard to his state of mind at the relevant time.
684. I note also, in respect of Mr Lang, his evidence when it was put to him that tCG did not want the SSL Directors to obtain independent financial restructuring advice. His response was: *“if I’m frank, I didn’t really care what Group wanted in the situation. If we wanted it, we could or should have pushed it harder.”* This struck me as an honest response that is entirely inconsistent with the SSL Directors having been party to the choreographing of a pretence or a false narrative.
685. Mr Bailey’s evidence on this point is, I consider, entirely consistent with that of Mr Lang. I would refer to the following exchange during the course of his cross-examination by Mr Smith KC:

Q. As you are aware Mr Pennycook said yesterday that if the Group had put SSL into administration at this point it would have been an act of self-harm by the Group?

A. Well, we as directors of SSL were presented with this threat at this stage, which as I said before was for us a binary choice.

Q. Well, we don’t agree with that, because I was going to take you to the next paragraph of your witness statement where you repeat this phrase about binary.

“We had to consider the options of Project Chicago or an insolvency event and the outcome for interested parties such as SSL’s creditors in a binary way.”

You have made a number of references to this concept of binary, haven’t you?

A. Yes.

Q. When you say “binary”, I think you are meaning a choice between Project Chicago or SSL going into administration,

right?

A. Yes, into an insolvency process.

Q. Yes, but there was in fact a third option, wasn't there, which was simply to do nothing: don't do Project Chicago, don't respond to the Transaction Demand and basically call the Group's bluff on the basis that it's never in fact going to put SSL into administration. So it's not actually a binary choice, is it?

A. We viewed it as a binary choice because we viewed it -- it would be reckless to call the Group's bluff and in fact we believed it would be clear breach of our duties to play chicken effectively with Group."

686. Again, I found Mr Bailey's explanations to be both truthful and credible, and I accept them.

687. In the circumstances, I do not consider that the SSL Directors were party to the creation of a false narrative or pretence in relation to the Transaction Demand, and that they did genuinely consider that they had a binary choice, either to go along with Project Chicago, or to face the consequences of tCG carrying out its threat to withdraw support from SSL, thereby leading to its insolvency which, on the basis of the information and advice that they had received through tCG, would lead to a worse position for SSL and its creditors.

M.VII Conclusion in respect of s. 238(5)(a)

688. The question that arises under s. 238(5)(a) is whether the SSL Directors, acted in good faith in causing SSL to transact Phase 1 of Project Chicago, and whether they did so for the purpose of carrying on its business.

689. I agree with the Respondents that the existence, and even recognition by the SSL Directors themselves, of the conflict of interest between their position as directors of SSL (in the case of Mr Lang and Mr Crossland through CWS), and their other positions imposing fiduciary obligations within tCG, does not mean that they lacked good faith so far as their actions on behalf of SSL are concerned, at least so long as they subjectively perceived and considered that they were acting in the best interests of SSL. Similar considerations, I consider, arise in respect of the indemnity provided by tCG to the SSL Directors.

690. However misconceived they were, if indeed they were, I am satisfied, as I have indicated, that the SSL Directors did believe that they faced a binary choice, and that the choice that they made to cause SSL to go along with Project Chicago was made believing that that was the better of the two unattractive choices open to them. Further, I am satisfied that the existence of the conflict and the indemnity did not prevent the SSL Directors from acting in what they subjectively considered to be in the best interests of SSL.

Approved Judgment

691. The Joint Liquidators take the point that the SSL Directors had been advised that Project Chicago was at risk at least of being challenged, and that it was therefore desirable to keep SSL trading for two years so as to exceed the two-year “*look back*”, plainly a reference to the two-year period prior to insolvency during which a transaction might be open to challenge as a TUV or preference, at least if involving a connected person. It is submitted that this, coupled with the fact that the SSL Directors were aware of at least the risk of a subsequent insolvency of SSL if it went along with Project Chicago, points to an intention on the part of the SSL Directors to exploit the laws of insolvency so as to negate any suggestion that they were acting in good faith. I see the force of this point. However, if the SSL Directors did genuinely consider and believe that Project Chicago was the better of two unattractive options, and the one that was more likely to favour the interests of SSL and its creditors, even if that was not in fact the case, then I do not consider that this point undermines the Respondents’ case that they did, in fact, act in good faith.
692. I am therefore satisfied that the SSL Directors did, considered subjectively, act in good faith in causing SSL to go along with Project Chicago.
693. Further, if they did act in good faith, then I consider that they did so for the purpose of carrying on the business of SSL. In short, they considered that the best way to seek to ensure that SSL stood some prospect of continuing to carry on business was by going along with Project Chicago. This is, I consider, consistent with what is required so far as acting in good faith “*for the purpose of carrying on*” the business of the company is concerned, having regard to the legal position as set out in paragraphs 648(v) and 649(iv) above.
694. I am therefore persuaded by the Respondents that the requirements of s. 238(5)(a) have been satisfied.

M.VIII Conclusion in respect of s. 238(5)(b)

695. It is now necessary to consider the question as to whether, from an objective perspective, there were reasonable grounds for SSL, i.e. for its directors, to believe that “*the transaction*” would benefit SSL.
696. Viewed at a distance, the transaction plainly benefited the other tCG societies involved. Amongst other things, they obtained the benefit of the “*good*” stores operated by SSL, leaving the “*bad*” stores with SSL, and were able to take some £73.6 million to profit as early as July 2016, once the onerous lease liability in Holdings’ accounts was written off. However, unless the threat by tCG to take some fairly immediate action to withdraw support, thereby forcing SSL into some form of insolvency process, was a real one, it is difficult to see how Project Chicago can, even at the time, have been reasonably considered to be for the benefit of SSL given that it was, thereby, stripped of its “*good*” stores, and left with its “*bad*” stores in circumstances in which there was at least a significant prospect that SSL would end up in some form of insolvency process leaving landlord creditors significantly out of pocket. As we have seen, in his email dated 22 December 2016, Mr Wormald stated that he considered that “*it was always anticipated that the endpoint for SSL would be an insolvency.*”

697. As to tCG's real intentions, as my analysis of SSL's financial position above demonstrates, although SSL had significant net assets and was making profits, tCG plainly had concerns about SSL's position within tCG given that its profits represented only some 1.5% of £2 billion odd turnover and were somewhat marginal, the lack of past investment, the existence of the onerous leases, and the fact that a significant number of SSL's stores did not fit in with the "*True North*" business strategy that tCG was promoting. There was thus, I consider, an incentive to restructure in some way, and once Deloitte had devised the Project Chicago model as initially discussed at the meeting on 26 September 2013 and as then developed within the 2013 Deloitte Report, this must have seemed to tCG to be a very attractive way forward. It is understandable therefore why it gained momentum. In these circumstances, there were good reasons for getting the SSL Directors on board and doing so notwithstanding that Project Chicago did not offer an attractive future to SSL itself as opposed to the wider tCG.
698. Despite the desirability of some form of restructuring of SSL, I do not consider that the circumstances were such that continued involvement by tCG in SSL going forward was so unattractive that the complete withdrawal of support from SSL, thereby forcing SSL into some form of insolvency process, was ever a realistic possibility, at least in the short to medium term. Certainly, Mr Pennycook recognised as much when he accepted that the Transaction Demand did not reflect what would actually have happened if the SSL Directors had declined to permit SSL to go along with Project Chicago. Both he and Mr Wormald considered it most likely that, in these circumstances, tCG would have looked again at the CVA option. Had it done so, then I consider it likely that SSL and its creditors would have found themselves in a better position than that offered by Project Chicago.
699. The Respondents correctly point out that the question is not whether the relevant transaction in fact benefited the company, but whether the company had reasonable grounds for believing that it would do so. Thus, the fact that SSL may not have benefited from its participation in Project Chicago is not the end of the enquiry.
700. However, where one has a transaction such as the present under which SSL found itself in a significantly worse financial position as a result of the relevant transaction than that in which it was before it entered into the same, then I consider that it can, as a matter of fact, only properly be said to have benefited from the transaction to the extent that the only available alternative or alternatives to the transaction sought to be impugned would have been significantly worse. Consequently, in considering whether the company had reasonable grounds for believing that the transaction would benefit it, it must, I consider, be relevant to consider the reasonableness at the relevant time of entering into the transaction that was in fact entered into as against the available alternative or alternatives. This must, I consider, depend upon whether there were reasonable grounds for believing that the only available alternative or alternatives provided significantly worse options than that in fact pursued.
701. The Respondents rely upon the fact that the SSL Directors took legal advice from PM and had the benefit of financial information and analyses from the reputable firms of Deloitte and AP, and that at least so far as Deloitte was concerned, Deloitte was prepared to extend its duty of care to SSL in respect of certain documents. The essence of the Respondents' case is that the SSL Directors were entitled to rely upon

the information and analyses with which they were provided, which, so it is said, showed that it was in the interests of SSL to go along with Project Chicago given that it offered a better outcome for SSL and its creditors than that offered by the only available alternative, immediate insolvency. This is said to have provided the SSL Directors with reasonable grounds for believing that the relevant transaction would benefit SSL.

702. So far as legal advice is concerned, it is, I consider, difficult to place a great deal of weight on the fact that the SSL Directors took advice from PM given that extensive legal advice privilege has been claimed over that advice. Whilst it would, plainly, be wrong to draw any adverse inferences from the fact that privilege has been claimed, it is also difficult to say that the provision of legal advice supports the case that the SSL Directors considered that going along with Project Chicago would benefit SSL if one does not know what advice PM gave, save as revealed by documents that have been disclosed.
703. Further, I consider that there are a number of difficulties with the SSL Directors' reliance upon analyses and information provided by Deloitte and AP.
704. In particular:
- i) Deloitte and AP were primarily instructed by tCG, and it was Deloitte that had formulated Project Chicago, and to this extent had an interest in it being carried into effect.
 - ii) Of the advice and information provided by Deloitte and AP, it was only somewhat late in the day, in November 2014, that Project Chicago was introduced to the SSL Directors, and thereafter they were deliberately only provided with limited and selected information with regard to it such that they can have had no assurance that they were getting the full picture.
 - iii) A further consideration is the fact that there plainly was a conflict of interest between the SSL Directors' position as directors (in the case of Mr Crossland and Mr Lang through CWS) of SSL on the one hand, and their various positions with regard to other companies within tCG in respect of which they owed fiduciary duties. As the Joint Liquidators point out, whilst the amendment to SSL's Rules to permit the SSL Directors to act notwithstanding the conflict might have cured technical objections, it did not remove the fact of the conflict and, indeed, represented a recognition of it.
705. The conflict of interest was recognised at an early stage as reflected in the minutes of the SSL Board Meeting held on 12 December 2014. This meeting considered the briefing paper that had been provided by tCG in relation to Project Chicago. One of the SSL Directors is recorded as having queried whether the SSL Directors could make any decisions in relation to Project Chicago given the conflict of interest. Mr Cameron (of PM) was present at the meeting. He is recorded as having, earlier in the meeting, suggested the appointment of an independent director. In the light of this query, the "need" for an independent director was recorded as having been "*again stressed*".

Approved Judgment

706. Following this meeting, on 15 December 2014, Mr Bailey wrote to Mr Cutting in terms no doubt advised upon by PM, setting out that the SSL Directors did not consider that they had sufficient information upon which to reach any conclusions, but considered that it would be helpful to set out their initial thoughts. In the course of this letter, Mr Bailey said: “ ... we feel *strongly* that the appointment of an Independent Director to the board of SSL is *required*. Such an Independent Director would help to demonstrate that the directors’ decision-making was proper and in the interests of SSL and its stakeholders, notwithstanding their other tCG positions.” [My emphasis]
707. Against the background of these concerns regarding conflict, the idea of appointing an independent director gained some traction as demonstrated by correspondence between Mr Cutting and Mr Bailey on 23 December 2014 and 13 January 2015. However, as identified in the factual narrative above, despite some initial indications of support for the idea, there was scepticism within tCG with regard to such an appointment. Indeed, Claire Davies of tCG’s secretariat, by her email dated 14 January 2015, queried whether anyone “*in their right mind*” would take on the role. Ultimately, nothing came of the idea of the appointment of an independent director, and it is evident that pushback from tCG was a factor behind this.
708. In the context of tCG having not been prepared to share the advice that they were receiving from Deloitte and AP with the SSL Directors, the alternative idea emerged of SSL and/or the SSL Directors obtaining independent advice from an accountant or restructuring expert. It was in this context that PM wrote to AG on 28 January 2015 proposing that tCG share any advice that it had received with SSL, going on to comment: “*In the event such advice cannot be provided to SSL, SSL will consider engaging accountants directly.*” PM went on to note that regardless of the further disclosure of the advice received by tCG in respect of the different options in relation to SSL, the SSL Directors were considering “*whether it will be necessary to engage consultants to consider what options may be available to SSL and advise on the financial consequences of different options for SSL and its members or creditors.*”
709. As the factual narrative demonstrates, tCG thereafter resisted the idea of instructing AP on a joint basis, a matter which caused disappointment and concern to the SSL Directors.
710. The minutes of the SSL Board meeting on 27 March 2015 recorded Mr Cameron as having advised as to the importance of specialist advice from a restructuring expert being obtained “*from an SSL perspective*”. This was taken up in correspondence with AG, but no reply was received.
711. The minutes of the SSL Board meeting on 14 May 2015 record the SSL Directors as having agreed that they did not currently have sufficient information to reach any conclusions as to the viability of Project Chicago or the financial consequences for SSL and its stakeholders. This prompted PM to write to AG on 20 May 2015 to point out that this was the case and to seek tCG’s views regarding the appointment of an independent turnaround specialist to the board of SSL.
712. The matter was further considered at the SSL Board Meeting on 1 June 2015. The minutes of this meeting record Mr Cameron noting that AG's suggestion was that

Deloitte would extend a duty of care in respect of discrete documentation/information provided to SSL, but that AG had indicated that Deloitte would not be providing specialist professional advice directly to SSL. In light of this, Mr Cameron recommended that the Board “*should consider whether it would require the benefit of specialist financial advice going forward.*”

713. It was in response to correspondence raising this issue that, by his email dated 17 June 2015, Mr Barnes of AG introduced the concern that the appointment of someone new at this stage could “*jeopardise the timescales and add to the costs*”, and he raised concerns about “*derailment*”.
714. In these circumstances, the SSL Directors did not further pursue the question of either the appointment of an independent director, or the obtaining of independent accounting/restructuring advice.
715. Under cross-examination, Mr Lang referred to the SSL Directors as having ultimately decided that they did not want an independent director, but that in retrospect they probably should have got one and that if they had “*pushed back harder*”, then potentially they could have got one. Mr Lang also accepted that such an independent director might have come in and advised strongly against SSL’s involvement in Project Chicago.
716. With regard to independent financial or restructuring advice, Mr Bailey accepted under cross-examination that no such advice was received despite the importance of such advice having been flagged up on a number of occasions. Mr Lang also accepted that the importance of independent restructuring or financial advice had been identified, but that this had not been followed up.
717. I note the following exchange with Mr Lang under cross-examination:
- “A. *I don't know about a naivety of what is going on, but maybe a belief that we knew more than we possibly thought. We thought we had the right knowledge and information for us to make the right decision. Again, in retrospect and knowing what we now know, we might have pursued that harder.*
- ...
- Q. *In retrospect, it is fair to say that you and the other directors were out of your depth, isn't it ?*
- A. *At that point in time, we felt we were getting the right information/explanations.*
- Q. *What about now?*
- A. *Now I would say probably given what we know that yes we might have brought someone in. I am not sure I would define that as being out of our depth, it is just that you would bring a specialist in.”*

718. In giving evidence, Mr Bailey said that whilst the SSL Directors did have a conflict of interest, they “*didn’t put a great weight of that at the time because [they] didn’t see that as being a problem or an issue.*” However, I am concerned that the evidence does suggest that, directly or indirectly, pressure was put upon the SSL Directors not to press the point with regard to the appointment of an independent director, and not to seek the independent restructuring/financial advice that the SSL Directors had been advised by Mr Cameron to obtain.
719. The Joint Liquidators make the fair point that a difficulty with the existence of a conflict of interest is that a person subject to the conflict of interest might think that they are acting in the best interests of one of their principals, but the conflict might operate in such a way that the person subject to the conflict is not consciously aware that they are not in fact doing so.
720. I accept that, in the present case, as the Joint Liquidators suggest, an independent director with restructuring experience, or an accountant or restructuring specialist providing advice, might have been expected to have questioned at least:
- i) The validity of Deloitte’s solvency analysis purporting to show that SSL was solvent post Project Chicago;
 - ii) The validity of Deloitte’s EOSs purporting to show that Project Chicago was in the interests of SSL’s creditors;
 - iii) The likelihood of tCG in fact withdrawing support and forcing SSL into insolvency if the SSL Directors refused to go along with Project Chicago;
 - iv) The other options available to the SSL Directors (including “*doing nothing*”);
 - v) The risk of SSL subsequently going into an insolvency process (which AP had advised tCG was “*high*”); and
 - vi) The appropriateness of relying on the £50m Deferred Consideration as an asset when considering SSL’s solvency shortly prior to the transaction.
721. I find it difficult to accept that if an independent director had been appointed, or if a restructuring expert or accountant had been instructed to independently advise SSL in respect of Project Chicago, or if the SSL Directors had not been subject to the conflict of interest that they were, the SSL Directors would still have concluded that they had the binary choice that is relied upon by the Respondents as justifying the decision of the SSL Directors to cause SSL to go along with Project Chicago.
722. Given the obvious and identified need for independent restructuring/financial advice given, in particular, the conflict of interest to which the SSL Directors were subject, and the fact that such advice was not obtained, or an independent director appointed, I do not consider that it is open to the Respondents to say that SSL, by the SSL Directors, had *reasonable* grounds to believe that the entry into of Project Chicago would benefit SSL.
723. I therefore conclude that the Respondents have failed to make out the statutory defence under s. 238(5) IA 1986 because, even though they might be able to satisfy

the requirements of s. 238(5)(a), they are unable to satisfy the requirements of s. 238(5)(b).

N. Preference

N.I Introduction

724. The preference claim received very much less attention during the course of the trial than the TUV claim. However, in view of my finding that the Withdrawals of Share Capital were supported by consideration, it becomes of key importance.
725. If the Withdrawals of Share Capital were supported by consideration, then the amount of capital withdrawn and thus returned, namely £477,771,490 satisfied by way of the set-off arrangements provided for by the Funds Flow Letters, represented a debt repaid to CGF as a creditor. The issue arises as to whether it was a preferential payment falling within s. 239 IA 1986. There is a further issue in respect of the repayment to CGL of the outstanding ISLA balance.
726. S. 239 IA 1986 is set out in paragraph 166 above. The structure thereof as applied to the present case is as follows:
- i) S. 239(2) provides that where the company/society has “*at a relevant time ... given a preference to any person, the office holder may apply to the court for an order under this section.*” “*Relevant time*” for these purposes is two years from the insolvency event where the transaction is with a connected person – see s. 240(1)(a). Consequently, given that CGL and CGF were both “*connected persons*”, there is no issue that this requirement is satisfied from a temporal perspective.
 - ii) However, s. 240(2) provides that time is not a “*relevant time*” for the purposes of s. 239 unless the company is, at the time of the transaction, unable to pay its debts within the meaning of s. 123 IA 1986 or becomes unable to pay its debts within the meaning of that section “*in consequence of the ... preference*”. However, unlike the case of a transaction at an undervalue, there is no presumption of insolvency, and the onus is on the office-holder to prove it.
 - iii) S. 239(3) provides that, on an application under s. 239, the Court shall “*make such order as it thinks fit for restoring the position to what it would have been if the company had not given that preference.*” This substantially mirrors the language of s. 238(3) in relation to a TUV.
 - iv) S. 239(4) provides that, for the purposes of s. 239 and s. 241, a company gives a preference if:
 - “(a) *that person is one of the company’s creditors or a surety or guarantor for any of the company’s debts or other liabilities, and*
 - (b) *the company does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the company going into*

insolvent liquidation, will be better than the position he would have been in if that thing had not been done.”

- v) S. 239(5) then provides that the court shall not make an order under s. 239 in respect of a preference given to any person *“unless the company which gave the preference was influenced in deciding to give it by a desire to produce in relation to that purpose the effect mentioned in subsection 4(b).”*
- vi) S. 239(6) provides that a company which has given a preference to a person connected therewith at the time when the preference was given *“is presumed unless the contrary is shown to have been influenced in deciding to give it by such a desire as is mentioned in subsection (5).”* Again, given that CGL and CGF were both connected persons, to the extent that there were preferences in fact in their favour, SSL is to be presumed to have been influenced in deciding to give the preference by a desire to put those societies in a position in which, in the event of SSL going into liquidation, would have been better than the position that they would have been in had the preference not been given.

727. The Joint Liquidators’ preference claim is based upon two steps within the overall transaction, namely:

- i) The repayment to CGL of the ISLA. As pleaded, this was an amount of £15,291,401.04, being the amount referred to in the First Funds Flow Letter. However, at trial the claim was limited to the sum of c. £4.6 million.
- ii) The return of share capital in the amount of £477,771,490, paid by way of the set-off arrangements provided for by the Funds Flow Letters.

728. The following issues arise in relation to these alleged preferences:

- i) Whether the Joint Liquidators have proved that SSL became unable to pay its debts within the meaning of s. 123, *“in consequence of the ... preference.”* It is not, as already identified, the Joint Liquidators’ case that, at the time of the giving of any preference, SSL was unable to pay its debts;
- ii) Whether there was a preference in fact; and
- iii) Whether, in giving any preference, SSL was influenced in deciding to give it by a desire to produce in relation to the relevant person the effect mentioned in s. 239(4)(b).

729. I will consider each of these issues in turn. The principal battleground between the parties has been in relation to the third, desire to prefer, issue.

N.II Inability to pay debts

730. A preliminary issue arises in relation to the ISLA repayment, in that the Respondents submit that it cannot realistically be said that SSL became unable to pay its debts in consequence of the alleged preference bearing in mind that it represented the

comparatively minor sum, within the context of the present case, of c. £4.6 million. I do not consider that there can be any answer to this. Taken on its own, this particular element of the overall transaction cannot, as I see it, have caused SSL to become unable to pay its debts.

731. I have considered whether this repayment of the ISLA in the sum of £4.6 million ought to be treated as part of some wider preferential transaction involving both the payment of this sum, and the Withdrawals of Share Capital. However, this is not how the case was put. Further, s. 239 talks in terms of giving a preference to “*any person*”. This particular alleged preference was given to CGL, which is a distinct legal person from CGF which was the beneficiary of the Withdrawals of Share Capital. This, I consider, further confirms my view that it would not be appropriate to treat the repayment of the ISLA as part of some wider preferential transaction.
732. So far as the Withdrawals of Share Capital are concerned, given that they were settled through the set-off arrangements provided for by the Funds Flow Letters, and that these arrangements constituted the substantive transaction behind Project Chicago involving the transfer of assets of value to CFS, I consider that the solvency question presently raised is, essentially, the same question as that raised by the TUV claim. The effect of any preference is, as I see it, more or less the same as the effect of the relevant transaction for the purposes of the TUV claim so far as the question of whether SSL became insolvent in consequence thereof is concerned.
733. The difference is that the burden of proof is now on the Joint Liquidators to prove that the preference caused SSL’s insolvency, rather than being on the Respondents to disprove this, given that the presumption provided for by s. 240(2) does not apply to the preference claim.
734. Consequently, given where the burden of proof lies, and the fact that the s. 239(6) presumption does not apply, it is possible for the Court to reach a different conclusion with regard to the issue of insolvency than in the case of the TUV claim, and I must consider what the practical effect of this is.
735. However, I am satisfied that my finding of insolvency in the case of the TUV claim did not ultimately depend upon the application of the presumption. I was able to consider evidence going either way on the issue of insolvency, weigh the same up and reach a firm conclusion thereon as set out in § K above. This is, I consider, an issue which, as is very often the case, does not turn on the burden of proof. As Flaux LJ put it in another context in *E3 v Secretary of State for Home Department* [2019] EWCA Civ 2020, [2020] 1 WLR 1098, at [69]: “*At Trial, the court or tribunal simply considers the evidence in the round and decides a particular issue on the balance of probabilities.*”
736. I am satisfied that the Joint Liquidators, to the extent that they are now required to prove that SSL became insolvent in consequence of the transaction alleged to constitute a preference, can, and do prove insolvency.

N.III Preference in fact

737. So far as the repayment of the ISLA is concerned, this fails as a preference for the reason that I have already explained in dealing with the requirement to show that SSL

became insolvent in consequence of the preference. Consequently, I only deal with it very briefly under this heading.

738. The Respondents' case is that, as the evidence came out at trial, it was shown that the ISLA balance had reduced further and indeed had become a credit balance in favour of SSL due to, amongst other things, the transfer of the CGF Properties to CGF. Thus, so the Respondents contend, nothing was owed to CGL that required to be repaid, and it was not a creditor who could be preferred.
739. It is certainly true that, under cross-examination, Mr Rowley accepted that CGL was a debtor, not a creditor, and therefore could not have had its position improved by the set-off arrangements provided for by the Funds Flow Letters, a position also recognised by Mr Davies. However, the Joint Liquidators make the fair point that this is not how matters were pleaded, and to the contrary that the Re-Amended Defence had pleaded that one of the "*direct financial benefits to SSL of the Transaction*" was "*repayment of the loan to CGL*". Further, in dealing with the TUV claim, I was invited to take the figure of c. £4.6 million into account as consideration provided to SSL in the updated summary table of consideration that I was provided with by the Respondents. The position in relation to the transfer of properties to CGF remains somewhat opaque, and in all the circumstances, should the preference point have turned upon it, I would have found that there had been a preference in fact in relation to this particular sum.
740. With regard to Withdrawals of Share Capital, the essence of the Respondents' case is as follows:
- i) Given the composite nature of the overall "*transaction*", it is necessary to assess the Respondents' position holistically rather than to focus on CGF alone because, to do otherwise, would mean CGF received no preference at all, because it was not paid anything in relation to its c. £477 million, the assets representing the "*payment*" instead going to CFS and Rochpion under their respective sale agreements.
 - ii) If, having regard to the overall transaction, the liabilities that the Respondents "*received*" exceed the value of the assets they "*received*", then CGF received less than 0p/£ and did worse than it would have done in any hypothetical liquidation of SSL. On the Respondents' case the liabilities that they received did exceed the assets that they received.
 - iii) If, contrary to their primary case, the negative value of the liabilities did not surpass the positive value of what CGF received, then it is submitted that it is necessary to consider the EOSs prepared by the solvency experts in order to consider whether the positive value of what CGF did receive did, in fact, exceed that which it would have obtained on a hypothetical liquidation at the relevant time.
 - iv) The Respondents then make some detailed submissions in their written submissions as to why the Court should prefer Mr Davies' EOS, the conclusions the Court should draw in considering whether CGF had been preferred in fact, and to what extent.

Approved Judgment

741. It is unfortunate that oral submissions on whether there was a preference in fact were dealt with very briefly by the parties, and so there was no real engagement by the parties with the arguments advanced by the other of them. This may be because the parties recognise that the real battleground was over the issue of desire to prefer.
742. In the circumstances and given my finding in relation to desire to prefer which is adverse to the Joint Liquidators' case, I will deal with this issue fairly briefly.
743. I have reservations about the "holistic" approach suggested by the Respondents. I accept that, for the purposes of the TUV claim, I considered that the relevant "transaction" was wider than simply the Withdrawals of Share Capital, and extended as widely as to the assumption by CFS of liabilities of SSL relating to the SSL Pension Scheme etc. However, as I have identified, s. 239 talks in terms of giving a preference to "any person". In the present case, so far as the Withdrawals of Share Capital are concerned, that clearly means CGF. Thus, I consider that it is necessary to consider the extent to which CGF's own position might have been improved by the alleged preference.
744. The Respondents submit that without adopting the suggested holistic approach CGF received nothing, because the properties etc. were transferred to CFS, hence why they say that, to make sense of the situation, matters require to be looked at by reference to the wider transaction including the liabilities assumed by CFS. However, I do not consider this to be correct. CGF can, I consider, be seen to have benefitted because it gained effective ownership of CFS and obtained benefit in that way. It seems to me that the value of that benefit (if any) represents the preference in fact if and to the extent that this is a better result than what CGF might have received on an insolvent liquidation of SSL.
745. In any event, given my findings in respect of undervalue in relation to the TUV claim, it is my finding that the value of the assets received by the Respondents exceeded the liabilities "received", by at least £230 million, and likely considerably in excess of that sum as summarised in § L.VI above.
746. I would need, if required, to hear further submissions as to whether, on the assumption that CGF were to be treated as an ordinary unsecured creditor, it is better off as a result of what occurred over what it would have received in the event of an insolvent liquidation of SSL. From what I can make of the figures, CGF is better off, but that is only a provisional view.
747. However, I consider that the answer to the point is that on a liquidation of SSL, CGF ought not to have been treated as an ordinary unsecured creditor, but rather as deferred to ordinary unsecured creditors. In that case, the position of CGF would, as I see it, most certainly have been improved by the Withdrawals of Share Capital.
748. As the Joint Liquidators point out, s. 74(2)(f) IA 1986, under the heading "*Liability as contributories of present and past members*", provides that:

"a sum due to any member of the company (in his character of a member) by way of dividends, profits or otherwise is not deemed to be a debt of the company, payable to that member in a case of competition between himself and any other creditor not a member of the company,

but any such sum may be taken into account for the purposes of the final adjustment of the rights of contributors amongst themselves.”

749. If this provision did apply to SSL, then I consider the effect thereof would be that CGF, as a member, would, on any insolvency of SSL, have only been entitled to payment after ordinary unsecured creditors and thus, on this basis, would most certainly have been in a worse position in the event of an insolvent liquidation than as a result of the alleged preferential “*payment*” by way of the Withdrawals of Share Capital.
750. The Respondents suggest that s. 74(2)(f) does not apply because s. 124 CCBSA 2014 governs the position of “*Liability of existing and former members in a winding up*” of registered societies but contains no equivalent of s.74(2)(f). Therefore, so it is said, the latter provision has no application in the case of a registered society.
751. However, as against this, s. 123(2) CCBSA 2014 provides that the provisions relating to the winding up of companies have effect in relation to a registered society as if the society were a company, subject to the modifications set out in ss. 123(2)(a) to (c), none of which impacts on this point. S. 77(2)(f) IA 1986 is not inconsistent with s.124 CCBSA 2014 in the sense that it is dealing with a sum payable by way of dividend on liquidation rather than members’ contributions as such.
752. Further, I note Rule 53 of SSL’s Rules which provide that SSL might be dissolved by winding up in a manner provided for by the Industrial and Provident Societies Act 1965, the forerunner to CCBSA 2014, which, as we have seen, by s. 123(2) thereof, applies the provisions relating to the winding up of companies. Further, Rule 53, although dealing with surplus assets on a solvent dissolution, does draw a distinction between “*debts and liabilities*” and “*repayment of the paid-up share capital*”.
753. In the circumstances, I consider that the better view is that in the event of a hypothetical winding up of SSL, the effect of the above provisions is that the amount due to CGF by way of return of share capital would have stood to be deferred to ordinary unsecured creditors.
754. I therefore consider that the better view is that there was a preference in fact in relation to the Withdrawals of Share Capital.

N.IV Desire to prefer

Legal principles

755. The leading authority is *Re MC Bacon Limited* [1990] BCC 78. As Millett J emphasised at 87D-E, the test under s. 239(5) IA 1986 is the subjective one of desire, and not the objective one of intention. There must be a *desire* to produce the effect mentioned in s. 239(4)(b). As Millett J put it at p.87: “*Intention is objective, desire is subjective. A man can choose the lesser of two evils without desiring either.*”
756. The relevant principles were helpfully summarised in *Carton-Kelly v Darty Holdings SAS* [2022] EWHC 2873 (Ch), [2023] BPIR 303, at [101], per Falk J:

“a) ‘Desire’ incorporates a subjective test, distinct from intention. A person may be taken to intend all the necessary consequences of his actions, but he is not to be taken as desiring them.

b) The desire in question is a desire to produce the effect referred to in s.239(4)(b), namely to improve the creditor’s position in the event of an insolvent liquidation. It is not enough for there to be a desire to do the act that creates the preference.

c) Rather, the company must have ‘positively wished to improve’ the creditor’s position in the event of its insolvent liquidation.

d) Mere presence of that desire is not enough unless it influenced the decision to enter into the transaction, in the sense of being one of the factors which operated on the minds of those who made the decision. However, it need not be a decisive factor.

e) The test must be applied at the time when the decision to grant the preference was made.”

757. The presumption in s. 239(6), which applies to the Respondents in the present case, is a rebuttable one which imposes a burden on the Respondents *“to prove that the factors that operated on the minds of the decision-makers did not include a decision to prefer”* – see *Carton-Kelly v Darty Holdings SAS* (supra) at [205]-[206], per Falk J. I consider that this requires a more nuanced approach than the presumption under s. 240(2) IA 1986 considered in paragraph 735 above because of the requirement to show that a desire to prefer did not operate on the minds of the decision makers at all.
758. In *Re MC Bacon* (supra) at 87, Millett J spoke in terms of the company being actuated *“only by proper commercial considerations”*. I adopted this language myself in *Re Oxford Pharmaceuticals Limited* [2009] EWHC 1753 (Ch), [2010] BCC 834, sitting as a Deputy High Court Judge, where, at [76], I suggested that, in practical terms, the presumption requires the connected party to satisfy the Court on the balance of probabilities that the company was *“acting solely by reference to proper commercial considerations in making the payments, and that a desire (i.e. subjective wish) to better the position of [the payee] in the event of an insolvent liquidation did not operate on the directing mind or minds of [the company] at all.”*
759. It was emphasised in *Carton-Kelly v Darty Holdings SAS* (supra), that the statutory test is the presence and influence of an improper desire rather than the absence of a proper one, and ultimately the question is whether the connected party creditor has satisfied the burden of proving that the factors that operated on the minds of the decision-makers within the relevant company did not include a desire to prefer.

The Joint Liquidators’ case

760. The Joint Liquidators submit that the Respondents are unable to rebut the presumption by showing that Project Chicago was carried out for proper commercial reasons, and that the reasons for this overlap significantly with those said to establish why I should have found that the Respondents had failed in their attempt to rely on the subjective limb in s. 238(5)(a) of the s 238(5) IA 1986 statutory defence.

761. The Joint Liquidators, in their closing submissions, submitted as follows:
- i) The purpose of Project Chicago was, it is said, to benefit tCG and improve its financial position. SSL itself did not require restructuring prior to the implementation of the transaction, which was instead highly detrimental to SSL and its ability to carry on business. The primary and substantial beneficiary of the transaction was instead tCG and the SSL Directors carried out Project Chicago in full knowledge of this. The fact that, on the Joint Liquidators' case, the SSL Directors played a part in choreographing the Transaction Demand is said to be evidence of their desire to carry out the transaction for the benefit of tCG.
 - ii) On the Joint Liquidators' case, the Transaction Demand was a pretext, which was never likely to be carried through by tCG forcing SSL into an immediate insolvency process, and was choreographed in advance between tCG, the SSL Directors and their respective advisers. It is said that the question of what tCG would do if the SSL Directors did not proceed with Project Chicago was never properly investigated, and that the assumption was that the SSL Directors would approve Project Chicago, so that this eventuality would not arise.
 - iii) It is said that in the light of the conflict of interest that clearly existed between the SSL Directors' positions as (directly or indirectly) directors of SSL, they were inevitably influenced by a desire to assist tCG, which was also providing a financial incentive (through the indemnity that was given) to push the SSL Directors towards approving Project Chicago. It is said that the failure of the SSL Directors to take adequate steps to deal with their conflict of interest (such as through the appointment of an independent director to the board of SSL and by obtaining the appropriate independent financial and restructuring advice for SSL) only magnified the impact of that conflict on their decision-making.
 - iv) It is said that the SSL Directors always understood that in following Project Chicago, there was a serious risk that SSL would enter into an insolvency process, and that "*this level of awareness is sufficient for the purposes of the desire to prefer requirement in section 239*", reliance being placed on a passage in Parry, *Transaction Avoidance in Insolvencies*, 3rd edn (2018), at paras 5.97-5.98.
762. In short, therefore, the Joint Liquidators submit that the Respondents are unable to rebut the presumption arising under s. 239(6), and therefore SSL is to be taken as having had the requisite desire at the time that the relevant preference took place.

Determination of the desire issue

763. It is common ground between the parties that we are concerned, for present purposes, when considering whether SSL was motivated by a desire to improve the position of CGF or CGL in the event of an insolvent liquidation of SSL, with the state of mind of the SSL Directors, i.e. Mr Bailey, and Mr Lang and Mr Crossland in their capacity as directors of the corporate director, CWS.

764. In opening their case, the Joint Liquidators had sought to maintain that the decision to enter into the relevant transaction, including the Withdrawals of Share Capital, was effectively taken by tCG, and that it was therefore the desire of the latter which mattered. However, given the way that the case was put on behalf of the Joint Liquidators in closing, I do not understand this position to be maintained. In any event, I am satisfied that such a case is not supported by the evidence and that, ultimately, the decision on behalf of SSL to enter into Project Chicago was, in fact, that of the SSL Directors.
765. There is also common ground between the parties that there is significant overlap between this issue and the ability of the Respondents to rely upon the subjective limb (s. 238(5)(a)) of the statutory defence under s. 238(5) relating to the transaction at an undervalue claim.
766. This makes sense because if, as I found, the Transaction Demand was not perceived by the SSL Directors to be a pretext, and they are not to be taken to have been party to consciously choreographing the presentation of a false picture so far as the Transaction Demand was concerned, and the SSL Directors did, as I found, genuinely believe that they had a binary choice between going along with Project Chicago on the one hand, and, in the alternative, tCG taking some fairly immediate steps the effect of which would be to force SSL into some form of insolvency, then it very much undermines the Joint Liquidators' case as to why it is said that the SSL Directors must have had a desire to improve the position of CGF in the event of an insolvent liquidation of SSL.
767. In this context, it is important to bear in mind that, on the basis of my findings, the SSL Directors' thinking at the time was that the prospects of SSL going into liquidation would be reduced by going along with Project Chicago, rather than increased, and that the only real alternative for SSL was something likely to be significantly worse than entering into Project Chicago.
768. However, the evidence relied upon by the Respondents as rebutting the presumption under s. 239(6) does, I consider, go further than the evidence that I considered in determining the s. 238(5) statutory defence issue.
769. In paragraph 107 of his witness statement, Mr Bailey said this:

“Other than giving us the ultimatum, Group never instructed us in relation to the transaction. We were never asked or directed to do anything specific. We had nothing to gain ourselves from Project Chicago and I had nothing to lose; it was not like my position within the Food business was being threatened if I did not go along with Group's proposal. We were never asked to prefer Group's interests over any other creditors and we were never motivated by a desire to prefer tCG. We had no reason to prefer the Group in the circumstances; we just wanted to do the right thing for SSL. I cannot say that any more strongly. We wanted to do the right thing so if anyone examined or questioned our actions in the future, we could say with a clean conscience that we did what we were supposed to do for SSL and we took the right advice.” [Emphasis added]

770. At paragraph 113, Mr Lang said this:

“As I have explained above, the decision to enter into Project Chicago was made by us as SSL directors. I did not think about preferring any Group entity as a creditor when making decisions. I thought about the position that Group had put us in and whether the transaction would have left SSL solvent and in a position to operate in the future. I was clear that the basis on which we needed to consider the transaction was what was best for SSL, its creditors and its stakeholders, and not what was best for Group. I was never asked to prefer Group's interests over other creditors. Nor was I motivated myself by a desire to prefer Group's interests. Our position was very clear to me then, as it is now, that we needed to act as directors of SSL in the best interests of SSL and all of its creditors, despite the very difficult position we were placed in by Group.”

771. This evidence of Mr Bailey and Mr Lang was not directly challenged under cross-examination and, in the light of my earlier findings in relation to their evidence, I have no reason to doubt the truth thereof. It is, I consider, sufficient to rebut the presumption under s. 239(6) taken on its own.

772. The way it was put to Mr Bailey under cross-examination was that the *“consequence of what you did was to put the Co-op Group in a better position”*, to which Mr Bailey agreed that there was substantial benefit to tCG in SSL entering into Project Chicago. However, I agree with the Respondents that this cannot be equated with a desire on Mr Bailey's part to prefer CGF (or CGL). On this latter question, Mr Bailey did confirm under cross-examination that it was not his desire to confer this benefit on tCG in that he responded as follows:

“Q. ... and that is something which you wanted to do, wasn't it?”

A. No. We didn't have a view. As I said, we were separate from group in this. We had to face -- we had it make a decision in our mind at the time whether to accede to Project Chicago or allow the business to fall into insolvency.”

773. So far as Mr Lang is concerned, he was asked at the very end of his lengthy cross-examination whether *“what you were doing was putting Co-op Group in a better position than it would have been in in the event of SSL's insolvency.”* He was not asked about or challenged, with regard to his evidence that he had no desire to prefer either CGF or CGL.

774. In all the circumstances, I am satisfied that the presumption that arises under s. 239(6) IA 1986 has been rebutted by the Respondents on the present facts, and that the evidence of Mr Bailey and Mr Lang is sufficient to show that the SSL Directors, being the directing mind of SSL, did not, at any time, have a desire to improve the position of CGF or CGL (or any other tCG society) in causing SSL to go along with Project Chicago, including the Withdrawals of Share Capital that are alleged to have given rise to a preference.

Conclusion in respect of preference claim

775. Although the Joint Liquidators may have established that SSL was insolvent at the relevant time, and that there was a preference in fact in relation to the return of share capital, the Respondents have rebutted the presumption that arises under s. 239(6) IA 1986 and have shown that SSL was not, in making any such preference, motivated by a desire to put CGF into a position which, in the event of SSL going into insolvent liquidation, would have been better than the position that it would have been in had the preference not been made.
776. Consequently, the preference claim must, in my judgment, fail.

O. Remedy

777. In view of my finding that neither the transaction at an undervalue claim nor the preference claim are established, I do not strictly need to deal with the question of remedy. However, in case I should be wrong in respect of either of these claims, I consider that I should briefly consider remedy.
778. The essential aim of the exercise under s. 238(3) and s. 239(2) is to make such order as the Court thinks fit for restoring the position to what it would have been if the company/society had not entered into the transaction at an undervalue or given the preference (as relevant).
779. S. 241(1) then sets out a non-exhaustive list of remedies that the Court might grant. I note that s. 240(2) provides that an order may affect the property of, or impose any obligation on, any person whether or not he is the person with whom the company in question entered into the transaction or the person to whom the preference was given, subject to ss. 240(a) and (b).
780. When dealing with remedy, the Court is required to consider the full picture, whatever the width of the particular “*transaction*”. As Falk LJ said in *TAQA (CA)* at [94]:

“Section 238(3) is in the nature of a ‘but for’ test. The court must seek to restore the position to what it would have been but for the transaction at an undervalue. It is well-established that this provision confers a discretion. In exercising its discretion, the court will have regard to a wide variety of considerations with a view to achieving justice between the parties (see for example Reid v Ramlort [2004] EWCA Civ 800, [2005] 1 BCLC 331 at [125]-[126] in relation to the bankruptcy equivalent of s.238). [Phillips] HL provides an example of this in requiring account to be taken of the loan to meet the first rental payment, although it was not suggested that the loan was itself part of the consideration.”

781. Prima facie, one would, as I see it, restore the position to what it would have been but for the relevant TUV or preference by restoring to SSL the value of net benefit that it gave away by virtue of the TUV or preference. Certainly, in relation to the TUV claim this would be the balance of at least c. £230 million identified in § L.VI above. Given that the Joint Liquidators do not seek to recover more than the creditor cap (the Joint Liquidators’ best estimate of which, as at 1 March 2026, is £205 million), it is unnecessary to explore how far above c. £230 million that balance might go. I consider that a similar approach is appropriate in the case of the preference claim.

Approved Judgment

782. However, the Respondents seek to introduce one further potential restriction on the amount recoverable. They submit that in considering what is required to restore the position to what it would have been but for the relevant transaction or preference, one must have regard to what is likely to have occurred had Project Chicago not proceeded. They say that the evidence of Mr Pennycook and Mr Wormald was to the effect that the likelihood is that further consideration would have been given to a CVA, the suggestion being that a CVA would have been agreed with landlord creditors.
783. I am prepared to accept that the possibility of a CVA would, if the SSL Directors had dug their heels in, have come back on the agenda. However, the difficulty with this argument is that I do not consider that I can be satisfied on the balance of probabilities that a CVA would have been proposed to creditors, let alone that a CVA would have been approved by creditors. Further, there is no real evidence as to what sort of terms might have been proposed to creditors.
784. In the circumstances, I consider that it has not been shown that the level of any award ought to be reduced below the creditor cap that the Joint Liquidators would have been prepared to accept.
785. With regard to the amount of the creditor cap, the Joint Liquidators invite me to award a figure of £205 million. together with further relief in order to enable them to recover any further figure above this amount if the deficiency should prove to be more than £205 million. The Respondents, on the other hand, would wish to challenge the amount of the deficiency, and in particular the costs and expenses of the liquidation of SSL. After the circulation of my judgment, I received submission from both the Joint Liquidators and the Respondents on this issue, which was dealt with somewhat hurriedly in the course of closing submissions. In the light thereof have made a number of revisions to this judgment. Without making any findings with regard to the entitlement of the Joint Liquidators to seek more than £205 million or of the Respondents to challenge in these proceedings the amount of the creditor cap, I have decided that, in the absence of agreement between the parties, I should hear further argument at a consequential hearing with regard to the amount of the creditor cap and/or as to how it might appropriately be determined.
786. In short, had I found liability established in the present case, I would have awarded a sum limited to the amount of the creditor cap (the Joint Liquidators' best estimate of which is £205 million, but in respect of which I will hear further argument).
787. It is clear from s. 241(2) that the Court is not limited to making an award as against the other party to the transaction (in the case of a TUV), or the person to whom the preference was made. I would have been inclined to make a joint and several award against CFS and CGF as the members of tCG who have substantially benefited from the TUV or preference, had I found liability under either head to have been established.

P. Overall conclusion

788. I consider that the TUV claim must fail because I do not consider that, properly analysed, the Withdrawals of Share Capital involved a transaction or transactions for

no consideration. Rather, I consider that it was a transaction the consideration for which was the capital subscribed for the relevant shares.

789. If I am wrong on this point, then I consider that the TUV claim would have succeeded, and the Joint Liquidators would have been entitled to an award limited to the creditor cap (the Joint Liquidators' best estimate of which is £205 million) jointly and severally against CGF and CFS.
790. This does leave the preference claim. However, I consider that this claim must also fail because I consider that the Respondents have succeeded in rebutting the presumption that SSL, in making a preference in favour of CGL, was influenced by a desire to improve the position of CGL in the event of an insolvent liquidation of SSL. There are, I consider, other difficulties so far as the preference claim against CGL in respect of the repayment of the ISLA is concerned.
791. The claim must, therefore, be dismissed.

APPENDIX

Co-operative Group Structure at 31 October 2015

