Neutral Citation Number: 2015 EWHC 2289 (CH)

Case No: 7466 of 2012

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

7 Rolls Buildings,
Fetter Lane,
London EC4A 1NL

Date: 31 July 2015

Before :

MR REGISTRAR JONES
- -

Between :

(1) PHILIP ANTHONY BROOKS
(2) JULIE ELIZABETH WILLETTS
(Joint Liquidators of Robin Hood Centre Plc, in liquidation) **Applicants**
- and -
(1) KEIRON ARMSTRONG
(2) IAN WALKER **Respondents**

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- -

MR JAMES COUSER (instructed by **Nelsons**) for the **Applicants**
MR TIRAN NERSESSIAN (instructed by **Ashton Bond Gigg**) for the **Respondents**

Hearing dates: 1-9 and 31 July
- -

Approved Judgment
I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR REGISTRAR JONES

MR REGISTRAR JONES :

A) Introduction

1. Robin Hood Centre plc ("the Company") from July 1988 until its creditors' voluntary liquidation on 6 February 2009 carried on the business of running a Robin Hood themed tourist attraction in Nottinghamshire. The business included a "dark ride" through themed stage sets, a retail shop and a café/banqueting facility.

2. The Applicants ("the Liquidators") allege in reliance upon section 214 ("Section 214") of the Insolvency Act 1986 ("the Act") that the Respondents ("the Directors") should be made liable to contribute to the Company's assets because they knew or ought to have concluded before 6 February 2009 that there was no reasonable prospect of avoiding insolvent liquidation. They also apply under section 212 ("Section 212") of the Act for compensation against the Directors for breach of duty.

3. The Directors were appointed officers of the Company on 11 March 1996 and resigned on 6 February 2009. The First Respondent ("Mr Armstrong") was appointed Company Secretary on 15 May 2000.

B) Section 214 – Wrongful Trading

4. Section 214 confers upon the court a discretionary power to declare that a person who is/was a director is liable to make a contribution to the company's assets if it appears during the course of that company's liquidation that (see Section 214(2):

   (a) It went into liquidation at a time when its assets were insufficient for the payment of its debts and other liabilities and the expenses of the winding up ("the Insolvency Condition");

   (b) At some time before the commencement of the winding up (but not before 28th April 1986), that person knew or ought to have concluded there was no reasonable prospect that the company would avoid going into insolvent liquidation ("the Knowledge Condition"); and

   (c) That person was a director (including a shadow director) of the company at that time ("the Director Condition").

5. However, Section 214(3) provides that the court shall not order compensation if satisfied that after the Knowledge Condition was first satisfied, the director concerned took *"every step"* (assuming him to have known that there was no reasonable prospect that the company would avoid going into insolvent liquidation) with a view to minimising the potential loss to the company's creditors as he ought to have taken ("the Minimising Loss Defence"). The onus is upon the Directors to establish this statutory defence on the balance of probability if the Knowledge Condition is proved by the Liquidators.

6. My attention has been drawn to the notes in ***Sealy & Milman, "Annotated Guide to the Insolvency Legislation, 2015 edition*** at page 224 ("***Sealy & Milman***") in which it

is argued otherwise: *"On principle and, it is submitted, on the language of the section, the onus of proof to show that a director has failed to take every step that he ought to have taken should be on the liquidator"*.

7. That is not my construction for a number of reasons. First, it is not the natural construction of the words used and it does not make sense to require the applicant to prove the director took "every step". Second, if Parliament had intended the burden of proof to be upon the applicant, it would have expressly provided that a declaration would not be made unless (or only if) the applicant satisfied the court that *"every step"* etcetera had not been taken. Third, it is more logical to place such a burden upon the respondents in circumstances where they have been trading knowing there was no reasonable prospect of avoiding insolvent liquidation. Finally, the relevant facts will be known to the respondents and it is therefore right and appropriate for them to justify continued trading in those circumstances. In the case of ***Re Idessa (UK) Limited (In liquidation)***, [2011] EWHC 804 (Ch) at [113], Ms Lesley Anderson QC accepted the submission that the burden of proof is on the respondent in respect of a statutory defence and I follow her decision.

8. The question of the meaning of *"every step"* and "minimising potential loss to creditors is addressed in ***Sealy & Milman*** at page 223: *"The phrases 'took every step' and 'minimising the potential loss to creditors' seem, at first sight, rather overstated. However, there is no doubt that the use of 'every step' was deliberate: a proposed amendment to 'every reasonable step' was expressly rejected in Parliament; and on similar reasoning, we must assume that 'minimise' was fully intended, rather than, say, 'reduce' or 'avert"*.

9. This is important to note but Section 214(4) must also be taken into account. It provides that: *"the facts which a director of a company ought to know or ascertain, the conclusions which he ought to reach and the steps which he ought to take are those which would be known or ascertained, or reached or taken, by a reasonably diligent person having both - (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions (including any functions entrusted to him/her even if not carried out) as are carried out by that director in relation to the company, and (b) the general knowledge, skill and experience that that director has"* ("the Reasonably Diligent Director Test").

10. Therefore the deliberate use of *"every step"* and Parliament's rejection of a filtered down reasonable steps test, must be applied in the context of Parliament having provided instead the Reasonably Diligent Director Test to determine what *"every step"* should have been.

11. The Liquidators allege within their evidence and Points of Claim that the Knowledge Condition and the other requirements of Section 214 were satisfied on the following dates:- 31 January 2005; 31 January 2006; 9 October 2006; 31 January 2007; 3 May 2007 ("together "the Dates"). An issue between the parties is whether the Liquidators are bound by those dates for both claims ("the Ambit of Claim Issue").

12. Mr Couser for the Liquidators submits in his skeleton argument that: *"... the court is entitled to conclude that the date on which the [Directors] knew or ought reasonably to have concluded that the Company could not avoid insolvent liquidation was some alternative date"*. He relies upon the decision of ***Re Sherbourne Associates Limited***

[1995] BCC 40. Mr Nersessian for the Directors raises issue with this on the basis that the Liquidators must make plain what their case is and they cannot have free range to choose at trial, or indeed in final submissions, any date they wish to propose to the court. He relies upon the same authority.

13. In my judgment the starting point is that the Act requires the Liquidators to prove the Knowledge Condition at some time before the commencement of the winding-up rather than at a particular, specified date. A starting date does not always have to be specified (although plainly usually useful) and the case will not necessarily be lost if a specific date is not made out (see ***Re Continental Assurance Co of London Plc*** [2001] BPIR 733, Annexe B at 899).

14. Nevertheless that starting point is subject to the basic principle that the Directors must know the case they have to meet and case law establishes that the Liquidators will not be able to claim a different date or period at trial to the one capable of being identified from the application and evidence in support. The case of ***Re Sherbourne Associates Limited*** (above) is a good example of the implementation of that approach of fairness.

15. In this case the Points of Claim plead wrongful trading by reference to the Dates. Then in paragraph 41: *"... by continuing to trade after each of the Dates in the alternative, or alternatively after the date upon which the court determines the Company was insolvent, the Directors were in breach of their fiduciary duty to act in the best interests of the creditors. Paragraphs 1 to 40 [the facts and matters relied upon to allege wrongful trading] are repeated"*.

16. Mr Nersessian for the Directors submits this means there is a wrongful trading case on any of the Dates down to 3 May 2007 and a misfeasance claim which is similarly limited. Mr Couser submits that the wrongful trading claim is down to 3 May 2007 but subject to a reasonable extension based upon the facts and matters alleged and the misfeasance claim for failing to act in the best interests of the creditors runs throughout the Dates and until the liquidation on 6 February 2009.

17. During the course of his submissions upon the Ambit of Claim Issue, Mr Nersessian observed that one of the difficulties is the relationship between the evidence in support of the application and the Points of Claim directed to be served after it (in this case by Order made 15 March 2013) when the two may be inconsistent. The evidence was first in time in compliance with ***Rules 7.3 and 7.8 – 7.9 of the Insolvency Rules 1986*** ("the Rules"). Statements of case were subsequently directed pursuant to ***Rule 7.10(2)(b)***. Whilst the purpose of the Points of Claim is to set out the facts and matters relied upon in support of the cause(s) of action contained in the application notice, that will also have been a purpose of the evidence in support.

18. In my judgment (there being no express directions to the contrary) the Points of Claim became the document identifying the facts and matters to be relied upon in support of the cause(s) of action appearing in the application. It marks the parameters of the case being advanced (to use the words of Lord Woolf MR applied to CPR pleadings in ***McPhilemy v Times Newspapers Ltd*** [1999] 3 ALL ER 755 at 793). However, if there is an inconsistency or material difference with the evidence, the court will apply the fairness test asking whether the respondent nevertheless knew or reasonably ought to have known that an inconsistent or different approach identifiable from the evidence was (still) being relied upon.

19. The inconsistency or difference may be appreciated but still require amendment of the Points of Claim. In which case, the application to amend will be subject to the usual tests including (but obviously not limited to) the consideration of prejudicial consequences and issues of justice, fairness and oppression; for example time to prepare; ability to prepare including consideration of the effect of delay upon memory; the burden (including financial and subjective) upon a party having to meet a changed case.

20. This all means in my judgment that determination of the Ambit of Claim Issue must await further consideration of both types of documents and take into account how the trial progressed. I will return to it later but emphasise at this stage that the issue turns upon whether the Directors knew and had a reasonable opportunity to prepare for the case they have to meet not upon technical pleading issues or games.

C) Section 212

21. Section 212 provides a summary remedy (i.e. it is a procedural short cut which does not create new causes of action) if in the course of the winding up of a company it appears that a person who is/was an officer of the company (amongst other capacities) has misapplied or retained, or become accountable for, any money or other property of the company, or been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company. If so, the court having examined this conduct may compel that person:-

    (a) To repay, restore or account for the money or property or any part of it, with interest at such rate as the court thinks just, or

    (b) To contribute such sum to the company's assets by way of compensation in respect of the misfeasance or breach of fiduciary or other duty as the court thinks just.

22. The cause of action relied upon for misfeasance by the Liquidators is the common law duty (see ***West Mercia Safetywear v Dodd*** [1988] BCLC 250) and/or from 1 October 2007 the statutory duty under ***section 172(3) of the Companies Act*** 2006 to act in the interests of creditors in the event of a company becoming insolvent.

23. The Liquidators' misfeasance claim arises from the facts and matters relied upon in support of its claim under Section 214. It is alleged that the Directors breached their duties by failing to conclude that the Company was insolvent and, as a result, by failing to exercise their powers in the interests of the creditors.

24. The Liquidators are entitled to pursue either or both claims. Misfeasance, however, is a claim of the Company for breach of duty and therefore any money recovered will form part of the Company's general assets and may be covered by a prior charge or assignment over future property. Section 214 provides for a contribution to *"the company's assets"* and therefore the monies recovered are held for the creditors generally. Preferential creditors will have a prior claim (after payment of costs and expenses) but the contribution will not be subject to any security over future property because the prior charge or assignment is not an asset of the Company.

25. In this case the Directors were guarantors of the Company's liability to its bank, a secured creditor by debenture. The Directors will be subrogated as a result of any payment. S***ection 215(4) of the Act*** provides the court with a discretion should a declaration under Section 214 be made to direct that the debt and any interest owed by the Company to the Directors (or any part) *"shall rank in priority after all other debts owed ... and any interest on those debts"*.

26. For the misfeasance claim, the Directors can and do (if necessary) rely upon ***section 1157 of the Companies Act 2006*** which confers power upon the court to grant relief either wholly or in part from any liability if it appears notwithstanding the breach of duty that they (or either of them) as preconditions (see ***PNC Telecom plc v Thomas & Others (No2)*** [2008] 2 BCLC 95) acted (i) honestly, (ii) reasonably and in all the circumstances ought fairly to be excused. It is only available for the Section 212 not the Section 214 claim (see ***Re Produce Marketing Consortium Ltd*** (No 2) [1989] BCLC 520).

D) The Liquidators' Case

27. Essential features of the case relied upon by the Liquidators to support the conclusion that the Knowledge Condition is satisfied include the fact that the Company's financial statements record a trading loss for each of the 12 financial years starting with the year ended 31 January 1997 which followed a creditors' voluntary arrangement in 1996.

28. In addition the Liquidators contend that although the accounts record net assets not liabilities during those periods of trading losses, a number of different factors should lead to the conclusion that the Company was in fact balance sheet insolvent applying the test in ***BNY Corporate Trustee Services Limited v Eurosail*** [2013] UKSC 28, **[2013] 1 W.L.R. 1408** ("Eurosail").

29. In that case the Supreme Court construed section 123(1)(e) of the Act (which prescribes commercial (i.e. cash flow) insolvency as a ground for deeming insolvency for the purposes of a winding-up petition) as creating a test based not only upon debts presently due but also debts falling due in the near future. This approach accords with the wording, it catches cases of endemic shortage of working capital and it distinguishes temporary illiquidity. Once that period of *"near future"* is passed, this test becomes speculative.

30. The alternative test of actual (i.e. balance sheet) insolvency under section 123(2) of the Act is the one to be applied for the purposes of Section 214. It stands side by side with the commercial insolvency test and can establish insolvency even if the company is able to pay its debts as they fall due. This test compares present assets with present and future liabilities, discounted by making proper allowance for contingencies and deferment. It is not an exact test but a matter of judgment. It is not a *"point of no return"* if that means anything different from the court being satisfied on the balance of probability that a company has insufficient assets to be able to meet all its liabilities (see also ***Bucci v Carman (Liquidator of Casa Estates (UK) Ltd)*** [2014] EWCA Civ 383; [2014] B.C.C. 269).

31. In essence the Liquidators rely in support of their contention upon (in summary and amongst other matters) the following factors over various accounting periods: debts owed by associated companies included bad debts for which provision should have been made; the profit and loss accounts should not have included £267,966 as turnover received from Bar Humbug Limited for the 2005 year-end; there was a substantial VAT liability since 2003 identified in 2006 which should have been included in the financial statements as a provision (at least); and there should have been a provision for the outcome of a rent review.

32. 31 January 2005 is the first specific date relied upon by the Liquidators for their wrongful trading claim. The financial statements for that year end record a loss of (£113,169). This resulted in losses carried forward on the balance sheet of (£1,470,214). The Liquidators' case is that the financial results for the previous 12 years establish the Company's business was inherently loss making and that by 31 January 2005 it could no longer avoid insolvent liquidation as a result, notwithstanding the fact that the recorded net assets totalled £176,258.

33. The net assets included fixed assets (in essence the ride and the property) which the Liquidators argue could not be relied upon to raise money. If sale was to be relied upon to raise funds, the nature of those assets would have meant the sale of the business as a whole and in any event a sale would not produce the realisations required to pay the creditors. For the purposes of borrowing, there was already a fixed and floating charge over all the current assets to secure the overdraft and other bank lending. Furthermore the loss making would make it difficult to raise funds.

34. The Liquidators also refer to the fact that the current assets for the 2005 year-end included £27,065 due after more than one year from group undertakings. The Company had had to write off £237,597 as bad debts from one such company during the previous financial year. The Liquidators contend that the financial position of all the group undertakings was always sufficiently perilous to justify their liabilities being treated as a bad debt in the accounts.

35. Moving to the second identified Knowledge Condition date, 31 January 2006, the Liquidators rely upon a loss of (£30,547) recorded in the audited financial statements for the financial year ended 31 January 2006. This increased the deficit in the balance sheet for the profit and loss account. There were net assets of £145,710 but the debts owed by "group undertakings" after more than one year had increased to £81,451. The Liquidators contend that this "asset" should be treated as worthless.

36. The Liquidators also point to the notes to the financial statements which identify a contingent liability of £128,000 resulting *"Since the year end [because] a routine VAT Compliance visit has identified a potential liability of £128,000"*. The note recorded the Directors' confidence that *"the liability will not crystallise"* and that is the reason stated for there being no provision in these statements. The Liquidators consider that confidence completely misplaced. If they are correct, it is a substantial liability to have to cover but it is to be noted that the note reads *"since the year end"* and it was only during 2006 that HMRC investigated and not until a letter dated 16 September 2006 that a decision was notified. It is well established that hindsight cannot be relied upon to establish a claim under Section 214.

37. The VAT issue concerned 2 schemes operated by the Company. They were similar and it is sufficient to describe them as follows: entry tickets were sold for a price which included the value of discount vouchers that could be redeemed at a future date (not the day of entry) for purchases inside the Robin Hood attraction. The vouchers were valued and VAT only applied to the net amount of the ticket price attributable to the entry tickets. VAT was only included in the voucher value should the voucher be used.

38. That general description of those tax avoidance schemes belies their detail. They were implemented following receipt of advice from tax specialists in 1999. It is assumed for this case that the scheme worked as advised and implemented. However, the material VAT Regulations changed in 2003. The Directors state they were unaware of this until the resulting problem was identified by Her Majesty's Revenue and Customs ("HMRC") from and as a result of further enquiries following their visit to the Company on 16 February 2006.

39. After investigation including communications with the Company and its accountants, Smith Cooper (the trading name of the accountants FB40 Limited), HMRC by letter dated 15 September 2006 informed the Directors that as a matter of law, since 2003, VAT should have been paid upon the full ticket price (including any value attributed to the discount voucher) charged to the attendees upon entry. The Company had failed to account for the VAT due upon the element of the price attributed to the voucher for the last 3 years.

40. The Company sought advice from Mr Stephens of Deloitte LLP at a meeting held on 9 October 2006. There is an issue over what was advised and/or over its effect. In essence, whilst the Liquidators accept that the advice included 4 options (acceptance with a time to pay agreement; reconsideration; appeal; or discretionary leniency), their case is that this advice made plain to the Directors that the Company had very little prospect of successfully challenging HMRC's demand for payment of overdue VAT, interest and penalties. A debt due and owing in the region of £130-150,000 was a debt which could not be paid then or in the future. This is the third specific date relied upon by the Liquidators for their wrongful trading claim.

41. The Liquidators in support of that claim rely upon a letter dated 18 October 2006 from Smith Cooper to HMRC arranging a meeting with HMRC. It stated: *"As for an agenda ... it is not our client's intention to discuss detailed technical points. As you know the amounts you claim as under declared are substantial and would result in the business being unable to continue ..."*. It is argued that this shows a lack of merit in any opposition to HMRC's decision and/or an admission of insolvency which sustains the case that the Knowledge Condition was satisfied.

42. Against that background and in the context of figures received for professional fees to advise and act being (at least arguably) disproportionate, the Liquidators assert that the Directors were wrong to cause the Company to first pursue the option of seeking reconsideration and second, after that failed, an appeal. The Liquidators' position is that the Directors' choice merely achieved delay (albeit at least in part attributable to time scales for decisions upon appeal) to the detriment of the Company's existing and future creditors pending its capitulation in March 2009 when the Directors finally but inevitably decided not to pursue the appeal.

43. In support of their case of inherent financial failure the Liquidators rely upon a detailed "Quality Management Final Report" ("the PLB Report") produced in June 2006 by PLB Consulting Ltd.

44. Its purpose was to advise the Company and "Experience Nottingham", a sub-regional tourism partnership for the Nottingham area who commissioned it, upon the possibility of a transfer of the business, "Tales of Robin Hood", to a new organisation with charitable status. The PLB Report records that a *"number of key regional and sub-regional organisations expressed an interest in the future of the [Company's business], in so far as it contributes, or could contribute, to their corporate agendas for heritage, learning, tourism and regional economic development"*.

45. Whilst not concerned, as such, with insolvency, the PLB Report provided (within the context of its commission) an overview of the Company's *"financial health"* based upon the information it had received. It identified the following *"key issues"*: the Company had *"very little value"* having run at a cumulative loss of nearly £1.4 million without achieving an operating surplus in 5 years; its main assets were the exhibition and show (currently valued at just over £181,000) and a 50 year lease on city centre retail premises; the themed ride was nearing the end of its life-span and required considerable re-investment in order to sustain any competitive advantage; attendance figures required improvement; staffing overheads were a significant problem because a minimum level of staff was required for such a venture (without seriously diminishing quality); and the Company had not been able to achieve visitor admission numbers and/or ticket prices sufficient to cover this cost; and the main income stream was the retail and catering (some 2/3s).

46. Mr Couser on behalf of the Liquidators submitted that a fundamental problem for the Company, as evidenced by the PLB Report including a reference to original anticipated numbers in the region of 400,000 not 40-60,000, was always that it could not generate a sufficient number of visitors at an appropriate price in order to pay for the expenditure required to achieve a profitable business. He submits that the business model was fundamentally flawed and that this explains the year on year losses.

47. For completeness I note that the PLB report contains 3 years of projections commencing 1 September 2008 but I do not find them helpful. They address a different scenario, namely the business having been acquired by a not-for-profit organisation with consequential changes and taxation advantages.

48. The audited accounts for the financial year ending 31 January 2007 revealed a loss of (£26,751). The total loss carried forward in the balance sheet's profit and loss account therefore increased to (£1,527,513). Whilst net assets stood at £118,959, the accounts did not include the existing VAT liability to HMRC. There was no VAT provision in the financial statements. Instead the statements record that the *"Company had no capital commitments or contingent liabilities at the balance sheet date (2006 £nil)"*. This was also despite a rent review which would date back to 29 September 2006.

49. In addition the Liquidators draw attention to the fact that the current assets included a debt falling due after more than one year of £133,999 owed by "group undertakings". They contend it was a bad debt reducing further the Company's ability to avoid an insolvent liquidation. 31 January 2007 is the fourth specific date relied upon by the Liquidators for their wrongful trading claim.

50. A letter dated 3 May 2007 from HMRC informed the Company that its original decision had been upheld upon review. This is the 5th and last specific date relied upon by the Liquidators for their wrongful trading claim.

51. The rent review decision was notified by letter dated 29 August 2007. The new rent increased from about £29,000 to £92,500. Whilst this was considerably less than Tesco had been arguing for, it was a significant increase both from the previous rent and the figure the Company had sought, £53,000. The Company failed to pay its rent and service charges due from the July 2007 quarter. The Liquidators' case is that the Company could never, foreseeably afford the new rent.

52. By letter dated 20 November 2007 HMRC decided that £134,888.00 plus notified interest (at that date £14,540.89) was due and payable subject to the tax provisions concerning appeal. As previously mentioned, the Company pursued reconsideration and an appeal which the Liquidators claim had no merit and for which the Directors had no cause to believe it had any reasonable prospect of success.

53. When addressing their case concerning the Company's insolvent financial position, the Liquidators also rely upon a letter requesting postponement of the obligation to pay the debt pending determination of the Company's appeal to the Tribunal on the ground of hardship. By letter dated 31 January 2008 the accountants, Smith Cooper, explained the Company's hardship as follows: *"... there is no question that paying tax due will result in financial hardship ... if they are unsuccessful with the appeal the business will have to be immediately referred to an insolvency practitioner as the Company will be insolvent. The attached accounts show the position as at last year end and if the VAT amount was added to the liabilities then the business would have liabilities in excess of its assets. On liquidation, which would be the only option ... not all of the creditors would be paid even if the book values were obtained for the assets, which is unlikely. The Company is unable to secure any additional financing as the bank facilities are currently fully utilised to manage the working capital requirements"*. The Liquidators' case is that this conclusion was equally justified with reference to the accounts for 31 January 2007.

54. Although the Company continued trading until the end of January 2009, the Liquidators claim that the Company's trading position, the existence of the VAT liability and the effects of the rent review both for its back-dated and future liabilities meant the Directors knew or ought to have known that the Company could not avoid the insolvent liquidation that was finally put in place in February 2009. Their case is that the Directors should compensate the Company for the increased deficiency resulting from their failures whether pursuant to section 214 or section 212. If this case has merit, the Directors will need to rely upon the Minimising Loss Defence or dispute the measure of compensation.

E) The Defence

55. I will deal with the grounds of defence in outline because they will be further identified when considering the Directors' evidence and the reasons for my decision. The starting point is their case that the Liquidators have misconstrued the Company's

accounts. It is submitted by Mr Nersessian that the Liquidators have failed to take account of the fact that the recorded losses include significant sums for depreciation as administrative expenses. Once those sums are stripped out, the picture emerges of a business which was or could be profitable and was able and did continue to operate until the end of January 2009.

56. The end point is that the Directors in any event took all reasonable steps by trading until that date in the context of them also taking steps to sell (in one form or another) the business, obtaining professional advice and at the same time keeping creditors informed of the position. The VAT liability was subject to appeal and the adverse consequence of the substantial increase in rent following the review only had a material effect for the purpose of the Knowledge Condition once Nottingham City Council could no longer support a proposed transfer of the business through a sale of the business. This only occurred at the end of January 2009.

57. Turning to the specific dates relied upon by the Liquidators, the Directors in their defence assert:-

a) 31 January 2005 – there simply are no grounds for asserting the Knowledge Condition is satisfied. The Company was commercially and actually solvent and there were no factors from which to predict an insolvent liquidation which did not occur for another 4 years. The income from Bar Humbug Limited was properly included in the Company's turnover.

b) 31 January 2006 – the position of actual and commercial solvency was not only maintained but there had been an improvement in performance from the previous financial year. There are no grounds for asserting there was no reasonable prospect that the Company would avoid going into insolvent liquidation at this stage noting another 3 years needed to pass before this occurred.

c) 6 October 2006 - The Directors dispute the Liquidators' interpretation of the advice received on this date from Mr Stephens concerning the VAT assessment. There were viable and legitimate options available other than payment of the VAT demanded. In any event the Liquidators' focus is wrong. It is not simply a question of considering the VAT assessment. It is necessary to consider the business as a whole in the context of what the Directors considered or ought to have considered might happen in the future based upon the steps that could be and were taken to oppose the assessment. Viable options existed, they were being implemented and the Knowledge Condition is not satisfied. The Company was still being run with the aim of profitability in circumstances where debts were being paid as they fell due. For example, the Company kept to a PAYE/NIC time to pay arrangement ("the TTPA" with all other reference to any other such arrangement in respect of other liabilities being to "a TTPA").

d) 31 January 2007 - By this year end the cash position had improved together with profitability. Throughout the Directors have taken professional advice when it was required. Not only does this show how properly they acted but it is also significant that they were never advised that the Company could not avoid insolvent liquidation. The Directors are entitled to rely upon professional

advice obtained at the correct time from the correct people. The Company remained actually and commercially solvent.

e) 3 May 2007 – This is the date of HMRC's internal reconsideration of the VAT decision letter but nothing changed in the 4 months since the year end to suggest the Knowledge Condition was satisfied on this date instead. Even if the letter is looked at in isolation, which it should not be, this was an internal review which still left the other options advised by Mr Stephens as "viable". It cannot be said its VAT position was unsustainable unless hindsight is applied and, even then, there has been no decision to establish that the appeal would fail. The Company was still balance sheet solvent and paying its debts as they fall due as evidenced by compliance with the TTPA. The rent review was not to be decided until 29 August 2007. The Company was moving towards difficult financial times but this was recognised and a plan was formulated by experts, Mazars, with other professionals, legal and insolvency, advising. Looking at the picture as a whole, the Directors were doing what they should have been doing.

58. The Directors contend that, looking at this case realistically, it cannot seriously be suggested liquidation should have occurred some 4 years before it did. The section 98 list of creditors shows how small the trade creditors are and this is indicative of commercial solvency and of a reasonable course having been adopted.

59. Even if all of those contentions are wrong, it is submitted by Mr Nersessian that there are serious causation issues. The change in law in 2003 caused the VAT liability which existed irrespective of the steps the Directors might have taken instead of continuing trading from 31 January 2005. The Company could not have paid that debt if placed into liquidation earlier. The rent as increased could not be paid in any event and Tesco could not have found an alternative tenant. This is evidenced by Tesco's willingness to negotiate and by the fact that the site remains empty save for a Tesco Express store.

F) The Liquidators' Evidence

F1) Mr Brooks – Liquidator

60. It is to be borne in mind when considering the evidence of Mr Brooks that he is an insolvency practitioner who has expertise in insolvency and knowledge of accountancy but is not a qualified accountant. I will apply his evidence accordingly. It is also to be borne in mind that he has no first-hand knowledge of the facts and matters he relies upon. He is either presenting the evidence found by the Liquidators in the course of their duties or responding to questions which challenge the bases of the Liquidators' case.

61. In those circumstances it is unnecessary to set out his evidence in detail. I will instead identify a number of matters which came to the fore during cross-examination which are best set out here for the purposes of my judgment. Before doing so, I record that whilst I found Mr Brooks a little too keen to attack the conduct of the Directors and

this caused him sometimes to fail to understand or see the full picture during cross-examination, he gave his evidence carefully and with due consideration. In my judgment based on character, he was a reliable witness. That does not mean I necessarily accept his views and contentions and I have not always found his answers reliable in particular in the context of analysing the Company's financial position from the accounting information.

62. There is an issue over an absence of a significant number of the Company's books and records. The Liquidators criticise the Defendants for failing in their duty to hand over books and records of the Company to them following their appointment. The Directors criticise the Liquidators for not taking them into their possession or otherwise for losing or destroying them and point to the absence of books and records as a fact that hinders the conduct of their defence.

63. Mr Brooks's evidence is that he attended the Company's premises on 29 March 2009 in circumstances of the immediate landlords having indicated an intention to take possession. As supported by a contemporaneous record from his secretary, he only found and took possession of 5 boxes of material together with the computer hard drives. The Second Respondent ("Mr Walker") was present and Mr Brooks says he did not identify any other available documents. He was shown the main room and the filing cabinets there and in the passage way. Mr Brooks's evidence is that he was surprised by how few documents there were and expressed that surprise but received no response explaining why this should be or referring to other locations to be searched.

64. Moving on from that issue, Mr Nersessian challenged Mr Brooks's reliance upon the Company's perceived lack of profits and their relevance. Mr Brooks maintained his position that the operating losses identified in the profit and loss accounts for each year establish that the Company's business was inherently loss making. He did not accept that it was relevant to strip out the amounts attributed within the expenses for depreciation in order for the Directors to be able to assess whether the Company's trading operations were truly profitable or not. He contended that depreciation itself revealed the business was coming to an end and the resulting operating losses including that expense reflected the true trading picture. Mr Brooks considered the "dark ride" to be old and the attraction itself to be one which required considerable modernisation and therefore investment if it was to remain an attraction.

65. Those losses formed an important base for Mr Brooks's analysis of the Company's financial position as at 31 January 2005 and 2006. When advancing the Liquidators' case that the Knowledge Condition was satisfied, he also relied upon errors in the accounts: the inclusion of bad debts from group undertakings (for those and subsequent years); the inclusion of income from Bar Humbug Ltd in 2005; and the failure to provide for the VAT due in 2006 as backdated from 2003.

66. In this context Mr Nersessian drew attention to the fact that the financial statements down to and including the 2007 financial year end were produced following audits and the auditors reported that the accounts gave a true and fair view having carried out examinations on a test basis and being reasonably assured from evidence that the statements were free from material misstatement subject only to the 2006 year end qualification in respect of a future VAT claim.

67. Mr Brooks had to accept this but I agree with his response. If his case in respect of such matters is correct, they needed to be taken into account by the Directors nevertheless when addressing the current and future financial position of the Company.

68. Moving to 9 October 2006, the date of the advice given by Mr Stephens following receipt of the VAT decision letter dated 15 September 2006, Mr Brooks considered the advice, as recorded in Mr Stephens's note, pessimistic. Although a number of options were identified, they were not provided in the context of advice concerning the financial position of the Company. That was for the Directors to consider. Mr Brooks contended that they should have done so from the premise that there were no real or reasonable prospects of a successful reconsideration or appeal. They would or ought to have realised that the Company's financial position prevented it from proposing a realistic TTPA. He also contended that the subsequent conduct of the Directors, a slow and/or ineffective pursuit of the options, demonstrates that they knew this to be the position. He alleged that they pursued the options without any genuine anticipation of bringing them to a successful conclusion. The Liquidators' case is that the Company simply could not generate the funds required in the context of its current and past trading results to pay HMRC and should not have continued trading.

F2) Mr Stephens

69. Mr Stephens is a partner at Deloitte LLP and a tax specialist. He advised the Company on 9 October 2006 following the decision of HMRC that VAT was owed since 2003 as a result of the effect of amended Regulations upon the discount voucher scheme operated. Subject to some additional points in his witness statement, Mr Stephens's recollection is dependent upon the attendance note of the meeting. This is a contemporaneous note and the hearing concentrated upon a second, approved draft which resulted from a review of the first draft. There were errors in the note in particular a failure to refer to the attendance of the Company's retained accountant, Mr Seagrave of Smith Cooper. However, it is a detailed and clear note. It is the tenor of that advice which is most in issue but at this stage I will consider the note as drafted taking into account the oral evidence of Mr Stephens alone.

70. The discussions and advice which can be identified from the note can be explained as follows: the tax avoidance scheme was summarised together with the problem resulting from the change in Regulations; it was emphasised by Mr Stephens that Deloitte LLP advised upon structure but were not involved in its implementation by the Company; the grounds for HMRC's decision were described as *"technically robust"*; the facts explained to Mr Stephens by the Directors led him to conclude that it would be very difficult to argue that the voucher had no value when "purchased" with the ticket - in particular when no-one had been refused entry for refusing to pay the full ticket price on the basis that they did not want the voucher; as a result it would be very difficult to attribute value to the voucher (as the implemented scheme did) and *"it was therefore likely"* that VAT was payable upon the full ticket price upon entry with the result that VAT was due and owing. The note records that the reasons for those opinions were not expanded upon because the letter of engagement was for 2 hours of *"high level advice"* only and therefore the engagement accordingly limited.

71. Mr Stephens proceeded to identify 4 options available in the circumstances of his advice as summarised above. In cross-examination he emphasised they were viable options. Whilst I considered Mr Stephens to be a good witness throughout his evidence, this willingness to provide evidence which supported the Directors substantiated my view of his reliability. His evidence suffered (insofar as this proves to be relevant) from the fact that he had little memory of the meeting but the benefit of his evidence is that in my judgment he was able to give a fair account and explanation of what his note meant.

72. The note addresses the options in the order of discussion not merit as follows:-

a) The first option was to accept the decision and seek to negotiate a TTPA with a total debt in excess of £150,000 to be expected. The note records that Mr Stephens *"did not comment on how this would work or the period of repayment"*. In cross-examination he explained this was because he did not have the information available to do so. That is totally understandable. He would have needed details of the Company's financial ability to pay and of the period over which payment could be made before being able to consider HMRC's likely response. Whilst it is plain from other sections of the note that he was advised of the Company's parlous state (see the third option below), nevertheless his advice that this was a viable option must in my judgment be understood in that context of an absence of relevant information. Viability depended upon what could realistically be proposed.

b) The second option was to immediately request reconsideration asking for an extension of time to do so. This would require a technical ground to challenge the decision. It is important to note in my judgment that he did not identify any grounds or even suggest what they might be. It would cost £7-10,000 for the drafting or less if it would be a review of the Company's draft grounds, which also evidences the fact that the option was viable (subject to funds). However, the chances of success were described as *"very low"*. In cross-examination concerning prospects it was clear that *"very low"* would have its natural meaning. He explained that 90-95% of such requests were rejected, not least because HMRC was marking its own homework. Whilst he was unaware of the additional prospect of an "independent" appeal referred to in a subsequent letter from HMRC to the Company dated 3 May 2007 (although this may well simply refer to a decision by someone else within HMRC), that did not alter his view of the merits. In my judgment Mr Stephens's advice of viability for this option must be understood in the context of no technical grounds having been identified by him or anyone else at this stage, HMRC's arguments having previously been described as *"robust"* and the *"very low"* prospects given.

c) Exercise of the second option would not prevent the Company from pursuing the first and/or third options. The third option was to appeal within the 30 day time limit and apply for relief from having to pay the demand being appealed due to hardship. The prospects of claiming a stay for payment were *"good"* but the appeal required technical grounds. None were identified. Deloitte's drafting would cost between £5-10,000 and representation up to £100,000. There was no guarantee of recovery of this expenditure even if the appeal succeeded. However, the chances before the Tribunal were described as *"slim"*. That conclusion was reached taking into account the possibility of

standing the appeal over until the outcome of an appeal ("the Luminar Appeal") by another, unconnected company concerning a voucher scheme. However, although standing over had good prospects, as Mr Stephens expanded upon orally in evidence, in reality the facts of the Luminar Appeal were significantly different to the disadvantage of the Company. This was the context for his advice that this option was viable.

d) The fourth option was to seek agreement with the VAT officer relying upon leniency and, if the facts permitted, upon an informal estoppel due to any representations previously made by officers concerning the validity of the scheme as implemented. This would be (in effect) a commercial negotiation based upon a plea of innocence whilst acknowledging that the Company as the party registered for VAT was responsible for following the Rules and reporting and consequentially paying the correct VAT. It would require the scheme to be discontinued. Whether such representations could be relied upon or not, this option was described as *"remote"*; a word Mr Stephens equated with his previous use of the word *"slim"*. The note recorded the advice that the Company *"had nothing to lose here"*. The viability of this option must be viewed in this context.

73. Mr Stephens stated in cross-examination that the *"game was not over"* because there were options but he also said the chances were considerably less than 50%; *"slim"*, *"remote"* but not impossible is how he explained viability whilst adding that even cases with a 5% chance can succeed before the Tribunal.

74. I will consider the evidence for the Directors concerning this meeting below. If the findings above stand, however, they raise the issue of what conclusion was and ought to have been drawn within the context of the Knowledge Condition test when the advice was very pessimistic and no technical grounds for review or appeal were identified.

F3) Mr Wetherell and Mr Britton

75. The evidence of Mr Wetherell and Mr Britton concerned the Company's position as lessee of the property in Nottingham where the attraction was situated. Mr Wetherell is a partner of Johnson Fellows LLP, Chartered Surveyors, and Mr Britton is a Property Manager of Assets and Estates for Tesco Stores Limited. Subject to the limitation of the dates from which each had personal knowledge as opposed to hearsay knowledge, both were witnesses who in my judgment were helpful, reliable and tried to assist the court.

76. Their evidence when read with or subject to the documentation establishes that:-

a) The 99 year lease for the premises of the attraction commenced on 29 September 1964. It was assigned to the Company by Tesco leaving Tesco liable upon its covenants as the original lessee. Although at some stage Tesco "became" British-American Tobacco (Holdings) Limited for these purposes, the detail of and explanation for this does not need to be investigated because

it is sufficient between the parties to refer to Tesco as the original lessee and assignor.

b) The Company paid its rent and service charges in advance up to and including the quarter ending 30 June 2007 but not after. Non-payment of subsequent quarters resulted in service by the head landlord of a notice pursuant to section 17 of the Landlord and Tenant (Covenants) Act 1995 dated 13 November 2007. This required Tesco to pay the unpaid rent due for the June and September 2007 quarters together with the service charges. The total then due was £62,684.49 which took account of the review.

c) The rent was subject to a review to take effect from 29 September 2006. The date negotiations over the review started is unclear but a failure to reach agreement led to the appointment of an arbitrator by letter dated 6 February 2007 (presuming this year derived from the content of the award is correct and a subsequent reference in the award to a visit on 18 May 2005 should read 2007 also). The Company argued for an increase from £29,000 to £53,200 per annum. The head landlord, Kandahar (Nottingham) Nominee No.2 Limited argued for £171,000. The decision dated 29 August 2007 was an annual rent of £92,000, a substantial increase back-dated to 29 September 2006.

d) Tesco would have to pay this new annual rent for as long as the Company failed to do so. In those circumstances on 27 November 2008 Tesco obtained an overriding lease pursuant to the legislation and, as previously mentioned, took possession after the Liquidation had commenced. It has paid but not recovered its liabilities to the head lessor. Tesco has not been able to find a tenant but has a Tesco Express Store on part of the site.

e) Between at least September 2008 and February 2009 there were meetings between Tesco (being represented from January by Johnson Fellows LLP through Mr Wetherell) in respect of which both witnesses gave evidence.

f) Mr Britton accepted there were good, public relation reasons for not closing down a City attraction by obtaining possession. In addition possession would produce the difficulties and delays of re-letting the property. His personal knowledge was limited to the period from July 2008 but his evidence was plain, namely that nevertheless Tesco wanted repayment of the rent and the Company or assignee had to be able to pay the rent at or around the rent set by the rent review. Tesco would not subsidise a rent shortfall.

g) Mr Britton was not sure whether the first written demand for payment was made by Tesco before January 2009 and he acknowledged that during his involvement Tesco was encouraged by and encouraging of proposals which might lead to an assignment by the Company. His evidence remained nevertheless that a rent not materially lower than £92,000 per annum plus service charge payments was Tesco's pre-requisite. Tesco certainly would not agree to a rent of £2500 per month shown in draft financial projections referred to below. They rejected an offer of £35,000 from the Company for that reason.

h) There is an e-mail from Mr Britton to a solicitor at the firm of Berryman, who advised the Company, sent on 15 December 2008 in answer to Berrymans notifying him that they act for a community based charity, the Robin Hood Partnership, seeking to acquire the Company's business including an assignment of the lease. In his e-mail Mr Britton: confirms distraint has not been exercised; quantifies the debt to Tesco for rent and service charge at £202,000; complains that the possibility of assignment *"is only just coming to light"* despite the Company having been unable to pay for some 18 months; and *"remind[s] you that Tesco do not and will not subsidise their Tenants"*; and reiterates that Tesco will be *"happy"* for the Company to remain in possession if the full reviewed rent for the December 2008 quarter is paid.

i) This potential assignment pursuant to a business plan to which I will refer later ("the Mazars Plan") would have a number of taxation advantages but Mr Wetherell describes it in his witness statement as a business plan which did not feel as though it had substance. His personal knowledge is limited to the period from about December 2008.

j) A letter of demand for payment of £224,250.36 was posted on 12 January 2009. This was for the rent due on the quarter days from 24 June 2007 to and including 25 December 2008 (£185,653.16) plus unpaid service charges due on the quarter days from 24 June 2007 to 29 September 2008 (£17,971.63).

k) Mr Wetherell gave evidence of a meeting he had with Nottingham City Council on 29 January 2009. They, as further explained below, had been supporting the Company in its intended transfer to a body with charitable status. A note records that Mr Walker must not be involved with the trust, makes reference (amongst other matters) to the debt owed to Tesco of *"circa £200k"*and also states that the Council *"was keen to continue the attraction"*.

l) However, by e-mail dated 30 January 2009 the Council stated its decision not to take any further, active role. The lease was disclaimed by the Liquidators on 27 March 2009 and the locks changed on 16 April 2009.

F4) Mrs Susan Elston and Mr Griffin

77. I heard from two representatives from HMRC, Mrs Elston and Mr Griffin. Mrs Elston has no personal knowledge of the facts and matters detailed in her witness statement which compiles information obtained from HMRC's records. I need not refer to her evidence here.

78. Mr Griffin had responsibility for monitoring and ensuring compliance with the TTPA. I need only refer to the fact that he recollected difficulties in achieving compliance and plainly did not consider the Company was nearly as committed to making payment as he was to collecting it. However, at the end of the day it is agreed between the parties that the TTPA was complied with.

G) The Directors

79. Mr Armstrong and Mr Walker were the only directors and Mr Walker dealt with the day to day running of the Company. He is an engineer by profession He had previous business experience but this was his first position as a director of a public limited company, albeit a small one.

80. Mr Armstrong's role was advisory and strategic and he did not receive a salary. He has had far greater experience than Mr Walker as a director of companies in the retail sector. Neither Director has any accountancy qualifications or expertise. They each rely upon the fact that the Company's accounts were audited, that they sought appropriate professional advice at all times and that they were never advised that the Company was facing insolvency and should no longer trade.

81. It was put to Mr Walker and then (following his denial) to Mr Armstrong that the accounts for the Company's parent, Speedyzone Limited, for the 2002 and 2003 year ends showed he was receiving a salary from it. Mr Armstrong denied this and could only think (it being a long time ago) that perhaps he had been allocated a salary in circumstances of the money being used for an investment by him. Although the salary issue is confused, in my judgment nothing turns on this.

H) The Directors' Evidence - Mr Walker's

H1) Documents

82. There is plainly an issue between Mr Brooks and Mr Walker concerning the cause of the missing documentation and the extent to which the other is to blame. Mr Walker was adamant there were enormous numbers of documents at the Company's premises on 29 March 2009. He referred to: notes concerning the Robin Hood partnership far in excess of the 5 boxes Mr Brooks took away: notes showing the Directors trying to establish and move the business into a charity; notes and other documents concerning Tesco and Nottingham County Council; the Company's minute book; and all the notes and correspondence to be found in the many files that had to exist and be kept for a business of the type the Company ran.

83. In cross-examination, consistent with his written evidence, he denied those records were not at the Company's premises when Mr Brooks attended. He said that he showed Mr Brooks where everything was and that it was not difficult to do so because all the filing cabinets could be seen and were accessible. Mr Brooks took what he thought was relevant not everything which was there. He denied that Mr Brooks expressed surprise at how few documents there were and noted that no complaint or request for documentation was made afterwards by Mr Brooks. In re-examination he confirmed he had shown Mr Brooks where everything was and that it was all there.

H2) Character/Skills

84. In cross-examination it was put to Mr Walker that the year end 31 January 2002 and 2003 audit reports demonstrate that he would only accept professional advice if it suited him. This is because the accounts for those year ends are qualified by an opinion that provision of £146,666 and £189,766 respectively ought to have been made in respect of debts owed to the Company by a subsidiary, Hi-Flyers Limited. As at 31 January 2002 and 2003 it had net liabilities of £388,233 and was commercially insolvent. It would only be able to repay the debt if it was successful in litigation being pursued against a supplier. The provision was advised in circumstances of the litigation *"not [being] sufficiently certain as to the outcome and quantum of the claim"*. The Company had been supporting the litigation financially.

85. Mr Walker's response at first in cross examination (consistent with his statement) was that Counsel's advice upon the merits sustained the belief that Hi-Flyers Limited would be successful. His recollection was that Counsel had advised there was a 70% prospect of success and an offer of £100,000 was received, although rejected. That does not accord with the quotation above and Mr Walker candidly accepted during cross-examination that the auditors would have set out the advice accurately. In those circumstances he could not find a reason for not agreeing to the provision.

86. I will say at this stage that whilst I agree that this is an example of him having decided not to follow professional advice, it is not right to reach a conclusion upon his character based upon these events some 11-12 years ago which cannot be properly explored even for the purposes of this issue.

87. My overall impression of Mr Walker as a witness is that he sought to give his answers honestly and to assist the court. I do not always accept his evidence but nevertheless reach that overall conclusion taking account of the difficulties for him caused inevitably by the passing of time. My impression is that he has an obstinate streak and that he will follow his own judgment exercised with the precision to be expected of someone qualified as an engineer. However, there is nothing necessarily wrong in that. Directors are required to exercise their own judgments. I have concluded that this is not a case where his character can be successfully challenged in order to persuade the court to reach an adverse view of his evidence. It is necessary to concentrate upon what he did or did not do.

88. Mr Walker's competence has also been attacked. In essence based upon his evidence it is submitted that *"he was hopelessly out of his depth, [and] his answers in cross examination demonstrated that he lacked the commercial ability to be left holding the reins in the manner that he was"*. I reject that submission. Whilst I have yet to decide whether he pursued the proper course in the context of the tests of these claims, my assessment of Mr Walker's evidence is that his hands on management showed an ability to understand the financial position of the Company and the need to take financial decisions to meet the day to day problems. Subject to the issues in this claim which are considered below, I find that he demonstrated an ability to manage the Company with reasonable skill and care. I note in particular the keeping and regular use of management accounts, his understanding of how the business's assets operated and his involvement with creditors.

89. I also reject the submission that it was to Mr Walker's *"discredit that he continued to draw his salary until the very end of the Company, despite the undoubted creditor pressure that existed"*. Of course I have yet to consider or decide whether the

Company should have continued trading. Obviously if it should have ceased trading, he would not have received a salary. However, insofar as I am concerned solely with whether he should have withdrawn the salary to which he was entitled (which could not be described as unreasonable, let alone extravagant) in the context of ongoing trading, it was not to his discredit to receive his remuneration. He undoubtedly worked and indeed worked very hard for his money.

H3) Management Accounts

90. The Sage system was used in-house by the Company, although Smith Cooper might have helped now and again, and it appears from Mr Walker's evidence, which I accept, that the records were kept up to date. Management Accounts were produced monthly and it appears that month end accounts would normally be available the following week. The information in accordance with that system included cash flow, profit and loss and balance sheet accounts.

91. The management accounts would be considered in regular, monthly management meetings with the various heads of departments. Smith Cooper may have been there on occasions. Mr Armstrong would receive copies but consider them separately with Mr Walker. The Company received bank statements and operated a £60,000 facility. The evidence shows that whilst this was exceeded from time to time, it was authorised borrowing.

H4) Year End 31 January 2005 Financial Statements

92. Mr Walker in his witness statement says that as at 31 January 2005 the Company was trading *"cash positive day to day"*, costs had been cut and there was adequate working capital to keep trading with optimism that further investment would be found. There was no creditor pressure. Whilst there had been a substantial loss in 2004, this was attributable to having written off the debt owed by Hi-Flyers Limited following failure of its litigation. Judgment had been delivered on 30 January 2004.

93. Mr Walker's case during cross-examination (maintaining his wintess statement evidence) was that the profit and loss account should be read in a far more positive light than its operating loss of £113,169 suggests. The sum of £69,102 deducted for depreciation as an operating charge should be stripped out when considering the past, current and future trading performance of the Company at the financial year end ("The Depreciation Deduction Argument"). This would leave instead, as he contended, a manageable loss.

94. The profit and loss account for the financial year ending 31 January 2005 included income received from Bar Humbug Limited. The reason for this became clearer during cross-examination. In essence Bar Humbug Limited allowed the Company to carry on the business of a bar in premises near to the Robin Hood attraction, to incur the expenditure (for example stocks and wages) and to retain the profits. Mr Walker had an interest in both companies and whilst the nature of this arrangement and its underlying rationale is arguably obscure, there are "Divisional Accounts" for the

Company showing income of £267,966, expenditure of £250,781 and a profit of £17,185. Mr Walker's evidence was that the arrangement ended at or about the year end and therefore this business and income was not available to the Company for the following year. He considered this to be manageable.

H5) Year End 31 January 2006 Financial Statements

95. Mr Walker in his written evidence denies there is any cause to suggest that the Knowledge Condition was satisfied at 31 January 2006. He maintains that trading remained cash positive. He states that costs had been cut. There was adequate working capital for trading purposes and there was optimism for investment. There were no problems with the landlord, with HMRC generally and no creditor pressure. Trading was better than in the previous year end. He also relies upon The Depreciation Deduction Argument which, if accepted, would turn an operating loss into a profit of £37,282. He could find no reason for concluding that the Knowledge Condition was satisfied.

96. During cross-examination Mr Walker was shown a number of documents dated from March – January 2006 which evidence quite a large number of small debts owed to HMRC, the gas supplier and trade creditors not being paid and, as a result, had led to demands for payment, some by: solicitors' letters; claim forms (draft and issued); a disconnection warning; and a warrant.

97. Mr Walker would not accept this was evidence of cash flow difficulties. He suggested that many must have been due to administrative difficulties and/or disputes. The fact they were subsequently paid may simply have been a commercial decision. He also relied upon the operation of the overdraft which either showed there was head-room at the relevant time or that the Bank was generally relaxed with the operation of the account extending credit when necessary. His case in cross-examination was that the Company had been able to pay these small sums and failure to do so would have been due to other reasons. In addition he pointed out it was in fact a small sample compared with the number of bills that were paid in particular by the shop which was very large and had an equivalently large stock.

H6) During 2006 – The PLB Report

98. In June 2006 the Company received the PLB Report. Mr Walker in his written evidence says he considered its proposals to represent the future and he lined up *"all of the various people that would be needed to make what PLB Consulting had outlined, actually work"*. In cross-examination he rejected the suggestion that the PLB Report was prepared because the Directors recognised that the Company would inevitably become actually insolvent if it carried on trading.

99. Mr Walker in his witness statement recognises that from the time of his appointment in 1996 the Company needed to improve its funding because of the need for refurbishment. However, in the context of the PLB Report he says that the Directors' view of the PLB Report was that *"the Company had options to maximise its full*

potential and to access funding or alternatively an arrangement whereby the business ... would be acquired by a trust run by 'Experience Nottingham' with all creditors of the Company being paid and a return to shareholders".

100. Mr Couser relied upon the PLB Report during his cross-examination to evidence the facts that visitor numbers were too low to be sustainable and that the ride and other fixed assets required a major overhaul with an investment in the region of £1 million if the business was to continue even with the benefits of charitable status. Mr Walker whilst accepting that the business needed to be taken to the next level, would not accept this. As an engineer he had the expertise to conclude that the ride had not neared the end of its life-span and he believed it could be improved sufficiently as an attraction without substantial investment.

101. Cross-examination concerning the PLB Report was a catalyst for Mr Walker to demonstrate his enthusiasm and commitment for the business of the Company. I need not repeat the details but it is plain that he envisaged changes to the attraction which, if implemented, would take it to the *"next level"*. He considered them to be achievable and spent a long time investigating improvements whether by obtaining exhibits from the Royal Armouries in Leeds or by designing 4 and 5D rides or pursuing other paths. He did so within the context of Nottingham's tourist attractions being viewed as a unified whole to the benefit of each attraction.

102. He was adamant and relied upon his expertise as an engineer that the ride was not nearing the end of its life-span. He explained that he and the staff knew how it worked, how to maintain it and to improve it. It had been maintained well and visitor numbers, which might indicate a problem, were not down over recent years but up. Whilst the report may refer to original numbers up to 400,000, that was then and the Company had been trading at a profit on its 50-60,000 visitors with the assistance of the catering/banqueting revenue.

103. In cross-examination he explained that the PLB Report resulted from discussions with Professor Heeley and was for the benefit of "Experience Nottinghamshire", a body funded through the East Midlands Development Agency, as well as the Company. It proposed transfer of the Company's assets to a new organisation with charitable trust status. Although he did not refer to it, the report specifically mentioned the need for the Directors to be careful to consider whether a disposal of the main asset would be in the best interests of shareholders. The Directors were asked to agree both book values and a preferred sale price for the assets to be transferred.

104. It was accepted by Mr Couser for the Liquidators that the apparent intention was to pay at least but not significantly more than book values and Mr Walker insisted that it was always envisaged by the Directors and always identified as a requirement that the creditors would be paid in full with a potential surplus for shareholders.

105. Mr Walker said the PLB Report was handed out to creditors. However, it did not in fact lead to anything. His evidence was that this was not a question of fault but of circumstance. Those needed to provide the financial and other support to implement the plan did not pursue it. Mr Walker in his statement says that when by the end of 2007 it became clear that only very slow progress was being achieved in pursuit of the recommendations of the PLB Report, the Directors concluded that a *"Plan B"* ("Plan B") was required *"just in case those discussions came to nothing"*.

H7) 16 September 2006 – The VAT Decision

106. In the context of having addressed the PLB Report, Mr Walker's statement continues: *"So when the disputed VAT assessment arose later in 2006 we took comfort from the fact that it could be taken care of if needs be due to the funding options that we were exploring ... It may be said that the prospect of that investment caused us to underestimate the significance of the VAT assessment for the Company. But that was not how it was. We treated [it] as a standalone issue and took Deloitte advice ..."*.

107. The VAT decision letter was dated 16 September 2006. Mr Walker accepted that it followed HMRC's receipt of information provided by Mr Seagrave and this is apparent from the first paragraph of the letter. At paragraph 2 of the letter is written: *"You have confirmed that my understanding of the information obtained during my visit of 12 June 2008 is accurate. For ease of reference I repeat that information here"*. There does not appear to have been a response raising issue with the information repeated which included the following facts and matters:

a) For the Silver Arrow Voucher scheme, *"Customers are not advised by signage, staff, publicity, website or any other means, that the entry price includes a voucher, and they are not aware before they pay that they are receiving a voucher ... No customer has ever declined the voucher"*.

b) For the Banqueting Voucher, *"Customers are not told before payment (again by signage, staff, publicity, website or any other means) that the price they are paying for the banquet ... includes a voucher ...Customers are only made aware of the voucher by a jester ... while ... seated in the banqueting suite ... No customer has ever declined the voucher"*.

108. Mr Walker accepted that this letter had been received after investigations by HMRC. Mr Walker remembered HMRC visiting the Company's premises. He thought that his accounts clerk would probably have provided most of the information but he would have done so too if asked. During re-examination Mr Walker denied that the information set out above was accurate and he did not recall providing it himself. However, he had no explanation for why the author would have got it wrong or why the author would have referred to this information having been confirmed by him if he did not do so. He can point to no communication raising issue with the facts stated. Although he suggested that he would have responded and could only assume the letter had been lost or not recovered by the Liquidators, there is no explanation for why this particular letter might be missing when others concerning VAT are available.

109. The letter then set out HMRC's understanding of the Company's analysis, namely that the discount vouchers were face-value retailer vouchers under the Regulations and therefore their value should be disregarded when admission/banqueting tickets were purchased. It was not a composite transaction because *"the company has a policy that customers can obtain a ticket ... at a significantly lower price if they refuse the voucher"*.

110. HMRC disagreed with that analysis. They decided this was an artificial scheme which fell outside the purpose of the Regulations. In any event their preferred decision was that no consideration could be attributed to the vouchers on the facts summarised

above. It was noted that it was highly improbable that customers would purchase vouchers which could only be used in limited circumstances at future dates and not for the visit for which the ticket was purchased had they known this was what they were purchasing. The alternative decision was that the vouchers were supplied as part of a composite transaction. In the further alternative the vouchers should be treated as a pre-payment towards a specific product or service. In all 3 cases the result of the decision was that VAT had been and would be due when the entry tickets were purchased and the vouchers also received.

111. Mr Walker's evidence was that although the Company had implemented the schemes, they did so acting on advice and their implementation was checked by its professional advisers. He understood it to be compliant and was insistent there was signage explaining to the public that the vouchers did not have to be purchased. Employees at the ticket office were instructed to sell tickets without the vouchers at the reduced price (i.e. less their value) if asked and he said the tills had a refund button to ensure this could happen. It is to be observed that the note of the 9 October 2006 meeting with Mr Stephens records that Mr Walker confirmed that refusal to pay for the voucher within the full entry price would lead to an admission refusal and this evidence concerning the tills had not been previously mentioned. However, it is also to be observed that there is a letter from Mr Seagrave to HMRC dated 29 March 2006 informing them that *"No one has ever declined a voucher, but the price would be reduced accordingly"*.

H8) 9 October 2006 – The VAT Decision Advice

112. In his evidence in chief in respect of 9 October 2006 when he met with Mr Stephens together with Mr Seagrave, Mr Walker says the Company was trading cash positive and there were no problems with the landlord and no creditor pressure. He says that the advice of Mr Stephens concerning the VAT claimed provided the positive conclusion that it *"was not 'game over' ... and challenging the assessment was a legitimate and reasonable thing to do"*. The Directors decided to follow his advice and accordingly, as he says in the statement, *"we were entitled to see if the Company was indeed liable ..."*. He says that *"Neither Mr Stephens nor Mr Seagrave told us the position on the appeal or for the Company overall was hopeless*".

113. During cross-examination Mr Walker accepted that option 1 as advised by Mr Stephens (i.e. a TTPA) would not be used unless and until the options of seeking reconsideration and/or appeal had failed. He made clear that this was not because an appeal would delay the need for the Company to find payment but because he believed it could be successful. In order to justify this, he explained that the Company could have paid the £150,000. He was not using the appeal process as a delaying tactic. He said the Company could have raised the money from the bank based upon security over his, approximately £150,000 equity in his matrimonial home.

114. Mr Walker also accepted that option 4 was not one the Company would pursue. He had no evidence or recollection then or now of any representations from HMRC that could be relied upon. In any event the approach of leniency required the Company to abandon the discount scheme and it would not do this (although in re-examination he

said he could not remember a decision to that effect). He believed the schemes to be compliant with the Regulations.

115. Mr Walker acknowledged that Mr Stephens' note records that he had advised that the prospects for Option 2 were very low. When asked the ground relied upon to support the request for reconsideration, Mr Stephens not having identified one, he said it would be because there was correct signage explaining the option to the customers to purchase the tickets with or without vouchers. In other words he challenged in part the facts HMRC had thought were accepted. This does not appear in the letter requesting reconsideration set out in a letter from Mr Seagrave dated 20 November 2006. The letter merely relies upon the Company's belief that *"the voucher does have value"*. Mr Walker added that he expected HMRC to *"come and have a look"* but there is no suggestion that he was advised this would occur and his evidence is that he left the request for reconsideration and appeal to Mr Seagrave.

116. Mr Walker explained that he wanted the Company's appeal to stand behind the Luminar Appeal in particular because of cost. He said that the costs, which Mr Stephens had estimated in the region of £110,000, could have been raised by Company borrowing on the basis that he would have offered security over his equity in the matrimonial home.

117. However, this created a difficulty for Mr Walker because representations to HMRC concerning the need for hardship relief in connection with the appeal made no reference to that possibility. Instead they represented that the Company would be insolvent and have to refer to an insolvency practitioner if the £150,000 had to be paid in order to appeal. The representations were made in a letter dated 31 January 2008 from Mr Seagrave.

118. Mr Walker asserted that this letter was written without instructions. He said in cross-examination that it was wrong for Mr Seagrave to write that the Company could not raise £150,000 to pay the debt. He explained that HMRC would deal directly with Mr Seagrave, he would speak to him *"as and when needed"*, and that he could not recall if Mr Seagrave had sent that letter to him. In any event Mr Walker accepted that the Company did not investigate raising the money.

119. Mr Walker was also taken to a letter from Mr Seagrave to the Tribunal dated 15 September 2008 which states that the Company did not have the resources to pay professional fees to attend the Tribunal or have the necessary skills to otherwise deal with process. This letter applied to a pre-hearing review and asks for its adjournment. Mr Walker said that Mr Seagrave also had no instructions to write this letter and that the Company could have found the money for the fees. He said Mr Seagrave was instructed to deal with the VAT Tribunal and he had no input into the letter. He said he delegated the appeal to Mr Seagrave *"carte blanche"*. He did not know that no application had been made for this appeal to stand behind the Luminar Appeal. He thought the appeal was still going forward and there was a later date scheduled, by when it was all too late.

120. The correspondence reveals that the Tribunal adjourned the hearing of its own motion and by letter dated 24 September 2008 gave notice of a hearing on 6 January 2009. In another letter dated 29 September 2008, in response to the letter dated 15 September 2008, the Tribunal asked Mr Seagrave if the Company wished to withdraw or

continue the appeal. There does not appear to have been a reply and the appeal did not proceed.

121. Mr Walker acknowledged during cross-examination that advice from Mr Stephens that HMRC's decision was *"technically robust"* meant it was a strong argument on technical grounds. It became clear he did not know (whether from Mr Stephens, Mr Seagrave or anyone else) what grounds could be presented to sustain an appeal. Whilst he said he believed the appeal was based upon the fact that the schemes were *"compliant"* that does not explain the grounds.

122. When asked further about this, he informed the court that he spoke to Mr Seagrave at the end of the 6 October 2006 meeting and discussed what Mr Stephens had said. He told Mr Seagrave that he would act on his advice and that he should deal with the VAT claim accordingly including by taking it to appeal. Mr Walker's evidence was that he left it to Mr Seagrave. He was never further advised on the merits of the appeal and in effect knew nothing about it except it was proceeding. He was aware that Mr Seagrave's firm had VAT experts and he believed Mr Seagrave was liaising with them. However, he knew nothing of any substance except that Mr Seagrave was going ahead with the appeal. He stated that he was dealing with many issues and Mr Seagrave, a qualified accountant who had VAT experts on hand, was in a better position to deal with the appeal than he was. He left him to deal with the process and issues.

123. Mr Walker was pressed upon the prospects of success based purely upon the advice appearing within Mr Stephens's note. He saw the advice of *"very low"* and *"slim"* as meaning it was *"not a good chance but we could have demonstrated on appeal that we were compliant"*. Mr Walker accepted, based upon Mr Stephens's advice as noted, that by referring to *"not a good chance"* he did not mean any better prospect than Mr Stephens had advised. He accepted he was not saying there was a reasonable prospect but a prospect.

124. The absence of a reasonable prospect is plainly relevant when considering the Directors' actions. In addition there is the problem that Mr Stephens had not identified the grounds of appeal and Mr Walker never knew what they were. Mr Walker acknowledged that in those circumstances he was not in a position to assess the merits of the appeal after Mr Stephens had advised there were options and it was left to the Company to decide which option, if any, to take and which grounds, if any, to rely upon. Whilst he left it in the hands of Mr Seagrave, he accepted he could not measure the prospects in these circumstances.

H9) Year End 31 January 2007 Financial Statements

125. Mr Walker's position in his written evidence concerning the 31 January 2007 year end accounts is consistent with his evidence for the previous financial years. The Company was cash-positive on a day to day trading basis, there was no creditor pressure and the accounts established a profit before depreciation *"of £37,282 in 2006 after two years of exceptional losses"*. The VAT assessment was being *"properly handled ... and ... progressing as discussed with Mr Stephens ..."*. The Depreciation Deduction Argument applied producing on his case an operating profit of £40,124.

126. Mr Walker was taken through a number of demands for payment, draft and issued claim forms for the period of these accounts, as he had been for the previous year. They included a number of letters from HMRC concerning non-payment of PAYE/NIC liabilities and a British Gas notice of discontinuance. They were all for relatively low sums and Mr Walker made the points that this selection is taken out of the context of the thousands of bills that were paid and it may well be that some had histories of dispute or reasons for non payment which would demonstrate that this was not cash flow difficulty. Furthermore the Bank remained willing to assist the Company within the agreed facility and if further requests for borrowing were made. The Company's trading had improved. It was, of course, a long time ago, as he said, when trying to recollect the position.

127. The first demand for VAT relating to the discount vouchers was for £149,428.89 dated 13 October 2006.

H10) 3 May 2007 – HMRC's Reconsideration

128. HMRC in their letter to the Company dated 3 May 2007 maintained their VAT decision after reconsideration. In his evidence in chief in respect of 3 May 2007 Mr Walker repeats his contention that the company was trading on a day to day cash positive basis. He describes the VAT assessment as progressing by appeal in accordance with the advice of Mr Stephens and under the supervision of Mr Seagrave. Changes had been made to the voucher scheme in accordance with the advice of Mr Stephens. Costs had been cut and there was adequate working capital. The rent review was ongoing and no other creditor pressure. 3 May 2006 did not mark any material change. The Company would trade for another 20 months. The year end 31 January 2008 accounts would reveal a profit of £516 provided the Depreciation Deduction Argument succeeded.

H11) 2008 – The Mazars Plan

129. *"Plan B"* led to the Mazars Plan in a report entitled "The Robin Hood Partnership (a Company Limited by Guarantee) Strategic Development Plan". The version in evidence is the 4th draft dated September 2008. The dates of the earlier drafts are unknown but it is reasonable to conclude that work would have started during the early part of the year even though the PLB Report assisted by providing information which was adopted.

130. The Mazars Plan was based upon the business changing from an important tourist attraction to a premier educational and heritage destination for the City of Nottingham. An executive summary includes reference to seeking funds to upgrade the business being acquired from the Company and thereafter it continuing within the context of the new owner having charitable status. The advantages for a charity would be: gift aid; no VAT; and rates relief. There were financial projections indicating an operation and cash surplus. It was envisaged that further investment and modernisation would significantly increase visitor numbers.

131. Observations concerning the existing business in the report included: average annual visiting numbers averaging 50,000 in recent years in contrast to the attraction being originally designed in the 1980s for attendances in excess of 400,000 visitors a year; whilst cash generative, depreciation had produced deficits; and a major investment programme was required to modernise for current standards. The Mazars Plan was presented at a time when a company limited by guarantee had been formed and was applying for charitable status and a trading company formed. However, it does not appear to have been advanced further in substance despite negotiations with Nottingham City Council and Tesco. This Mr Walker attributed in cross-examination to the world-wide recession starting on 15 September 2008 with the insolvency of Lehman Brothers.

132. Mr Walker in his written evidence emphasises, apparently for a period around September 2008 but maybe slightly later, that *"Once I became aware that there was a risk that the major creditors might not be paid in full I took the steps of engaging with them personally to manage their expectations"*. This for him, therefore, is the key date when his director's duties might have included a duty to have regard to the interests of creditors; considerably later than the Liquidators allege. He has provided a sample of dates and appointments for meetings with creditors in chronological order from his old paper diaries in circumstances of having insufficient access to paper and computer records of the Company. I accept his evidence as a general description of his liaison with creditors.

133. Mr Walker also says: *"It is here that the focus of the advice and strategy shifted to one of trying to secure the best possible outcome for creditors of the Company"*. It was *"effectively creditor protection"* in circumstances of increased rental liabilities. Upon cross-examination he explained the difference as being between the previous circumstances when it was considered that the creditors would be paid if there was a transfer of assets and current circumstances which only at this stage indicated that creditors would have to be paid in full over a period of time. Mr Walker explained that at this stage he had the advice of an insolvency practitioner, Mr Lyon. He never advised that the Company should not continue to trade. Mr Walker said he still believed all creditors would be paid through implementation of the Mazars Plan.

134. During cross-examination Mr Walker was taken to a passage in the Mazars Plan and to the proposed budget which both proposed that the assets would be transferred by the Company for £60,000 and (as I construe it) the overdraft of £60,000 would be taken over by the purchaser. In addition the figures show a payment of £17,625 for goodwill. It was put that the creditors who would benefit most would be the Directors because they would no longer be guaranteeing the overdraft of the Company for £20,000 each.

135. In fact it is not necessarily to be assumed that they would be released and the figures show that the overdraft would continue to exist. In any event Mr Walker emphasised that these were notional figures. They were not inserted upon his instructions and any agreement to achieve the transfer of assets would have to be negotiated. He insisted that any such agreement would depend upon agreement of the Company's creditors. He said he showed the Mazar Plan to all major creditors, including regular trade creditors. The former were HMRC and Tesco and in re-examination he described the latter as people he saw on regular basis such as the butcher, people coming in weekly.

136. He explained that he had regular meetings with HMRC and Tesco after he had provided them with copies of the Mazars Plan and indeed before. A schedule of dates has been provided of all meetings including those. He referred in re-examination to meetings with Tesco during 2007/8. He says in his statement: *"They accepted that explanation and were content with what I told them. They did not take any steps to wind-up the Company, levy distress against goods or repossess the premises. In any event Mr Lyon ... was on stand-by to take an appointment as administrator in the event of significant creditor pressure ..."*. His answers during cross-examination effectively confirmed this.

137. In regard to Tesco he accepted the Company could not pay an annual rent of £92,000. He also accepted that from the July 2007 quarter the Company had ceased payment completely. Even the original quarter's rent based upon £29,000 per annum rent was not paid or set aside (nor the service charge). However, he makes the point in his written evidence that Tesco *"clearly wanted"* the Company to remain in possession not least because that would mean they were not left with an empty property resulting in a number of additional obligations and liabilities for them. He saw their commercial incentive as being to leave the Company as the tenant and made the point in cross-examination that it has remained unoccupied since possession was obtained in March 2009 following the liquidation subject only to a Tesco Express store being opened on part of the property.

138. During cross-examination he explained that he had offered future annual rents of £35,000, £45,000 and £55,000 knowing they fell short of the figure Tesco would like but believing this was commercially realistic. At a meeting with Senior Executives of Tesco in January 2009 he was told "leave it with us"; not no deal. He thought (before offering the £35,000) that Tesco would accept £30,000 a year because of the public relations benefits and the benefits to Nottingham as a whole. Nevertheless whilst the projections of the Mazars Plan referred to £30,000 a year, they were nominal figures.

139. In regard to HMRC Mr Walker maintains in his statement they were kept fully informed and cannot understand how, as appears to be the case, they would have wanted a wrongful trading claim investigated.

140. Mr Walker relies upon the fact that the Directors received advice not only from Mazars but also from their insolvency practitioner, Mr Lyon. Berryman Solicitors were also retained. He says in his statement that detailed discussions with Mr Lyon led to the decision to continue trading through December 2008: *"The position was perceived to be finely balanced. To cease trading would have been the end of any hope of a rescue for the benefit of creditors. The Company had already taken a number of deposits for Christmas and New Year parties. If it had gone into liquidation then all of those individuals would have been unsecured creditors."*

141. Mr Walker was asked about the decision to continue trading over Christmas and to his reference to deposits already received. He was taken to an attendance note of Berrymans which included the following: January is a crunch time; the Company needed some of the banqueting income to pay off some of the PAYE/VAT; customer deposits of some £10-20,000 could not be put in a designated customer deposit account because the Company needed the money to trade. Mr Walker did not dispute this but emphasised that this was a meeting with legal, accountancy and insolvency practitioner professionals. Its purpose was to advise the charity being established and

the Company, discussing the mechanisms for transferring the assets. He explained that Christmas was a busy and usually successful trading period.

142. Mr Walker says in his witness statement that the Company was informed by Nottingham City Council that they would not proceed with the Mazars Plan on 30 January 2009. It was explained to him that this was because Tesco, for the first time, required them to guarantee the future rent. This he contrasted with the previous meeting he had with executives of Tesco at which he had offered a reduced rent and they had said, "leave it with us".

143. Mr Walker stated during cross-examination that it was only because of this that the Mazars Plan had to be abandoned and the only option was insolvent liquidation. He observed that the financial climate had changed not only from September 2008 due to the world-wide recession following the Lehmans crash but also after Nottingham City Council's financial position had been affected by the Iceland banking collapse.

144. The Company was placed into creditors' voluntary liquidation on 6 February 2009. He emphasises in this statement that *"The vast majority of the individual claims date from 2008 or later"* and pointed out during cross-examination how quickly the Directors acted once the position of losing the opportunity to proceed with the Mazars Plan occurred.

145. His evidence during cross-examination was that the Mazars Plan was apparently favourably received by everyone and was being worked towards implementation until 31 January 2009. Mr Walker said in cross-examination: *"I was doing my best at that time for company, creditors and shareholders to whom I spoke. I was doing what I thought was right after advice given."*

I) The Directors' Evidence - Mr Armstrong

146. Mr Armstrong's evidence in opposition (in summary) identifies 2008 as the first period the Directors considered the Company faced financial difficulties. He explains that their response was to seek to obtain the best possible approach for creditors as subsequently outlined in the Mazars Plan. Mr Armstrong in his witness statement says there was active dialogue with *"all relevant stakeholders, particularly HMRC and Tesco"* during this period. He also states that it was only when Nottingham City Council withdrew from these proposals in January 2009 that the Company had to be placed into liquidation. He notes that whilst there had been attempts to secure funding since 2006, this was not due to trading difficulties but *"with the aim of making the attraction as good as it could possibly be"*.

147. I found his answers in cross-examination, however, to be unhelpful. He continually failed to answer questions and instead responded either with information which skirted round the question or which appeared to have no, direct relevance. Despite this being explained to him on a number of occasions, his approach only improved during re-examination. Mr Nersessian suggested that this would be attributable to the fact that he was more at ease and to the nature of the questions; maybe it was attributable to Mr Nersessian's, undoubted, silky skills but that is not a satisfactory explanation for Mr Armstrong. In addition it was frequently unclear whether Mr Armstrong was

trying to impart information he remembered or trying to justify matters from information he had heard during the trial. In my judgment he would grasp at explanations and treat them as memory when in fact his answers were based upon supposition. This occurred despite it having been explained that he must say if he cannot remember and state if it is supposition. The difficulties this caused and the fact that it did not assist him was explained to him on more than one occasion.

148. As a result, in my judgment Mr Armstrong's evidence under examination is to be largely disregarded because his answers were unreliable. However, I have managed to conclude: he is an experienced director and understands the need to scrutinise accounts; he and Mr Walker ran the Company together and they made the key decisions together; whilst no review of VAT compliance was carried out, he would expect the original advisers to contact the Company and inform it of changes; Mr Walker had delegated responsibility to deal with the VAT issue in his capacity as managing director; Mr Armstrong did not know of the meeting with Mr Stephens before-hand but was told about it afterwards by Mr Walker probably person to person; he knew professional advice was being provided by Mr Seagrave afterwards but he left the decisions to Mr Walker; he had no discussions with Mr Walker concerning the effect of the £150,000 VAT liability upon the financial position of the Company only upon how the claim would be handled.

J) The Directors' Evidence - Mr Seagrave

149. Mr Seagrave is a chartered accountant and business adviser. In his witness statement he emphasises that he had no reason to suspect that the accounting information received from the Company was misleading or misrepresented the true position.

150. During cross-examination Mr Seagrave explained that he would expect the management accounts produced and discussed within the Company to be effectively the same as the accounts within the financial statements for the same period. He said the Sage system accounts were effectively transposed into the accounts for the financial statements audited by Smith Cooper.

151. Mr Seagrave also refers to 4-5 meetings held during the 18 months or so before the liquidation including 2-3 with Berryman, solicitors, at which Mr Lyon, an insolvency practitioner, attended on at least one occasion. He says: *"These meetings, particularly the later ones, were the forum to consider whether the Company could continue trading"*. The Directors were never advised to cease trading or to place the Company into liquidation. The proposed solution was the one later set out in the Mazars Plan.

152. His position concerning the VAT demand is that the meeting note produced by Mr Stephens does not accurately reflect the meeting and in particular is far more negative than he remembers. He considers it fails to express the tone or spirit of the meeting which was far more positive. He emphasises that the appeal process in particular was presented as a legitimate option.

153. It was apparent from his evidence under cross-examination and indeed accepted by Mr Seagrave that he knew and had at the time known very little, if anything, about the details of HMRC's claim or the potential grounds of opposition. That acceptance

meant this could not be put down to delay and a failure to review them before giving evidence. This included acceptance of the fact that he had had no real knowledge of the substance of the Luminar Appeal. His understanding was that the issue was whether the vouchers had value and that appeared to be all. He admitted he did not understand the relevance of this to the Regulations concerned.

154. Whilst the letter from HMRC setting out its decision contained their understanding of the Company's case, Mr Seagrave said the case they referred to would have been produced by a VAT expert within Smith Cooper not by him. He could not remember instructing that expert after the meeting with Mr Stephens and there does not appear to be any paperwork to indicate he did.

155. His recollection concerning subsequent expert VAT advice was affected by the fact that difficulties he had when he left Smith Cooper have meant he has not recovered his files. However, his evidence must be taken from the information available. Furthermore the contemporaneous evidence supports the conclusion that he did not instruct or ask anyone to advise after the meeting with Mr Stephens. There is nothing in the request for reconsideration to suggest expert advice had been taken or in the relevant correspondence with HMRC or in the grounds of appeal. Further, whilst he arranged a meeting with HMRC as explained in a letter from him dated 19 October 2006, it was not to discuss technical grounds but the way forward. A note of that meeting on 7 November 2006 refers to HMRC having to explain the reconsideration and appeals process to Mr Walker notwithstanding Mr Seagrave was there.

156. Another example to support this conclusion appears from the letter of reconsideration dated 3 May 2007. It starts by observing: *In your letter you request a reconsideration on the basis that '... they believe [your client] the voucher does not have a value'. You did not provide any further evidence or technical argument to the analysis used by [HMRC for their decision]"*. That letter invited production of *"any information and evidence or technical argument that you think relevant to this issue, and to advise any inaccuracy or omission in the information on which the decisions were based"*. That invitation met with silence and all Mr Seagrave did was request an independent reconsideration in a letter dated 22 May 2007. There is no indication of the involvement of an expert.

157. It is also to be noted that the reconsideration letter dated 20 November 2007 refers to the invitation and comments upon the absence of *"any further information, evidence or technical argument to support your client's case"*. The grounds of appeal within the notice dated 22 November 2007 read: *"We believe the vouchers do have a true face value"* and nothing more. It cannot have been the case that further expert advice was sought or, if it was (which would be contrary to the evidence of Mr Seagrave), it was not relied upon and the inference for not doing so must be that it was negative.

158. Mr Seagrave was left with his recollection that the tone or spirit of the meeting was not reflected in Mr Stephens's note. He said in cross-examination that he put that down to Deloittes's risk management protecting themselves against any claims in the future for the advice given. He suggested that the reason for the difference could be explained by bias to protect them further down the line. Bearing in mind how negative the advice expressed in the note is, that appears unlikely. Mr Stephens sets out his stall in that note and stands by it. In any event this is pure and unfounded speculation.

Furthermore I have heard from Mr Stephens and am satisfied by his evidence that he would not have sought to and did not seek to achieve that result.

159. This places Mr Seagrave's understanding of tone and spirit in context. He could not and did not dispute in cross-examination that words such as *"technically robust"*, *"very low ... chance"* and *"slim"* or words to their effect would not have had their normal meaning if they had been used. He could not recollect whether those words were used being only able to recollect how he felt the meeting went. He thought the conclusion was to follow behind the Luminar Appeal. In re-examination he said he assumed the options were viable and that overall quite a bit could be done. Quite what or how is unclear, other than by submitting a request for reconsideration and an appeal in the most general of terms without any reference to HMRC's reasoning and letting time go by without investigating the grounds or merits further.

160. Mr Seagrave recollected that immediately after Mr Stephens left, he and Mr Walker stayed on and discussed what to do in *"the context of a positive feeling"*. Mr Walker decided to appeal and he was engaged to take it forward on the usual client basis, meaning requiring and acting upon instructions. It is again to be noted that they had no grounds for reconsideration or appeal at this stage.

161. The usual client basis meant that Mr Seagrave disagreed with any suggestion that any of his correspondence would have been written without instructions. He said that even though he may not send a draft of the letter, he would have told Mr Walker the gist of the words to be used and have been instructed to draft accordingly. He could not remember what happened concerning the adjourned hearing in September 2007 or whether the appeal was withdrawn or not. He did not recollect receiving the letter from the Tribunal dated 29 September 2008 asking if the appeal was proceeding.

K) The Directors' Evidence - Mr Lyon

162. Mr Lyon is a Chartered Management Accountant and a Licensed Insolvency Practitioner. His firm produced the Mazars report and he explains in his witness statement that: *"Mr Walker in particular went to considerable lengths to engage with all stakeholders in the Company including ... major creditors, [HMRC and Tesco], taking time to explain the Mazras Report to them and what it represented. At the same time significant steps were taken to try to bring about the things necessary to carry [its] recommendations into effect"*. He also makes the point that conclusions should not be drawn from the figures because it was a draft, working document.

163. Mr Lyon's written evidence refers to meetings he attended on 4 September and 22 October 2008 at Berrymans with Mr Walker and Mr Seagrave. As an experienced insolvency practitioner he opines in his statement: *"As far as I was concerned the steps that the [Directors] took, in terms of engaging with the Company's creditors, obtaining and following a plan as encapsulated in the Mazars [Plan] and taking the necessary steps to implement that plan, amounted to acting in accordance with their statutory duties as directors of a company which was in financial difficulty. I did not see anything more that they could do to try and bring a better outcome for the Company's creditors"*.

164. Whilst that is opinion upon matters I have to consider and decide, it is relevant to an understanding of the advice being received by the Directors. He expressly states that he understood his remit to include considering whether there was wrongful trading or misfeasance. For example he was concerned with the question of trading over Christmas in the context of deposits and advised Mr Walker whether trading should continue. His advice was positive.

165. However, it is also to be noted that his advice was provided in circumstances of an understanding *"that there was nothing problematic with [the VAT appeal]"*. That appears from the following passage in his written statement in which he explains he was aware of the VAT appeal but had *"no reason to think there was anything problematic with that (in terms of the directors commencing it or pursuing it) as I understood that the directors had taken specialist tax advice from Deloitte in 2006 and that the appeal was being conducted by the Company's accountants, Smith Cooper, pursuant to that advice"*. He did not believe the company could not avoid insolvent liquidation until the rescue options were exhausted in January 2009. The same points concerning opinion apply.

L) Submissions

166. I cannot do justice to the submissions without setting them out in detail and this would produce a judgment of unacceptable length. Mr Couser's are largely in writing and Mr Nersessian's will flow easily within a transcript if required. The submissions are wholly consistent with the cases described and I will only refer to them when necessary. I have taken them all into account when making my findings and in reaching my decision.

M) Findings - Disclosure

167. I turn first to the missing records. Taking into account my judgment upon the evidence of Mr Brooks and the existence of a contemporaneous record of the 5 boxes and computer hard drives taken, it cannot be suggested (and I do not believe it really is) that he took away more documents than he has admitted to and either lost or destroyed them afterwards.

168. The issue is whether there were more documents at the premises or elsewhere which he was not shown either specifically or by location. It is not or should not be in dispute that if there were other books and records on the premises or elsewhere, whether in his office in the premises or not, Mr Walker should have informed Mr Brooks of this and should have provided access to them. Both Directors owed a continuing duty to deliver up all of the property of the Company.

169. However, a long time has passed and there is a basic dispute between two gentlemen whose honesty I do not question. There must have been other records but the difficulty for the Liquidators in the context of their criticism of Mr Walker is that they did not follow up Mr Brooks's visit with correspondence or even oral requests asking for further books and records or for an explanation for their absence. Whilst it was the

duty of the Directors to deliver up property of the Company in their possession custody or control and it appears they existed, not least from the fact that auditors were able to audit the financial statements from the books and records that existed, the failure to make those enquiries makes it difficult to resolve the dispute and it becomes a disproportionate task to do so. The elapse of time is a significant difficulty.

170. A second difficulty is that the contents of the computer hard drives are likely to be relevant to this issue and these were not searched until very late in the day. The results of those searches are not known to me, not least because lever arch files containing some of this evidence were only produced at the very last minute and (for reasons given) I refused to admit them.

171. This leads me to ask what the relevance of the cause of records being missing is. There is no evidence to suggest the Directors deliberately destroyed them to hide anything. Indeed it is the Directors who are complaining about their absence on the basis that it harms their defence not to be able to produce written evidence to sustain it. I have also rejected any suggestion that Mr Brooks deliberately destroyed any. It does not seem to me, therefore, that the cause is to the point. The position is that they are missing and this trial has to proceed accordingly. I will make allowance for this insofar as it presents a problem to either side.

N) Findings - Delay

172. This Application has not been issued quickly. A long time has elapsed since the events in question. However, there is no blame to be attached and this is a trial which has proceeded and the evidence been provided in those circumstances. The relevance of a lack of documents increases as time goes but 20 lever arch files have been produced for the trial, detailed witness statements have been drafted with time for careful consideration and I have no doubt that this trial has been possible and that delay has not prevented it from being fair and just. I have throughout borne the effects of delay upon recollection in mind and continue to do so for the purposes of this judgment.

O) Findings - Standard of Directors for the Knowledge Condition

173. The Liquidators accept that for the purposes of sub-section (4) of Section 214 Mr Walker should not be judged by any higher standards than those applicable to the "reasonable" director. It is submitted that Mr Armstrong's own general knowledge, skill and experience means he has higher standards by which he should be judged. This is based upon his experience with other companies with turnovers usually around £1-2 million but at least one with a £9 million turnover. In my judgment he may have greater experience as a director but in a different retail field and I do not find this has produced higher standards for this case. As a separate point I am satisfied from having seen him in the witness stand that higher standards do not fit his cloth.

P) Findings - Ambit of the Claim Issue

174. In my judgment only 2 additional dates can realistically be considered within the Ambit of Claim issue: the June quarter day when the Company failed to pay its rent and service charge; and 29 August 2007 when the rent review was decided.

175. In my judgment it cannot be said that the Liquidators have identified either date as one from which wrongful trading started. That is because:-

a) The Amended Application dated 18 April 2013 makes no reference to the rent review or unpaid rent. Its premise is that the Knowledge Condition was satisfied on the Dates in circumstances of the overall financial position of the Company as evidenced by the financial statements in circumstances of the VAT liability. The Misfeasance Claim also stems from that. The responses to requests for further information do not alter that.

b) The list of agreed issues refers to rent owed to Tesco but in the context of the quantum of losses caused or exacerbated by the acts of wrongful trading and/or misfeasance alleged.

c) Although the evidence in support from Mr Brooks dated 12 December 2012 addresses the effect of the rent review at paragraphs 161-163, 174 and 170, its context is to challenge the anticipated contention that it was the review not the VAT liability that caused (*"was the final straw tipping it into ..."*) insolvency. It made no positive assertion (express or implied) that either date was relied upon.

d) Whilst his evidence in reply responds to the *"the perceived issue ... [that] rent increase ... had [been considered by the Directors] ... the tipping point into insolvency"*, it does not state (expressly or impliedly) that the Liquidators will rely upon this event to establish a date of wrongful trading or to sustain the claim of misfeasance.

e) The same conclusion applies to the Liquidators' other evidence. There are details of the rent review and how the arrears arose by reference to Mr Wetherell's evidence but no suggestion of a new or supplemental allegation.

f) Nor can it be said that the evidence of either of the Directors shows they understood that the rent review decision date was material to the allegation of wrongful trading which concentrated upon the VAT liability in the context of past financial results or to the misfeasance claim.

176. There is, however, also the question whether those dates, whilst not standing as independent dates, can be relied upon in support of the fifth date, 3 May 2007. The reasons set out above equally apply to reach the negative answer for the rent review decision date. However, in my judgment non-payment of the June quarter is sufficiently near to the 3 May 2007 date to justify enquiry as to whether the Directors had knowledge of that event as at 3 May 2007. I consider that fair because it is plain that issue of non-payment has been raised by the Liquidators and is potentially relevant to the dates chosen. That is because:-

a) Mr Walker in his evidence in answer dated 27 February 2014 at paragraphs 59-60 dealt with the rent review in basic terms and stated, as a matter of acceptance, that *"The increased rent was the only major issue that intervened between the time of the PLB Consulting Report [June 2006] and the various drafts of the Mazars [Plan] [starting in 2008]"*.

b) Mr Brooks in his evidence in reply in particular addresses the above-mentioned e-mail from Mr Britton in which he identified that Tesco had paid a sum exceeding £202,000 and went on to deal with Tesco's approach to the rent and an assignment.

c) In addition the evidence of Mr Brooks in rejoinder draws attention to the evidence *"obtained evidence from Tesco which explains the sequence of the rent review and how the arrears developed"*.

177. In reaching those judgments I have taken into account cross-examination generally. I am satisfied that the issue I consider within the ambit was treated as "live" between the parties at trial and no unfairness, prejudice or indeed difficulty will result. In reaching that decision I have taken account of Mr Walker's second witness statement dated 31 March 2014 and in particular paragraph 70 where he refers to issues of causation including a comment that *"It is not clear which of the arrears of rent that Tesco had to pay ... are said to have been incurred as a result of wrongful trading"*. Although he suggests a lack of clarity, he recognises by implication its relevance and it is not difficult to identify the July quarter's rent and the fact of an impending rent review as relevant to the financial position as at 3 May 2007.

178. Now the ambit is set, I will turn to the Knowledge Condition.

Q) The Knowledge Condition - Case Law

179. The Insolvency and the Director Conditions being satisfied, the first task is to identify whether the Liquidators have proved the Knowledge Condition on the balance of probability. As explained when addressing Section 214 above, this requires me to ask whether the Directors knew or ought to know that there was no reasonable prospect of the Company avoiding an insolvent liquidation at or around the Dates.

180. The following case law is to be noted and I will bear in mind throughout this judgment:-

a) There is no duty upon directors not to trade whilst insolvent or to ensure that a company does not trade at a loss. There will always be cases where companies legitimately trade at a loss because the directors anticipate profit to the benefit of the existing creditors (see ***Secretary of State for Trade and Industry v Gash*** [1997] BCC 172 per Chadwick J. (as he then was) at [114].

b) Thus Section 214 does not require proof of solvency or insolvency at the date of knowledge. It requires knowledge that there is no reasonable prospect of avoiding a future liquidation in which there will be insufficient assets to pay the Company's creditors. This applies the balance sheet test for actual

solvency as explained above when considering ***Eurosail***. Therefore directors can cause the company to trade whilst commercially insolvent without being in breach of Section 214 provided the Knowledge Condition is not satisfied. Even if it is, the Minimising Loss Defence can be relied upon which is also consistent with Chadwick J's decision.

c) Underlying Section 214 is a policy against conduct ranging from irresponsible to unreasonable (see ***"Insolvency Law and Practice"***, Report of the Review Committee chaired by Sir Kenneth Cork 1982 at paragraphs 1781-1786, albeit that the committee's recommendations were not adopted in the form proposed). This may arise from positive actions or by the directors closing their eyes. It may be in the context of positive or objectively deemed knowledge. Their conduct must be reasonable and not be based, for example, on mere hope that something will turn up. The court considers *"rational expectations"* for the future (see ***Re Hawkes Hill Publishing Co Limited*** [2007] BCC 937 at [28] per Lewison J. (as he then was)).

d) In doing so the court must be careful not to approach the Knowledge Condition with hindsight. Not only are directors not clairvoyant (see ***Re Hawkes Hill Publishing Co Limited*** (above) at [41]) but it must also be remembered that there is a real difference between the court analysing events in the court room and the directors having to reach decisions on the ground, at the time and under the pressures their office brings. Mr Justice Park in ***Re Continental Assurance Co of London Plc*** (above) emphasised the difficulties. He pointed out that on the one hand directors can be criticised for failing to cease trading early enough, whilst on the other hand they might easily have faced criticism for acting too quickly. It is to be remembered that insolvencies usually give rise to large costs and expenses and lead to fire sales to the detriment of creditors.

e) Mr Justice Park also made the point (although one straddling both the Knowledge Condition and the Minimising Loss Defence) in ***Re Cubelock [2001] BCC 523***, that: *"The law has to leave room for cases where it was acceptable for the directors to take the view that their company, although insolvent in balance sheet terms for the present, was going to trade its way back into credit so that all creditors would be paid ... [and] there has to be room for cases like that even if in the event the directors turn out to have been wrong"*.

f) That should not be construed as introducing a *"point of no return"* test, which does not appear in Section 214 and which the Supreme Court in ***Eurosail*** warned should not be applied instead of the wording of the Act in case it is construed as meaning something different to the words so used. However, it emphasises that the court must bear in mind that directors will often be faced with decisions for which there is no obvious right or wrong answer. The fact that it may subsequently prove that the wrong decision was made, does not necessarily mean they failed to act as reasonable directors in the prevailing circumstances of the time.

R) Findings - Issues Concerning The Financial Statements

181. It is convenient to decide a number of issues raised by the parties concerning the application and interpretation of the financial statements before turning to the Knowledge Condition when my decisions will be applied.

R1) Availability of Accounts

182. Reliance upon financial statements for the purpose of establishing the Knowledge Condition at a specified date can cause difficulties because the financial statements were not available or approved until later in the next financial year. However, in this case the evidence of Mr Walker and Mr Seagrave satisfies me that the equivalent information would have been available to the Directors from monthly management accounts normally available in the first week of the new month or otherwise shortly after. In particular I bear in mind Mr Seagrave's evidence that the Sage management accounts were effectively transposed into the accounts for the financial statements audited by Smith Cooper.

R2) The Depreciation Deduction Argument

183. Issues such as the Depreciation Deduction Argument need to be determined in the context for which the financial statements are relevant. For the purposes of the Knowledge Condition and the Section 212 claim they are relevant because the Directors would or ought to have used the information they contain (in summary):

> to prepare a budget and cash flow forecast; to identify any financial or trading problems; to assess trading in the foreseeable future taking into account past and current performance; to identify and prepare for any cash flow requirements for that future trading and/or any under-capitalisation issues; and to decide whether and to what extent the Company was commercially and/or actually [in]solvent.

184. For those purposes the Directors would or ought to have excluded depreciation from the profit and loss account for the year. Depreciation as an administrative expense does not help the understanding of whether the Company's actual trading was making a profit or loss or would be likely to do so in the future. The Depreciation Deduction Argument is correct.

R3) High Flyers Limited's Debt Write Off

185. The profit and loss account for the year ended 31 January 2004 includes the write off of the debt owed by High Flyer Limited totalling £237,597 as an administrative expense. This was a one-off entry and as a result it too does not help the understanding of whether the Company's actual trading is making a profit or loss currently or in the future. It should be excluded when considering the profit and loss account for that financial year for the purposes of the Knowledge Condition.

R4) Bar Humbug Limited Income for 2004/2005 Financial Year

186. The Liquidators contend that it was wrong for the Directors to have included £267,966 received from Bar Humbug Limited within the Company's income for the financial year ending 31 January 2005. In the alternative they rely upon Mr Walker's evidence that an agreement between the companies justifying that income ended by 31 January 2005. In those circumstances the Liquidators argue that the loss of an income of £267,966 would be extremely detrimental and therefore highly relevant when the Directors considered the Company's future financial position at the beginning of February 2005.

187. In my judgment this can be easily disposed. First, although there is no documentation evidencing an agreement between the two companies or justifying that payment, the payment is included within the audited accounts. The auditors were satisfied that the inclusion of this income presented a true and fair view. Second, Bar Humbug Limited has never challenged the Company's entitlement to this money. Third, the loss of income for 2006 must also be set off against the operating costs. The management accounts reveal the profit made and therefore to be lost for the 2006 financial year was £17,185. Whilst not to be forgotten it was obviously nothing like as serious as the Liquidators contend.

R5) Overview of Profit and Loss Accounts

188. The decisions above mean that the profit/loss for the financial years should be viewed for the purposes of the Knowledge Condition as follows:-

a) 31 January 2004 – the loss of (£261,706) to be treated as a profit of £40,124;

b) 31 January 2005 – the loss of (£113,169) becomes a loss (£44,067) including the Bar Humbug Limited profit;

c) 31 January 2006 – the loss of (£30,547) moves to profit, £37,282, although without the VAT liability and the rent review consequences being as yet unknown;

d) 31 January 2007 - the loss of (£26,751) becomes a profit of £40,124 without the VAT liability and the rent review consequences as yet unknown;

e) 31 January 2008 (unsigned draft statements) – the loss of (£66,153) is to be read as a profit of £516 but without the VAT liability and with the rent review determined.

R6) Fixed Assets, Depreciation and the Balance Sheet

189. The Liquidators argue that depreciation of the fixed asset values of the exhibition and show (essentially the ride – book cost: £1,252,431) in the balance sheets (£213,075 as at 31 January 2004 down to £87,831 for 2008) should or ought to have caused the Directors to realise that the Knowledge Condition was satisfied because it

demonstrated that the Company had to reach insolvent liquidation in the reasonably foreseeable future unless substantial investment of some £1 million or more was incurred to replace/up-grade that asset.

190. On the facts of this case, I disagree. For the purpose of the Knowledge Condition, a distinction needs to be drawn between the need for substantial investment for significant long term improvement and the ability of the business to operate within current benchmarks without needing to upgrade (or at least not significantly). Whilst there is some evidence (for example in the PLB Report) to support the Liquidators' case that there would have to be substantial investment in the foreseeable future, it is contradicted for the reasonably foreseeable future even until the date of liquidation by the evidence of Mr Walker which I accept.

191. It was apparent from his cross-examination that Mr Walker is extremely knowledgeable about this area not only because of his engineering background but also because of his understanding of the operation of the business and its attraction to the public both in the pure sense of numbers and in the more abstract sense of enjoyment. I accept his evidence that the fixed assets were operational for the foreseeable future and that visitor numbers could be maintained without significant improvements.

R7) Fixed Assets and Creditors

192. For the purpose of the Knowledge Condition it is relevant to assess whether the Company's fixed assets could have been sold or secured to raise funds to pay creditors if required whether for commercial or actual insolvency purposes. In my judgment the nature of the assets (primarily being the demised land and buildings together with the exhibition and show, which includes the ride) and the evidence before me concerning the operation of the business meant in practice (as general propositions) that:-

a) If they were required to raise funds through sale, the business as a whole would have to be sold because they could not be severed from their location. As a result for the purposes of the Knowledge Condition the question for the Directors at the relevant time would have been whether the net proceeds together with the current assets would be sufficient to ensure payment of the creditors in full.

b) If required to raise funds through borrowing, the Directors would have needed to consider whether and to what extent that was realistic taking account of current value, current secured lending and the financial ability to repay the required funding. From the evidence before me, it appeared unrealistic subject to finding third party security.

c) Therefore the Directors when considering the balance sheet would or ought to have concentrated upon: whether current assets could or would pay creditors; and, to the extent they would not, whether future trading was likely to meet the short fall as well as the liabilities falling due.

R8) Debts Owed By the Group Undertakings

193. The factors relied upon by the Liquidators to dispute the reliability of the financial statements include their assertion that debts owed by associated companies were irrecoverable. The *"group undertakings"*, as they are described in the financial statements, owed debts to the Company in each, relevant financial year.

194. The Directors rely upon the audit opinions that the accounts give a true and fair view of the Company's financial position and therefore conclude that no provision should have been made for these debts as bad or potentially bad debts.

195. The Liquidators contend that is plainly wrong when each company's accounts are addressed. The bundles before me include accounts for Hi-Flyers Limited, Steamboat Inns Limited, Bar Humbug Limited, Conrads Limited and The Nottingham Transport Museum Limited. I have summarised them in Appendix 1 below.

196. In my judgment the accounts reveal that debts owed by any of those 5 companies were and had to have been treated as bad debts except for debts owed by Bar Humbug Limited. Whilst for that company the accounts for the years ending in 2006 and 2008 had net liabilities of about £38,000 and £24,000 and in 2007 only net assets of £12,634, net assets stood at £509,301 as at 31 January 2009. The debts are stated in the Company's accounts throughout as being due after more than 1 year and therefore this is a source of payment.

197. The problem is that none of the accounts assist in identifying which of those 5 companies was one of the indebted "group undertakings" and, if so, how much was owed. In my judgment I cannot take it further and therefore am left with the audit opinions and the possibility that some or all of the debt could have been repaid by Bar Humbug Limited. In my judgment the Liquidators have not proved this issue on the balance of probability or any shift in the evidential burden has been met. Whether this decision will make any real difference in practice is another matter.

S) Findings - The Knowledge Condition

S1) Year End 2004

198. I start with the financial position of the Company as at 31 January 2004 because the Directors when considering the available accounting information and assessing the future trading prospects of the Company on or about the Dates would or ought to have borne in mind the financial statements for that year end as material background. Adjustment of the profit and loss account due to the Depreciation Deduction Argument and the one-off debt write off for Bar Humbug Limited results in a profit of £40,124 and presents a different financial picture to the one of continuing losses identified by the Liquidators.

199. The Liquidators' Application does not suggest the Knowledge Condition was satisfied at this stage. However, the fact that the business operation generated a profit would

leave reasonable directors to be optimistically cautious about the Company's financial position subject to considering the balance sheet.

200. The existence of net current liabilities of (£125,189) on the balance sheet combined with my decision concerning the limitations of the fixed assets for sale or borrowing would or should have indicated to the Directors that future trading and the ability to pay creditors would need to be carefully monitored without there being a great deal of room for manoeuvre. This is the background to considering the first date relied upon by the Liquidators, 31 January 2005.

S2) 31 January 2005 – 1st Date

201. The profit and loss account for the year end 31 January 2005 still presents a loss (£44,067) after stripping out depreciation. Plainly this deterioration since the year end 2004 of some £84,000 in trading performance would or ought to have been viewed as significant and serious. The cash statement and net cash reconciliation accounts reflect the consequences of this deterioration in trading. The notes to the financial statements record an increase in the overdraft of about £25,000. The position is potentially mitigated by the expenses including bad debts written off totalling £63,679, but this may be attributable (at least in part) to normal trading as opposed to a one off deduction.

202. Bearing in mind the limitations of the fixed assets for sale or borrowing, it would or ought to have been a particular concern that net current liabilities had increased to (£189,905). Creditors within a year now stood at (£328,630) in contrast to the figure of (£256,800) for 2004. The Directors would or ought to have considered how the Company would be able to pay those existing creditors together with other debts arising and requiring payment during the financial year ending 31 January 2006 from current assets totalling £138,725 and the Company's anticipated 2006 trading income (without double counting).

203. However, for the purposes of the Knowledge Condition the Directors when considering future trading did not have to view the financial position from the basis that the Company must clear all its debts. The question is not whether the Company will become actually or commercially insolvent but whether they knew or ought to know that there was no reasonable prospect of the Company avoiding an insolvent liquidation.

204. There were potential positives. The evidence, which I accept, reveals that the Bank was relaxed and willing to extend the overdraft facility even if it exceeded the £60,000 facility. There had been profit in the previous year. The loss arose within the context of a large increase in turnover (£681,180 in 2004 to £1,010,477, due in part to the Bar Humbug Limited income) and a significant increase in administrative expenses (£627,188 as opposed to £405,846 after deducting the 2004 bad debt provision but not making allowance for depreciation in either case). This might have presented to the Directors an area for room to manoeuvre by cutting costs.

205. However, plainly there are serious issues to address within the context of the Knowledge Condition. At the time the Directors would or ought to have studied and

applied their budget and cash flow forecast. Unfortunately it is not now available. In those circumstances for this case the Directors turn to the 2006 year end results. True this involves hindsight but they are entitled to assert that if this is what happened, it is what could or should have been foreseen at or about 31 January 2005.

206. The 2006 year-end profit and loss accounts show an operating profit of £37,282 once the depreciation is stripped out. This can be described as "a turn-around" achieved notwithstanding the loss of the Bar Humbug Limited income. This in my judgment leads to the inexorable conclusion that the Knowledge Condition was not satisfied as at the 1st of the Dates. The Liquidators' case falls away due to this following my decisions upon the effects of the Depreciation Deduction Argument, the Bar Humbug Limited income and the debts owed by group undertakings.

207. Mr Couser also relied upon the fact that the Company had not been reviewing the VAT schemes maintained since 1999. He referred to the absence of any continuing retainer of Deloitte or Mazars to inform the Company should the applicable VAT rules alter. In my judgment that does not sustain the Knowledge Condition. Insofar as it alleges negligence, it is not a pleaded claim and does not fall within the ambit of the application.

S3) 31 January 2006 – 2nd Date

208. Although the financial statements for 31 January 2006 record a "turn-around", there were still problems for the Directors to consider. One which can be identified from the cash flow statement for the 2006 financial year end was a decrease in cash. In addition the balance sheet shows a build up of creditors falling due within one year from £328,630 to £347,140. The Notes record an increase in Bank loans and overdraft from £89,963 to £114,129 reflecting the cash flow difficulties.

209. There is also the evidence that from March – December 2005 and continuing into January 2006, lots of small debts, for example to HMRC, a gas supplier and trade creditors, were not being paid requiring demands: some by solicitors' letters; a disconnection warning; and a warrant. On the other hand (and recognising that the expiry of time and lack of documentation makes it very difficult to establish the true cause for each debt) trade creditors falling due within one year remained remarkably constant (£182,548 increased to £182,951) and Mr Walker's evidence as to the cause of non-payment (disputes and/or administration) cannot be discarded. Overall it appears that cash flow problems were being kept in hand by increased bank lending which would or ought to have been a concern.

210. Another feature identifiable from the balance sheet is a reduction in net current liabilities (£128,556 from £162,841). This was attributable to a significant increase in debtors due after more than 1 year, from £27,065 to £81,451. The whole of this debt is attributed to "group undertakings". My decision upon their inclusion in the balance sheet applies.

211. Therefore looking at the accounts in the round for the purpose of the Knowledge Condition, there were existing and future problems but this was still a "turnaround" year with a profit of £37,282. The Company was continuing to trade, there were no

substantial creditors unpaid or pressing to be paid and there was no suggestion that the Bank might withdraw the facility and call in the overdraft. The Knowledge Condition was not fulfilled.

212. That conclusion can also be tested and sustained by reference to the year ended 31 January 2007 financial statements, which are considered next. The bottom line for these purposes is that they produced a profit of £40,124 after stripping out depreciation.

213. The Liquidators in support of their claim also point to the fact that the *"potential"* VAT liability of (as then understood) £128,000 was noted as a contingent liability in the financial statements, albeit without provision having been made. As previously explained, the test for actual insolvency includes contingent liabilities and Mr Couser submitted that account should be taken of the fact that HMRC had investigated the VAT Schemes and determined that they could not withstand scrutiny. He submitted that the Directors either knew or ought to have known that the Company could not avoid actual insolvency due to this liability.

214. However, and I add for the avoidance of doubt that of course Mr Couser appreciated this, as at 31 January 2006 there had been no decision by HMRC. Investigations had only just have started and the note to the financial statement for the 2006 year end on 31 January refers to a potential liability being identified *"Since the year end"* (my underlining). The decision was not notified until a letter dated 15 September 2006. In those circumstances the submissions do not alter my conclusion that the Knowledge Condition was unsatisfied as at or about this 2nd date.

S4) 9 October 2006 – 3rd Date

215. On 9 October 2006 Mr Walker received advice concerning HMRC's VAT decision from Mr Stephens and on the same day together with Mr Seagrave decided to request reconsideration and, if unsuccessful, an appeal.

216. The difficulty for Mr Walker is that at that date he knew that whilst the Company had been advised of viable options, the chances for a successful reconsideration or appeal were below reasonable prospects of success. Rational expectations need to be considered when addressing the Knowledge Condition.

217. In my judgment the facts are also difficult for Mr Armstrong. He chose not to receive the advice but to delegate all dealings to Mr Walker. In my judgment this was a sufficiently serious issue for the Company because of the size of the liability to mean that he should have been involved in the decision making or, at least, reviewed it with Mr Walker. The evidence substantiates the conclusion that he either actively or passively accepted Mr Walker's decision whether in circumstances of having been informed about the advice or of having failed to request it. It may be this information was received by him later but it would or should not have been significantly later and therefore the facts are within the margins for this date under Section 214.

218. There was an answer given by Mr Armstrong during cross-examination that suggested a conflict between himself and Mr Walker on the basis that he might have a case for

blaming Mr Walker for providing him with incorrect information concerning the merits of the VAT appeal opined by Mr Stephens. In my judgment such suggestion should be disregarded. The first point is that it arose out of the blue. The second, his evidence was generally unreliable. Third, throughout the claim he and Mr Walker had retained the same solicitors and counsel and advanced their case on the basis they had the same defence without conflict. Fourth, the following day Mr Nersessian had instructions that there was no conflict. In all those circumstances their defences stand and fall together.

219. I do not accept the evidence from Mr Walker or Mr Seagrave that the note of Mr Stephens fails to reflect the tone or spirit of his advice and that the contents of the Note should either be treated as inaccurate or be construed differently.

220. The contents are plain and the words cannot be construed in any other reasonable way than their natural meaning. The advice cannot be described as positive in the context of merits as Mr Walker or Mr Seagrave suggested it was. It may have been positive in the sense that options existed and might be pursued by the Company but it did not go further than that. The question for the Directors in the context of addressing the Company's financial position and future in the light of the advice given was: what prospects of success did the Company have in pursuing those options? In my judgment the answer was no reasonable prospect.

221. The reality was and I find from the evidence that options 2 and 3 provided chances but the chances of success were so low that the probability of this being an unchallengeable debt had to be recognised within the context of addressing the Company's financial position. Words such as *"technically robust"*, *"very low ... chance"* and *"slim"* or words to their effect have their normal meaning and this is considerably below the standard of reasonable prospects.

222. The position becomes even more stark when the evidence, which I accept, establishes that the grounds for a reconsideration and/or appeal were never identified. The Directors were never advised of any grounds and (it follows) proceeded to make all relevant decisions without knowing what grounds there were to challenge the decision. Nor was there sufficient investigation of the Luminar Appeal to justify reliance upon it. Indeed the evidence is that investigations would have identified adverse differences unhelpful to the Company. In all those circumstances rational expectations would anticipate failure not success when viewing the Company's financial position.

223. I note Mr Nersessian's submission that the grounds referred to by HMRC within their analysis of the Company's case in the original decision letter could have been repeated. However, neither the request for reconsideration nor the appeal did this. Nor was that done or any other positive response made after the express invitations of HMRC to provide *"any further evidence or technical argument"* (see the letters dated 3 May 2007 and 20 November 2007). I refer back to my consideration of Mr Seagrave's evidence in particular.

224. In my judgment: the Directors decided to ask for reconsideration and appeal without at any stage being advised of or knowing the technical grounds required; the request and subsequently the appeal were effectively bare documents and deficient; they left the procedure in the hands of Mr Seagrave when it would have been obvious he did

not have the knowledge to advise them, had not sought further advice from VAT experts and was not asked to do so; they did not provide further information or argument to support the Company's case despite being asked to do so; as reasonable directors they could not rely upon the Luminar case when they and Mr Seagrave knew so little about it and there were distinct differences adverse to the Company.

225. In my judgment the Directors knew or ought to have known the lack of merit in the Company's case. Absent grounds and absent further advice upon the merits, the Company's request for reconsideration and its appeal were "non-starters". Realistically they could never have been expected to succeed not even as one of those cases without any real chance which Mr Stephens said sometimes succeeded.

226. Taking into account all those matters I find that the Directors reached their decision to proceed with those two options because they had decided to "park" the liability. They chose Options 2 and 3 to buy time. Anyone who was serious in advancing Options 2 and 3 would have sought specific advice upon the grounds. They would have ensured the grounds were identified and drafted with sufficient detail of evidence and technical argument. The Directors simply did not do this and the conclusion must be this was because of the Company's financial position. The fact that the appeal was not progressed and was left in its inadequate form speaks for itself and sustains that judgment.

227. However whilst I accept that Mr Walker did very little concerning pursuit of the reconsideration and appeal, I do not accept that Mr Seagrave would have acted without instructions when drafting his correspondence. I reach that decision and accept Mr Seagrave's evidence to the contrary because it would be too unlikely for it not to be the case. I consider Mr Walker's evidence an error in recollection in the heat of cross-examination due to the realisation that the letters referring to the Company's financial position in the hardship application and in the request for an adjournment were damaging to the Directors' case and needed explanation. I find that those letters would have been written on instructions in accordance with Mr Seagrave's usual practice. I can find no reason for him to abandon that practice. I accept Mr Seagrave's evidence to the contrary as plausible. I note, however, that had I reached the opposite conclusion, it would all the more endorse the finding I have reached that the liability was "parked".

228. As previously stated, I accept Mr Armstrong relied upon Mr Walker but he should have enquired further including about the grounds in order to be in a position to make a legitimate financial assessment. A director in Mr Armstrong's position acting reasonably would have sought specific advice upon the grounds to be relied upon and in that context asked for a further opinion upon the merits. He did not do so. He had no information to suggest that Mr Seagrave either could identify or had identified grounds. My decisions that his defence stands or falls with Mr Walker remains.

229. In my judgment it is plain that Option 4 was also a non-starter or at least had such low prospects as to be in the same category as Options 2 and 3. The possible issue of a binding representation by HMRC falls away because Mr Walker is unable to assert that any such representation was made. There is also the fact that no step was taken to pursue this option notwithstanding the deficiencies and consequential lack of merit for Options 2 and 3. The Directors when considering the Company's financial position should not have effectively ignored the liability.

230. As for Option 1, however, I agree with Mr Nersessian's submission that whilst a lump sum debt is due and owing by reason of the assessment (subject to demand), that debt does not have to be paid in a lump sum. It was reasonable for the Directors to investigate the possibility of a TTPA. Unfortunately they did not do so. Their approach of leaving that Option until time obtained from Options 2 and 3 had passed was not the approach of a reasonable director.

231. I now turn to consider those findings and the possibility of payment over time within the context of the financial information available before deciding whether the Knowledge Condition was satisfied by 9 October 2006. I have already considered the financial statements for the year end 31 January 2006. I will now turn to the PLB Report of June 2006.

S5) The PLB Report

232. I accept Mr Walker's evidence that the PLB Report, produced in June 2006, was not prepared because the Knowledge Condition was satisfied. This is apparent from its content. In my judgment its purpose was to provide a route to enable the attraction to be taken to the next level. It was a recognition that the business needed to improve its ticket sales and its profits and that investment was required to achieve this. I have already rejected the submission that the report evidences a Company with an attraction in terminal decline absent substantial investment whether through a new entity or otherwise. I accept the evidence of Mr Walker concerning the condition of the ride, actual and potential ticket sales and the generating of operational profits.

233. I also accept that the PLB Report never reached the stage of a formulated plan with agreed terms or even agreement in principle as to the sale price. I accept Mr Walker's evidence, I consider him honest, that he wanted to ensure all creditors were paid. The fact that the report makes reference to the Directors having to ensure that the disposal would be in the best interests of shareholders, indicates that all sides recognised the duties upon Directors in negotiating a sale. However, the PLB Report does not provide evidence that there was a realistic expectation either that a sale would be achieved or that its consideration would result in the Company's assets being sufficient to pay all its creditors.

234. The other financial evidence the Directors can turn to are the financial statements for the year ending 31 January 2007.

S6) Financial Statements - Year End 31 January 2007

235. The year-end 2007 financial statements are also audited without qualification. They make no reference to the VAT claim or to the rent review and expressly state there are no contingent liabilities at the balance sheet date. Whatever, the accounting position, plainly there were.

236. The profit and loss results are consistent with and indeed a small improvement upon the year-end 2006. A loss of (£26,751) produced an operating profit of £40,124 if

depreciation is stripped out. The cash flow increased, turning the negative (£32,481) to £32,329. The net debt was reduced from £117,000 to £81,902 and the bank overdraft from £114,129 to £82,426. These were plainly significant improvements.

237. Net assets were reduced to £118,959 but more importantly net current liabilities fell from (£128,556) to (£90,518) excluding the VAT debt. Although there was a significant increase in debt owed by group undertakings after more than one year from £81,451 to £133,999, ceditors reduced from £347,140 to £307,399. This included a decline in trade creditors from £182,951 to £148,630. There appears to have been a successful collection of debts, although this meant that debts due within one year were only £18,156 compared with £69,926 in 2005.

S7) Applying the 2007 Year End Accounts to 9 October 2006

238. In my judgment the importance of the 2007 year end accounts for the Directors' case when addressing the Knowledge Condition for the date of 9 October 2006 is that they show no reason to conclude anything had materially changed (other than potentially positively) during the first 8 months of the financial year except for the VAT liability.

239. As a result of my findings concerning the VAT liability, however, reasonable directors would or should have recognised that it was to become a debt due and owing (i.e. as and when demanded) and that the Company would not have £150,000 available unless it could be borrowed.

240. Mr Couser's submissions on behalf of the Liquidators relied upon continuing losses, the loss of Bar Humbug Limited's income, the fall in shareholder funds, debts being unpaid and other matters which I continue to reject for the same reasons I have previously relied upon. However, he also submitted that by this Date it was or should have been apparent that the debts could not have been paid taking into account the group undertaking bad debts (which I discard), the rent review which would be back dated to September 2006 and this VAT liability.

241. I agree these are all difficulties and reach the conclusion that it was a "near run thing". Nevertheless, I return to the emphasis Mr Nersessian placed upon the fact that the Company did not have to pay this sum at once. The question is whether the Knowledge Condition was satisfied in the context of a Company with a previous year's operating profit of near to £40,000 and what can be presumed to be a consistent, further 8 months knowing that a TTPA could be sought.

242. There is no doubt the Directors' reasonable expectation ought to have been that the financial position was very difficult due to this liability and that a TTPA might be difficult to agree because it would take 4-5 years of consistent profits to achieve repayment using the whole, current profit. However, in my judgment whilst they realised or ought to have realised there was a serious problem, it was too early to rationally expect that the Company could not avoid insolvent liquidation. In my judgment the position was the one Mr Justice Park identified in ***Re Continental Assurance Company of London Plc*** (above), namely where the Directors could equally be criticised for acting too quickly.

243. The Directors were entitled to time to investigate what to do rather than to be criticised for acting too precipitously. Subject to the VAT liability, the Company was commercially solvent and making a consistent profit. There were many potential avenues to investigate including: pursuit of the PLB Report's plan; borrowing funds from the Bank which appears to have provided continuing support and which had seen borrowing fall significantly having previously allowed lending to increase by an additional £30,000 odd above current levels; the possibility of lending secured upon Mr Walker's equity in his home; and the potential for Mr Armstrong to assist.

244. In addition liquidation would leave very little for the creditors. The lease would be forfeited or disclaimed and the business be left with fixed assets which could not be sold without the lease. In contrast the PLB report, only available since June, provided optimism. I accept that the boundaries between the Knowledge Condition and the Minimising Loss Defence become blurred at this stage but I am satisfied the former is not satisfied taking into account the purposes behind the provision. True the future rent review decision presented an extra layer of difficulty in particular for the PLB report's option. However, the review was nowhere near determination and there would be a myriad of potential commercial options and possibilities to deal with its adverse consequences.

245. In my judgment no reasonable director at that stage would conclude the future review consequences could not be dealt with. Nor that there was no reasonable prospect of avoiding insolvent liquidation when comparing present assets with present and future liabilities. However, it is apparent that 31 January 2007 became a very important date in all those circumstances.

S8) 31 January 2007 – 4th Date

246. As at 31 January 2007 the Directors had had nearly 4 months to assess the position following the advice from Mr Stephens and the decision to "park" (as I have described it) the VAT Liability. They knew or ought to have known:-

a) The Company was making a profit of around £40,000 a year and this was a consistent result for the second year running. The results were generally an improvement on last year. If it was not for the VAT Liability and the rent review, the Knowledge Condition would not be a concern.

b) The VAT liability was "parked" in circumstances of there being no reasonable prospect of a successful reconsideration or appeal.

c) Payment of the VAT Liability required delay and a TTPA. No steps had been taken to investigate this but it was apparent that the liability was disproportionate to the current level of profits if payment plus interest had to be made within even 3-5 years.

d) Payment would be even harder because of the rent review. The Company was proposing £53,000 per annum, an increase in the region of £24,000.

e) The PLB Report offered the only identified option for the sale of assets but rational expectation could not anticipate successful fruition. Based upon Mr Walker's evidence, I do not accept this was a route the Directors saw for their benefit without payment of creditors. However, there is no evidence to cause me to decide on the balance of probability that the Directors could reasonably envisage that all creditors would be paid once the VAT liability was included. Furthermore it would have been reasonable to expect a reduction in any consideration to be offered once the rent review determination was factored in. Reasonable expectations would or ought to have been that the proceeds of any sale would leave the Company with insufficient assets to pay its creditors.

f) If there was not to be a sale, the Company would have to borrow but this would only create alternative creditors, albeit presumably on longer payment terms. This option had not been investigated as at 31 January 2007. It might be reasonable to expect the Bank to restore its lending to near £114,000 (it having reduced from that figure since the 2006 year end to £82,000 odd). However, it would neither be reasonable to expect this to be long term lending without negotiation (which had not been investigated) and it would not be reasonable to conclude this would be sufficient for the rent and a TTPA. There was no proposal of lending from any other source.

247. In setting out those facts, I have ignored group undertakings for the usual reason but need to consider the evidence relied upon by the Liquidators to show the Company was not then paying a large number of its creditors. As explained, Section 214 does not apply the commercial insolvency test. However, it would be relevant to the overall picture.

248. In my judgment taking into account the financial statements for the year ending 31 January 2007, the evidence of Mr Walker concerning this issue should be accepted based upon the overdraft position. I anticipate there would have been some debts that should have been paid but overall I accept this was part of the complexities of ordinary trading and not a sign relevant to the Knowledge Condition.

249. Nevertheless returning to the balance sheet test, the effects of a further £150,000 debt and the rent review are highly significant. Although Mr Walker relies upon the fact that there was no creditor pressure and the Company's cash flow was positive within a second year of profit, the question he has not answered is how the £150,000 could be repaid. In cross-examination he identified options such as borrowing and a TTPA but because the liability was "parked", these were not tested. The Directors rely upon the absence of any professional advice to the effect that the Knowledge Condition was satisfied but there is no evidence this was sought in the context of the true position of "no reasonable prospect of success" for the reconsideration and appeal.

250. In my judgment the position came down to this assuming the Directors were acting reasonably in their decision making: Absent the VAT liability and rent review changes, the Knowledge Condition was not met. The Company could continue trading profitably and therefore potentially meet the liabilities appearing on its balance sheet for this year end during the following year and the liabilities that year's trading required to be paid. At best, however, that conclusion would be placed under strain if the rent review matched the Company's proposal. At worse the rent review determination would be impossible to pay. However, even the best conclusion left the

essential problem of an absence of any realistic head room with which to repay £150,000 upon reasonable terms. The Directors knew or ought to have known this. The Knowledge Condition was satsfied. There was nothing to lead to a rational expectation that the money could be borrowed or that the PLB Report's solution would result in all creditors being paid.

251. In my judgment as at 31 January 2007 the Directors, acting reasonably, could not have held a rational expectation that the Company would be able to afford and therefore be able to agree a TPPA thereby avoiding insolvent liquidation due to actual insolvency. Even if HMRC was willing to agree 4-5 years for repayment of the liability plus accruing interest and penalties, the amount of the instalment repayments would be too large. A source of repayment did not exist.

252. It is pertinent to note the difficulties the Company was having with the much smaller TTPA for unpaid PAYE and NIC. Mr Griffin gave evidence of his management of the TTPA between April 2007 to around March 2008. Although the evidence of Mrs Elston from HMRC's records dates the problem back to 12 September 2006 when Mr Walker was informed of PAYE/NIC arrears and she found evidence of him being chased again on 9 January 2007, the key points are that by 15 March 2007 there was a *"distraint call"* and a 7 day warning letter was issued. It was unrealistic for the Directors to believe that a TTPA for the VAT liability was achievable or manageable.

253. Whilst reminding myself of the case law guidance with regard to hindsight and the differences between considering the Knowledge Condition in the court room and dealing with matters at the time on the ground, I conclude that in all those circumstances, acting reasonably and with the general knowledge, skill and experience reasonably expected, the Directors knew or ought to have known by the 4th Date that the Company had no reasonable prospect of avoiding an insolvent liquidation with insufficient assets to meet the liabilities.

254. In those circumstances the duty to act in the interests of creditors relied upon for the purposes of Section 212 also arose. The Directors' evidence is that it was not until the autumn of 2008 that their approach changed to one of protecting creditors. In my judgment that change was required by 31 January 2007.

255. If, however, I am wrong about this date, the position became even clearer by the fifth date and this is my alternative decision (should that ever be required) for the reasons explained below.

S9) 3 May 2007

256. The fifth date is the date of the letter from HMRC informing the Company that its original decision had been upheld upon review. Mr Nersessian in his closing submission asked rhetorically when submitting that the Knowledge Condition was not satisfied: "what had changed on this date since 31 January 2007?"

257. The answer is 5 matters:-

a) The first is that Option 2 was soundly rejected but I agree this simply maintained the position.

b) The second is that the Company did not pay the rent and service charge for the June quarter. In my judgment this is consistent with financial deterioration and it is reasonable to conclude that the Directors would or ought to have known the likelihood of non-payment at or around 3 May 2007. There is nothing in the evidence to suggest this resulted from a hiatus which was unforeseeable at the beginning of May.

c) The third is that a decision upon the rent review was moving nearer and, therefore, so too were the adverse, back dated and future consequences even on the basis of a £53,000 per annum decision. There is no evidence of the advice received concerning the merits for the Company's case for £53,000. Absent that, it would also have been reasonable for the Directors to be concerned and take into account the fact that the outcome might be higher.

d) The fourth is the continuing evidence of financial difficulty concerning the TTPA including the *"distraint call"* and 7 day warning letter in March 2007.

e) The fifth is the additional evidence sustaining a conclusion of financial deterioration. The evidence of additional, small debts remaining unpaid in the context above pushes the conclusion of cause away from Mr Walker's explanations and towards (at least in some cases) financial pressure. Furthermore, whilst I accept that application of the accounts for the year ending 31 January 2008 would amount to hindsight, in this context it is right to take account of the fact that the operating profit was effectively reduced to break even (after stripping out depreciation) as an indication that the financial position would have been deteriorating by May.

258. In all these circumstances the Knowledge Condition continued to be satisfied as at 3 May 2007 or was then established based upon adding the additional matters above to the facts and tests applied when considering 31 January 2007. The Directors must rely upon their Minimising Loss Defence.

T) The Minimising Loss Defence

T1) The "Every Step" Requirement

259. What *"every step"* which a reasonably diligent person with the knowledge of or attributed to the director will be must depend upon the facts. As a matter of guidance the following factors fall to be considered by directors and kept under review both generally and when considering specific financial decisions assuming the business remains sustainable:

> Ensuring accounting records are kept up to date with a budget and cash flow forecast; preparing a business review and a plan dealing with future trading including steps that can be taken (for example cost cutting) to minimise loss; keeping creditors informed and reaching agreements to deal with debt and

supply where possible; regularly monitoring the trading and financial position together with the business plan both informally and at board meetings; asking if loss is being minimised; ensuring adequate capitalisation; obtaining professional advice (legal and financial); and considering alternative insolvency remedies.

T2) 31 January 2007 until 3 May 2007 or 29 August 2007

260. The starting point for the Directors after analysing the 31 January 2007 financial position was that the Company was making a profit (the second year in the region of £40,000) subject to its failure to pay the VAT liability. From the perspective of a reasonable director, it would have followed that continuing trading at that level should not lead to liabilities and should provide a source for potential repayment of the VAT liability. Even if the future profits would not achieve repayment on their own (whether through a TTPA or otherwise), profitability at a similar level would or should cover future interest and penalties whilst allowing the Directors to realise the assets in order to minimise loss.

261. A decision to take the step of continuing to trade at that profit level in order to minimise loss would also have needed to consider what would be likely to happen should the Company be placed into liquidation during February 2007 instead. Reasonable expectations would have included the following:-

a) First if anything was to be salvaged, an assignee would have had to be found quickly. In the context of a pending rent review decision with the head landlord asking for a huge increase in rent, as a matter of reasonable expectation, that must have appeared highly unlikely. There is no evidence to suggest the lease had value in the circumstances of liquidation. In fact to the contrary, the Liquidators disclaimed the lease and Tesco has not been able to assign their head lease.

b) Second, even if sale of the main fixed assets within a liquidation was possible, it would have been a fire sale and reasonable to conclude that this would have produced very little for creditors.

c) Third, realistically the Company would not have been able to trade. There would be no further profit to benefit creditors, good will would disappear and any prospect of taking a longer term approach towards achieving a sale of assets would be lost. The Liquidators would not have been able to pursue the PLB Report recommendations or an alternative plan and/or seek professional advice. There would have been no funds to do so.

For convenience I will call these "the Adverse Consequences of Liquidation ".

262. In my judgment applying the Reasonably Diligent Director Test, the Adverse Consequences of Liquidation when balanced against the potential benefits of profitable trading meant the Directors took the right course by continuing to trade from February 2007. It was the only realistic proposition if loss was to be minimised.

In my judgment it was too early to conclude that the impact of the rent review was likely to alter that conclusion.

263. However the Directors needed to ensure the trading position did not deteriorate. Regular review was required and they had to bear in mind the likely impact of the forthcoming rent review decision.

T3) The Change from 3 May 2007 or 29 August 2007

264. As previously identified, circumstances changed significantly by 3 May 2007. The financial position deteriorated generally but of particular concern was the fact that the Company would be unable to pay the rent (prior to review) and service charge from the June quarter.

265. In accordance with their duty to act in the interests of creditors and to be able to take *"every step"*, the Directors by 3 May needed to re-assess and decide reasonably quickly whether to place the Company into liquidation or whether they could continue trading with the aim of achieving a better result than the Adverse Consequences of Liquidation for the creditors and thereby minimise the loss for the creditors.

266. Circumstances altered even more dramatically on 29 August 2007 because of the rent review decision. The resulting liability of £92,500 per annum plus service charge compared with a previous rent of about £29,000 per annum (as stated by Mr Walker in his evidence in chief) plus service charge was simply too large an increase for the Company irrespective of the effects of backdating. Realistically the Directors would or ought to have concluded that the Company was and would never be in a financial position to pay that rent.

267. The Directors' fundamental problem was that the new rent made the business untenable and therefore would not only increase the difficulties for achieving a sale but also reduce the potential sale price. This would inevitably lead to diminishing returns and continued trading would fail to minimise loss even at the 2007 year end level. Although written some 8 months later, Mr Seagrave's hardship letter dated 31 January 2008 accepting the Company's insolvency if it had to pay the VAT liability correctly reflects the inevitable consequences of these changes in the Company's financial position and in my judgment its content was equally applicable by 3 May and 29 August 2007. The question is whether the Directors took "every step" from 3 May 2007. A further, urgent re-assessment was required.

T4) Steps Taken From 3 May 2007 to Minimise Loss

268. There is no evidence of the Directors addressing the change in circumstances by producing a new business plan, budget and cash flow for either 3 May or 29 August 2007. Instead they appear to have relied upon continued trading within the context of the PLB Report being implemented. Those steps did not address the problems of the rent and the VAT liability. The Directors had already decided to "park" the VAT

liability and effectively the same approach was taken to the rent and service charge. From June 2007 those liabilities were also left unpaid.

269. The unaudited 31 January 2008 draft financial statements record a break even result. There was a significant reduction in establishment costs but this was exceeded by an increase in general administrative expenses including the rent. The net cash flow had fallen from £32,329 to £3,345 and the net debt increased from £81,902 to £87,869. The overdraft was reasonably stable (£85,527 compared with £82,426 for the previous year) and there was a fall in trade creditors (from £148,630 to £131,813). However, the Company's spectres were the rent/service charge and VAT liability. They were left unpaid in the context of the PLB Report having failed to achieve anything.

270. The Directors turned to "Plan B" and the Mazars Plan superseded the PLB Report probably during the beginning quarter of 2008. They therefore continued to take professional advice but there is no evidence that the professionals were asked to and they did not address the issue of how to minimise loss when the Company could not pay those significant liabilities.

271. During 2008 there was a continuation of outstanding trade debt letters and demands etcetera. A schedule “Bank Statement Summary” prepared for the trial shows the overdraft generally above £60,000 and below £70,000 from 4 February 2008 – 5 January 2009.

272. Draft financial statements for 9 months ending 31 October 2008 only include a profit and loss account and balance sheet. There are no notes. The Company effectively broke even after stripping out £49,522 for depreciation from the operating loss of (£49,782). The draft financial statements for 9 months ending 31 October 2008 record the bank overdraft at £86,618 (compared with £85,527 as at 31 January 2008).

273. However, a telling result is the fall in trade creditors (£88,583 compared with £131,813 as at 31 January 2008), whilst rent and service charge, PAYE and VAT (£84,153 compared with £46,175 as at 31 January 2008) and the VAT liability were not being paid.

274. There were issues by the autumn as to whether the Company should trade over Christmas. The decision reached took account of professional advice by Mr Lyon. Essentially the key points were that this was normally a highly profitable period for the Company and it had already taken and used deposits for Christmas bookings.

T5) Was "Every Step" Taken?

275. In my judgment there are two fundamental problems for the Directors' Minimising Loss Defence after 3 May 2007. First they spent about a year and a half from May 2007 without getting close to a sale of the business. Second, the Company was only able to continue to trade because they adopted a policy of discriminating against Tesco and HMRC. They paid trade creditors whilst allowing the debts of those two creditors to increase and therefore to effectively provide the working capital the Company required to enable that trading. There was no agreement with either creditor to permit that policy. Mr Walker's evidence is that both creditors were kept informed

of the Mazars Plan and that both in effect accepted this was the only way forward. However, in my judgment it cannot be concluded from this or the evidence generally that they agreed to a policy of discrimination.

276. In my judgment The Minimising Loss Defence must be judged by reference to the body of creditors as a whole because it is they as a class who are protected by Section 214, not individual creditors. Therefore the fact that trade creditors were paid cannot mask the fact that the liabilities of the creditors as a class were increasing. The requirement to take "every step" applying the Reasonably Diligent Director Test needed the Directors to aim to minimise loss for all not just for some. Steps needed to be taken to address the continual increase in the significant debt resulting from the policy of non-payment of the rent, service charge and VAT liability. None were identified or taken.

277. The Directors, upon whom the burden of proof lies, have not adequately addressed this issue within their evidence and did not address it at the time. The reality is they chose to pursue that policy in order to be able to continue to trade whilst the Mazars Plan was identified and implemented without taking any steps to try to minimise the loss to those two creditors (or indeed anyone else who was not being paid as a trade creditor). The failure to do so or indeed to address the issue was in itself a failure to take "every step" as required.

278. Had they addressed it, there were at least two options to consider. First placing the Company into administration in order to continue trading under the control of an insolvency practitioner with the benefit of a moratorium and without implementation of a policy of discrimination. If that was not possible to achieve in practice (as may well have been the case because the assets could not be sold at a sufficiently high price) the second option was liquidation. The failure to take either course was a failure to take "every step" unless another appropriate step can be identified and was taken.

279. The steps the Directors took instead did not satisfy the "every step" test. The Mazars Plan was not concerned with advising the Company whether it could avoid an insolvent liquidation and how it should trade to minimise loss. It did not consider steps which should be taken to minimise loss caused by the policy not to pay the VAT liability and/or rent and service charge. There is no evidence that Berrymans were retained for that purpose. There is no evidence of specific advice being sought upon the steps to be taken in circumstances of the deterioration of the Company's financial position, its inability to pay the rent and service charge and the true prospects of success for the VAT liability. There is no evidence of the re-assessment required or of any consideration of what to do to minimise the resulting debts.

280. The Directors rely upon the fact that none of the professionals retained advised either of those options. However, that does not relieve them of their ability and obligation to take "every" step when reaching their decisions based upon the financial position which was or ought to have been known to them. Furthermore it follows from my decision concerning the advice of Mr Stephens that none of the professionals would have been informed of the true merits of the VAT liability and therefore none were aware of the true financial position concerning this liability.

281. The best evidence for the Directors comes from Mr Lyon. However, his evidence does not address the issue of the unpaid rent/service charge. Whilst he specifically advised in respect of trading over Christmas 2008, his evidence does not lead to the conclusion that he gave advice to continue to trade during the previous part of 2008. In any event he did not have knowledge of the merits of the VAT liability. Instead he thought *"there was nothing problematic with [the VAT appeal]"*.

282. The key points to be derived from Mr Lyon's evidence are the facts that, as I accept from Mr Walker, the Directors engaged with the major creditors and obtained and sought to implement the Mazars Plan. However, those facts do not sustain the Minimising Loss Defence.

283. In my judgment the Directors have failed to establish on the balance of probability that "every step" was taken after 3 May or 29 August 2007 applying the Reasonably Diligent Director Test. Continued trading meant the debts owed to HMRC and Tesco (at least) continued to increase without any attempt to prevent or minimise this.

U) Compensation

U1) The Liquidators' Submission

284. The Liquidators rely upon a deficiency comparison between a hypothetical liquidation on 31 January 2007 and the position as at 6 February 2009. They predict a deficiency of £58,186.19 as at 31 January 2007 based upon shareholders' funds of £118,959 less the VAT liability of £151,867.95 and estimated redundancy and notice pay of £25,277.24. This is compared to a deficiency for the actual liquidation of £489,105.26 for which shareholders' funds are assumed to be nil, realised assets £7,028.96, unsecured creditors £429,486.22 and the overdraft £66,648. To be deducted from that figure is also estimated redundancy and notice pay of £25,277.24. That comparison therefore produces an estimated increase in net deficiency caused by wrongful trading of £405,641.83 plus Liquidators' costs and expenses (to date) of £38,135.

285. The same method of calculation has been applied assuming a hypothetical liquidation on 3 May. This involves a slight increase in the VAT liability to £154,750.47 and the figure for unsecured creditors for the actual deficiency is decreased to £415,297.20. The result on the Liquidators' case is a net deficiency caused by wrongful trading of £388,570.29 plus Liquidators' costs and expenses (to date).

286. I consider the Liquidators' comparison to be wrong and wholly unrealistic.

U2) General Principles

287. The principles which are to be applied are:-

a) The discretion under Section 214 is unfettered (subject to acting judicially and to achieving the purpose of the power) and the purpose is compensatory not penal (see ***Re Produce Marketing Consortium Ltd*** (above)).

b) Compensation is designed to recoup the loss to the Company caused by wrongful trading. The resulting award will benefit the creditors as a whole. There is no jurisdiction to direct payment to a specific class of creditors or creditor. Those whose debts are incurred after the date of wrongful trading have no stronger claim. All creditors at the date of liquidation will suffer from the Company's loss to the extent that the assets of the company have been depleted and/or creditors increased by the decisions and actions of the directors (see ***Re Purpoint Ltd*** [1991] BCC 121 at 128 per Vinelott J.).

c) In order to establish a maximum liability (i.e. subject then to the exercise of discretion), the loss will normally be represented by the amount the assets have depleted and/or the creditors have increased. The increase in the net deficiency from the hypothetical insolvent liquidation on the date of wrongful trading to the date of the usual compulsory order or resolution to wind-up will normally reflect the loss to the Company as a result of the liquidation having been delayed (see ***Re Continental Assurance Company of London plc*** (above) at [296-297]).

d) Whilst current authority does not recognise it to be necessary to establish a causal link between wrongful trading and any particular loss, it not being an express requirement of Section 214, there must be more than a "but for" nexus. The court's discretionary jurisdiction enables allowance to be given when the loss is not caused by the actions of the director responsible for wrongful trading. Compensation should be linked to the liabilities that result from the wrongful trading attributed to the director(s) (see ***Re Continental Assurance Company of London plc*** (above) at [377-380] and ***Morphitis v Bernasconi*** [2003] Ch at 578, [53]).

e) In ***Re Continental Assurance Company of London plc*** (above) Mr Justice Park identified the following examples as potentially 2 ends of the spectrum of causation. At one end, the obvious case of continuing a loss-making business resulting in compensation to recover the trading losses the directors ought to have known would result from that continued trading. At the other end the exclusion of losses attributable to worsening weather conditions which could not be attributed to decisions taken by the directors.

288. In the absence of accounts as at 3 May 2007 from when compensation is to be addressed, it is appropriate to first compare the net deficiencies between 1 January 2007 and 6 February 2009 but adopting a more realistic approach than the Liquidators' approach described above.

U3) Comparing 31 January 2007 and 6 February 2009

289. The Liquidators have produced for trial a document entitled *"Schedule of agreed claims"* dated 25 April 2013 and one entitled *"Schedule of claims received from non-preferential creditors at 14 June 2013"*. The totals for proof of debts are £609,613.15 and £609,263.54. The first document refers to claims not received totalling £26,203.63. The figure for creditors in the Statement of Affairs was £549,522.75.

290. A comparison of statements of assets and liabilities between 31 January 2007 (using the balance sheet) and 6 February 2009 (using the statement of affairs and above-mentioned documents) produces the following information:-

a) Fixed Assets – The 2007 net book value for tangible assets totals £208,652 and for investments £825. The lease, exhibition and show can obviously be excluded for the purposes of liquidation, leaving £2,897 for motor vehicles and £8732 for fixtures and fittings. In the statement of affairs the motor vehicles are valued at £2,500 and fixtures and fittings £2000. It is reasonable to assume that the hypothetical "fire sale" would have produced no better result.

b) Current Assets - The 2007 balance sheet records stocks at £61,758, book debts at £152,155 (including £133,999 for group undertakings) and cash in hand £2,968. The statement of affairs lists stock valued at £20,000 realisable at £500 and debtors totalling £88.000 of which £17,000 was recoverable. Bearing in mind the financial position of the associated companies was the same for both dates except that Bar Humbug Limited improved after 2007, it is reasonable to assume that there would have been no significant difference between the two liquidations for repayment of debt. Whilst there was about three times as much stock, it is reasonable to conclude that the fire sale result would have been a savage reduction for both dates. Therefore 2007 would have achieved an advantage of around £1,000.

c) Creditors due within 1 year – As at 2007 these creditors totalled £307,399 made up of: Bank £82,426; Hire Purchase contracts £2,444; Trade Creditors £148,630; Group Undertakings £89; Social security and other taxes £41,978; others £8,675; Directors £14,332; and accrued expenses £8,825. This did not include the VAT Liability quantified by the Liquidators as £151,867.95.

d) The statement of affairs shows preferential employee creditors would be paid at a cost of £6,200. The Bank pursuant to its floating charge would receive £15,000 from the remaining net realisations of assets and be left owed £50,900. This would be reduced by the £40,000 the Directors would have to pay under their personal guarantees. It is reasonable to conclude that the preferential claims should be treated the same and the debt to the Bank similarly reduced in a hypothetical liquidation.

e) The *"Schedule of claims received from non-preferential creditors at 14 June 2013"* includes: £226,798.76 for unpaid rent and service charge owed to Tesco; £221,706.42 in respect of the VAT liability; £50,479.55 for PAYE and NIC; £31,906.38 owed to Nottingham City Council; and redundancy payments totalling £19,176.09. The remainder of the claims appear to be trade creditors totalling £59,545.95.

291. The comparison therefore reveals: no significant change to the assets available to creditors, which is consistent with the Adverse Consequences of Liquidation; no practical difference for secured and preferential creditors except that the Bank would have had in the region of £67,000 unsecured not £50,900; a reduction in trade creditors of £89,095; an increase in debt owed under the lease of £226,798.76; an increase in the VAT liability due to additional interest and penalties of some £70,000; an increase in debts owed for NIC and PAYE of about £8,500; no practical

consequence for redundancy payments; and an absence of comparable for Nottingham City Council, although this is likely to be for unpaid rates.

292. The comparison therefore returns to the fact that continued trading was to the benefit of trade creditors as a class but to the detriment of Tesco, HMRC and possibly also Nottingham City Council. Continued trading therefore increased the amount owed by the Company between 31 January 2007 (i.e. without taking into account the successful defence through to 3 May) and 6 February 2009 because those creditors were not paid. The total increase in debt attributable to those 2 creditors was in the region of £305,000. Those sums set a maximum loss figure as the increase in the deficiency based on those dates subject to further considering the debt owed to Nottingham City Council. It is to that figure that the discretion applies when assessing compensation. It is first necessary to further consider Tesco's position as landlord.

U4) Tesco's Claims

293. The approach adopted to date towards the unpaid rent and service charge is to assume that the sum capable of being proved in the hypothetical 3 May 2007 and the actual 6 February 2009 liquidations are limited to the sums unpaid at those dates. However that would not have been and was not the position if account is taken of the disclaimer. In particular:-

a) Pursuant to ***section 178(4)(a)) of the Act*** the Company's rights interests and liabilities in respect of the lease are renounced or relinquished by disclaimer. It brings a lease to an end, accelerating the landlord's reversion (albeit without determining or releasing the liabilities of the original lessee or surety in accordance with ***section 178(4)(a)) of the Act***).

b) As a result Tesco was entitled to possession from the date of disclaimer but had no contractual right to any further payment of rent from the Company from the date of disclaimer and therefore no right to prove for it contractually.

c) Instead Tesco has a statutory right to compensation and may immediately prove in the liquidation for any loss and damage sustained in consequences of the disclaimer (see ***section 178(6) of the Act***, continuing the law introduced for corporate insolvency by section 267 of the Companies Act 1929).

d) Compensation for loss of the right to future rent resulting from the disclaimer loss and damage is to be assessed on the basis that the contract between the parties terminated by repudiatory breach.

e) The normal measure is the difference between the rents and other payments the landlord would have received in the future but for the disclaimer and the rents and other sums the disclaimer will enable him to receive by re-letting (if any). However because it is compensation, an appropriate discount must be made to reflect accelerated receipt of sums that were not due at the date of disclaimer. (see ***Christopher Moran Holdings v Bairstow*** [2000] 2 AC 172).

294. The result is that had the Company been placed into liquidation on 3 May 2007 and disclaimer followed (which is reasonable to assume and there is no reason or evidence to justify otherwise) Tesco would have been able to prove for rent due and all future rent including the rent due to 6 February 2009. That leads to an argument, not advanced, that the additional liability resulting from the Company trading until February 2009 is only the loss of the discount that would have had to be applied to the loss of rent from 1 February 2007 to 6 February 2009. If so, the method of calculation is prescribed by ***Rule 11.13(2)*** (applied by ***Rule 4.94***).

295. It is the case, of course, that the distress occurred (actually or hypothetically) after commencement of the liquidation. Plainly that is an academic point and not one that should affect the exercise of the court's discretion when determining compensation. Furthermore in this case adopting the liability that could be proved reflects the fact that Tesco held a lease which could not be readily assigned and that in those circumstances and for public relations reasons they had been prepared to delay exercise of their rights of forfeiture. That does not mean they consented to not being paid but whilst the evidence is that they would not subsidise rent, the position was that they chose not to forfeit because the Mazars Plan was their only possible option during this period and long term. They did so without in practice significantly altering their ability to prove for unpaid rent and service charge.

296. Taking all those factors into account I consider it would be wrong in the exercise of my discretion to require the Directors to compensate for the increase in this debt. This decision reduces the £305,000 maximum for compensation to a sum in the region of £78,500 plus any calculation under ***Rule 11.13(2)*** which would affect the June 2007 – December 2008 quarters. In reality it would be disproportionate to make that addition. It is necessary next to look further at HMRC's claims.

U5) HMRC's Claims

297. The Directors did not cause the VAT liability and the only issue is whether they should provide compensation for the interest and penalties accruing during the period between the hypothetical and actual liquidations. In my judgment they should because the liability would otherwise have crystallised as at 3 May 2007.

298. There is also the increase in PAYE and NIC of about of about £8,500. They should provide compensation for the same reason. Whether these decisions should be further affected by other matters including discretion will be considered after addressing the £32,000 odd claim by Nottingham City Council.

U6) Nottingham City Council's Claims

299. I have not been taken to Nottingham City Council’s claim and it has not featured in this trial. Whether the claim of £32,000 odd should be included within the compensation depends upon it being correct to assume it is for unpaid rates and, if so, upon any comparison with unpaid rates as at 31 May 2007. These are matters the parties have not addressed me upon and this will have been because it is irrelevant to

the approach adopted by the Liquidators. I have considered whether the opportunity to include it in the claim for compensation resulting from my decision should be denied in those circumstances. I have decided that would be unjust unless the cost of pursuing the issue would be disproportionate. I will need to hear further from the parties concerning the facts and their application.

U7) Credit for Trading?

300. The main benefits of continuing trade were the reduction in the bank overdraft of about £16,000 and the reduction in trade creditors of £89,095. It would obviously be wrong to simply deduct those figures from the maximum compensation sum because the resulting sum would fail to reflect the fact that those reductions were at the expense of other creditors whose debts increased.

301. However, insofar as the reduction is greater than the increase, the Company's loss at the date of the actual liquidation will have been mitigated. In this case the reduction of debts owed to the Bank and trade creditors totalled some £115,000 as against an increase for which compensation should be paid of £78,500 or £110,000 if Nottingham City Council's claim is to be included. The mitigated sums to be deducted would be £36,500 or £5,000 unless those sums would be reduced by the proportion the sum for compensation (£78,500 or £110,000) has to the total increase in debt resulting from the continued trading of £305,000 or £337,000.

302. Whilst the award of compensation is objective, it cannot be wholly scientific because there will be many potential variables and a precise exercise will be disproportionate even if, which is unlikely, it is possible. In my judgment the issue of how the mitigated sum should be calculated should fall within the overall discretion of the court. However if I am wrong about that, it must be right that it should be proportionate.

U8) Overall Discretion

303. A potential cause for the exercise of discretion is that whilst the Directors adopted a policy of discrimination and should not have done so, I am satisfied from hearing their evidence (in particular Mr Walker) that there was no dishonesty or intent to commit a wrongdoing as such. Tesco and HMRC were not paid because the Company could not pay them. In that context it is notable that he kept them informed of what the Company was doing and planning. He thought he was acting properly.

304. This also reflects the air of unreality that surrounds the compensatory sum. Whilst compensation reflects the amount of the Company's loss, namely the increase in debt, the fundamental problem of an absence of assets of any significant value due to the Adverse Consequences of Liquidation should not be ignored when exercising the discretion. The true position was that the Directors allowed the Company to trade because otherwise nothing would be left. This provided the Company with a chance and did procure some benefit by the mitigation which resulted. In my judgment in the

circumstances of a variety of variables and the existence of the wide discretion conferred by Parliament, this is relevant.

305. As should be the fact, with which I am satisfied from the evidence, that Mr Walker tried his best to ensure that this attraction remained for the benefit of the tourist trade in Nottingham and worked extremely hard to achieve that. Adopting the approach of Mr Justice Knox in ***Re Produce Marketing Consortium Ltd*** (above), I consider it right to take those factors into account.

306. Taking all matters into account (including the £1,000 for stock, the ***Rule 11.13(2)*** calculation and mitigation) in my judgment on the basis of a hypothetical liquidation on 31 January 2007, the sum to be paid should be £40,000 or £55,000 (i.e. deducting some 50%) depending upon the facts concerning the claim of Nottingham City Council. Whilst calculated by reference to the claims of individual creditors, those sums represent the loss to the Company caused by wrongful trading and should be available for the general body of creditors insofar as they are not used to pay the costs and expenses of the liquidation.

U9) Timing

307. Those sums do not take account of the success of the Minimising Loss Defence through to 3 May 2007. In the absence of accounts for that date, a pro rata approach should be adopted (see ***In re Idessa (UK) Limited*** (above) at [131]). In addition there is an element of unreality in concluding that the Directors could have caused the Company to have been placed into liquidation on 31 January 2007 or on 3 May 2007. In my judgment a small discount should be made. I propose to reduce the sums by the equivalent of 4 months applying a pro rata calculation. The sum to be paid should be £35,000 or £46,000 depending upon whether the City of Nottingham's debt is included in the calculations.

308. In my judgment Mr Armstrong and Mr Walker should be jointly and severally liable. Mr Armstrong should share equal responsibility albeit he was a non-executive director because he was or ought to have been party to the decisions which led to that award. This reflects the fact that their defences stood or fell together.

V) Misfeasance

309. In this case I can find no reason for making a different or additional award. The breach of duty owed to creditors was the act of wrongful trading. In my judgment the compensation pursuant to Section 212 of the Act should be the same.

Order Accordingly

Appendix

Group Undertakings – Their Accounts

a) Hi-Flyers Limited – The abbreviated balance sheets for 31 January 2005 – 31 January 2008 record net current liabilities of just under (£600,000) in 2005 and in the other 2 years over (£600,000). Assets are minimal, just over £3000.00. Its debts owed to the Company will be irrecoverable.

b) Steamboat Inns Limited – It was insolvent at the date of its cessation accounts as at 30 August 2002. If it owed money to the Company at this date, that debt should have been written off.

c) Bar Humbug Limited - The abbreviated accounts for the financial years ending 31 March 2005 – 31 March 2009 record total assets less current liabilities of: net liabilities of over (£1 million) for 2005; net liabilities of (£38,582) for 2006, a fall attributable primarily to a substantial decrease in the amount owed to creditors (from £1.7 million to £550,000 odd with the debt owed to the bank moving from around £375,000 to £300,000 leaving about £250,000 owed to unidentified creditors at the end of 2006; net assets of £12,634 for 2007 but with no significant change in the amount owed to creditors, the bank remaining at the £300,000 odd level; net liabilities of (£24,514) for 2008 but with creditors reduced to just over £370,000 but with no information about the bank ; and net assets of £509,301 for 2009 with creditors falling due within 1 year recorded as £156,970 and after more than 1 year £131,383 with a note described the creditors as including "£173,807 (2008 - £214,911) for which security has been given".

d) Conrads Limited – for the year ends 30 November 2005 – 2007, net liabilities moving from (£41,230 to £79,615 to £79,909) with creditors moving from about £80,000 up to just under £100,00 but with no information concerning identity.

e) The Nottingham Transport Museum Limited – a company too small to be taken into consideration from its accounts.

End