Neutral Citation Number: [2023] EWHC 20 (Ch)

IN THE HIGH COURT OF JUSTICE **CASE NO: CR-2017-006695**

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

INSOLVENCY AND COMPANIES LIST (CHD)

IN THE MATTER OF DORMCO SICA LIMITED (IN LIQUIDATION)

AND IN THE MATTER OF THE INSOVENCY ACT 1986

Remote Hearing

Date: 12 January 2023

BEFORE:

INSOLVENCY AND COMPANIES COURT JUDGE JONES

BETWEEN:

(1) DORMCO SICA LIMITED (IN LIQUIDATION)

(2) RICHARD HOWARD TOONE

(3) JASON MALONEY

(4) ADRIAN PAUL DANTE

(IN THEIR CAPACITY AS JOINT LIQUIDATORS OF DORMCO SICA LIMITED (IN LIQUIDATION))

Applicants

-and-

S B L CARSTON LIMITED

Respondent

-and-

(1) KENNETH MUNN

(2) RUTH MUNN

Part 20 Respondents

- -

Mr Peter Shaw K.C. (instructed by Charles Russell Speechlys LLP) for the Respondent
Mr Munn and Mrs Munn in person

Hearing dates: 28 April, 1 July, 3 November 2022 and 12 January 2023

- -

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.

.....CHJ 11/1/23.....

I.C.C. JUDGE JONES

This judgment was handed down remotely at 2.00pm on 12 January 2022 by circulation to the parties or their representatives by email and by release to The National Archives."

I.C.C. Judge Jones:

A) Introduction

1. This judgment assesses the contributions to be paid by Mr and Mrs Munn pursuant to the judgment handed down on 1 December 2021 ("the Liability Judgment"). Applying the ***Civil Liability (Contribution) Act 1978*** ("***the 1978 Act***") it was decided that an assessment was required to determine (using the definitions adopted in the Liability Judgment):

   a) The amount (if any) SBL should recover from Mr Munn as his contribution towards the liability they both owed to SICA for the same damage suffered by it. SBL's liability arose pursuant to its settlement of SICA's claim under ***section 423 of the Insolvency Act 1986*** ("***IA***") resulting from SBL's purchase of SICA's goodwill ("the Goodwill") at an undervalue. Mr Munn's liability arose as a result of his breach of duty as a director of SICA which caused the sale at an undervalue.

   b) The amount (if any) SBL should recover from Mr and Mrs Munn as their contribution as a result of them also being liable for the same damage for which SBL is liable to SICA. That liability being also pursuant to ***section 423 IA***. They having received sums which represented (at least in part) the market value of the Goodwill within the consideration they received for the sale to ETL of part of their shareholding in CHL, the parent of SBL and SICA. The definition of "the Goodwill" derived from the Asset Sale Agreement between SICA and SBL is:
   "the goodwill of SICA in connection with the Business and the exclusive right for SBL (or its assignees) to use the names and represent itself as carrying on the Business in succession to SICA including the benefit of all pending contracts, orders and engagements and the right to all lists of customers and suppliers of the Business."

2. Those decisions resulted from a series of transactions ("the Arrangement") which on 6 February 2015 hived across the Goodwill to SBL for only £1.00, together with other assets for which it paid good consideration. The Arrangement left SICA an insolvent company but this did not significantly affect CHL's balance sheet adversely. As a result of the Arrangement SBL now owned SICA's business but without its debts and liabilities. The resulting increase in the value of SBL was reflected beneficially in CHL's balance sheet. Therefore, SBL and CHL gained from the transaction as a result of a "purchase" at an undervalue. The shareholders of CHL also gained from its increased share value in particular because they sold part of CHL's issued share capital to ETL as part of the Arrangement. The shareholders were Mr and Mrs Munn jointly and Mr Rees, who is not a party to the proceedings. Under the terms of the Share Purchase Agreement, Mr and Mrs Munn and Mr Rees received on completion consideration totalling circa £2.3 million between them. They also had the possibility of receiving additional deferred, performance based consideration of circa £0.575 million. The total in fact paid for 40% of CHL's shares, including the deferred consideration, was £2,800,000. Mr and Mrs Munn received 70% of that sum, Mr Rees the balance.

3. SICA commenced proceedings against SBL alone to recover the true market price of the Goodwill, relying on ***section 423 IA***. SBL joined Mr and Mrs Munn as Part 20 Respondents. Shortly before trial, SBL agreed pursuant to ***CPR Part 36*** procedure to pay SICA compensation totalling £2,650,000. As a result SICA took no part in the trial, which was limited to addressing the Part 20 claim. For the purposes of deciding that contribution claim, the Liability Judgment decided that Mr Munn was responsible for the Arrangement. His liability as a director of SICA followed. He and Mrs Munn were also liable to restore the benefit they had received from the Arrangement to the extent that it represented SICA's loss because the Arrangement was a transaction that defrauded creditors (as the term is applied to ***section 423 IA***).

4. However, a distinction exists between Mr and Mrs Munn. It is not in dispute that Mrs Munn did not have knowledge of the fact that the sum received from CHL for their shares was attributable to the sale of the Goodwill by SICA at an undervalue. SBL has accepted that she should be treated as an innocent party in the context of a statutory provision, ***section 423 of the IA***, for which liability depends upon the intention of the transferring party (SICA) not the intention of the recipient. Namely, to put assets beyond the reach of a person making, or who may at some time make, a claim against the transferor or otherwise to prejudice the interests of such a person in relation to such claim. The effect of this upon the outcome of the assessment is one of a number of issues to be determined.

5. The issues have been addressed over two, one day hearings at which SBL was represented by Mr Shaw K.C. (as he is now). Mr and Mrs Munn have acted in person. The second day was required to consider one matter specifically left over from the first day, and other matters identified within a draft judgment disseminated after that first day. It had been circulated under the usual embargo terms but also on the stated basis that further submissions would be required before a final decision could be made (unless, of course, the new matters it addressed were accepted).

6. The matter outstanding had been raised during the trial but had had to be left over to the assessment. It concerned the complication that SBL was placed into administration on 8 October 2021, the fourth day of the liability trial. It is apparent from the subsequent liquidation, and not in dispute, that SBL is not in a position to pay the settlement figure of £2,650,000 or any significant part of it. This gives rise to the issue (**"the Insolvency Issue"**): whether a contribution order should be made in those circumstances and, if so, whether the court could and, if so, should order payment directly to SICA. SBL's liquidators were agreeable to direct payment but there is concern that this would be contrary to the ***IA*** on the basis that any contribution to be paid to SBL would be an asset of its insolvent estate to be distributed in accordance with the ***IA's*** statutory waterfall. If so, it could not be paid directly to SICA, an unsecured creditor.

7. The other issues for determination upon this assessment flow directly from and need to be understood within the context of the relevant provisions of ***the 1978 Act***. Therefore, it is best to explain its requirements before identifying those issues in order to place them within their statutory context.

B) Assessment of Contribution - The Law

8. SBL chose to commence proceedings under ***the 1978 Act*** in the absence of SICA proceeding to recover its damage from Mr and Mrs Munn. This resulted in a settlement between SBL and SICA. The contribution proceedings continued because without an order for a contribution or an indemnity, SBL would have to pay the whole of the damage suffered by SICA (up to the agreed compensation). By doing so, SBL would discharge Mr and Mrs Munn from any liability to SICA (unless and to the extent that the damage suffered was more than the compensation sum or they are liable for different damage). This highlights the point that the court when applying common law or statutory rights of contribution is concerned with achieving what is just and equitable in terms of apportionment between those liable. It is not considering the position from the perspective of the claimant and, as a result, seeking to ensure the claimant can obtain judgment and recovery against the parties they chose not to sue.

9. Those common law and statutory rights arise because it is potentially unfair between those liable for the same damage that one should be discharged from their liability because the other pays the injured party in full. To avoid that result, the court had a common law jurisdiction to enable the paying party to recover an indemnity or contribution (as appropriate) from the non-paying party. However, the jurisdiction was limited and the ***Law Reform (Married Women and Tortfeasors) Act 1935*** ("***the 1935 Act***") was passed to extend the court's jurisdiction and to overcome various limitations of the common law. ***The 1978 Act***, a reforming statute, further extended the scope of ***the 1935 Act's*** jurisdiction, as well as making other changes to the law.

10. In essence ***the 1978 Act*** is concerned (as ***the 1935 Act*** had been) with reallocation of the burden of liability for the same damage by the exercise of a wide discretionary power of redistribution as between those who are liable. That occurs without altering the injured party's rights or affecting their pursuit of those rights, including any decision not to pursue each liable party or to delay pursuit of one party. ***The 1978 Act*** addresses the position between those who are liable rather than the position of the injured party.

11. That conclusion is apparent from a reading of ***the 1978 Act*** as a whole. It can be illustrated by ***the 1978 Act's*** reform of the law where a defendant has relied against the injured party upon a successful limitation defence which does not extinguish the cause of action but stands as a defence to it. Under the common law or ***the 1935 Act*** that defence would have prevented the defendant from being liable to pay a contribution to another liable party. That outcome was altered by ***section 2(3)(c) of the 1978 Act*** on the recommendation of the Law Commission (The Law Commission, Law Of Contract, Report on Contribution – Law Com. No 79) because the previous law produced the anomalous position that such outcome only occurred if the defendant was sued by the injured party. If not, the limitation defence against the injured party could not be used as a defence to a claim to recover a contribution. That change in the law is an example of the statute being concerned with the position between the parties liable rather than between them and the injured party. There are many other illustrations within ***the 1978 Act's*** provisions. That is because it is recovery by a party liable against those also liable which is the focal point of the

statute. As will be seen, that focal point needs to be borne in mind when addressing the issues in this case.

12. Turning to the most relevant provisions: ***Section 1, sub-sections (1)-(3) of the 1978 Act*** provide that if any person makes or is ordered or has agreed to make a payment to another for damage for which they are liable, that person may recover contribution from any other person liable in respect of *"the same damage"* whether jointly with them or otherwise (noting that the term liability in respect of any damage is interpreted by ***section 6(1) of the 1978 Act***, and for the inclusion of restorative claims within that meaning see ***Charter plc & Another v City Index Ltd*** [2007] EWCA Civ 1382, [2008] Ch 313). That applies even though the person claiming the contribution ceased to be liable for the damage in question after it occurred provided they were liable immediately before they made or were ordered or agreed to make the payment for which the contribution is sought. It also applies even though the person from whom the contribution is sought has ceased to be liable for the damage since it occurred unless that liability ceased because the cause of action was extinguished by the expiry of a limitation period or by prescription.

13. ***Section 2 of the 1978 Act*** reads as follows:

> "Assessment of contribution.
>
> *(1) Subject to subsection (3) below, in any proceedings for contribution under section 1 above the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question.*
>
> *(2) Subject to subsection (3) below, the court shall have power in any such proceedings to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.*
>
> *(3) Where the amount of the damages which have or might have been awarded in respect of the damage in question in any action brought in England and Wales by or on behalf of the person who suffered it against the person from whom the contribution is sought was or would have been subject to—*
>
> *(a) any limit imposed by or under any enactment or by any agreement made before the damage occurred;*
>
> *(b) any reduction by virtue of section 1 of the Law Reform (Contributory Negligence) Act 1945 or section 5 of the Fatal Accidents Act 1976; or*
>
> *(c) any corresponding limit or reduction under the law of a country outside England and Wales; the person from whom the contribution is sought shall not by virtue of any contribution awarded under section 1 above be required to pay in respect of the damage a greater amount than the amount of those damages as so limited or reduced."*

14. Those provisions therefore confer a wide judicial power. It is based upon applying just and equitable principles, whilst having regard (i.e. not necessarily exclusively) to responsibility. That is to be assessed between those liable even though they would have been each liable for the whole loss and damage if individually sued by the injured party. The result of the exercise of that power can range from an indemnity to exemption. The true construction of ***section 2 of the 1978 Act*** is explained by Lord Justice Tuckey in ***Re Source America International Ltd v Plat Services Ltd*** [2004] EWCA Civ 665, (2004) 95 Con. L.R. 1 at [51] as follows:

> *"Section 2 of the 1978 Act is not expressed exclusively in terms of causative responsibility for the damage in question, although obviously the court must have regard to this, as the section directs, and it is likely to be the most important factor in the assessment of relative responsibility which the court has to make. But in the result the court's assessment has to be just and equitable and this must enable the court to take account of other factors as well as those which are strictly causative. Such an assessment made by a trial judge will only be altered on appeal if it is clearly wrong."*

15. It was made clear in the case of ***Nationwide Building Society v Dunlop Haywards Ltd*** [2009] EWHC 254 (Comm), [2010] 1 WLR 258 that the assessment results from the right to recover contribution conferred by ***section 1 of the 1978 Act***, and that contribution applies to *"the same damage"*. Therefore, the assessment under ***section 2 of the 1978 Act*** must be applied to *"the same damage"*. Namely, the damage suffered by a claimant (in this case SICA) for which the party claiming the contribution (in this case SBL) and the parties liable to contribute (in this case Mr and Mrs Munn) are each liable. The party from whom a contribution is sought cannot be ordered to pay more than their liability to the claimant. In that case the party seeking a contribution (Cobbetts) had settled a claim for circa £20 million by the payment of circa £5 million. The *"same damage"* suffered by the claimant was the circa £20 million loss for which each were liable not the settlement figure. The judgment of Mr Justice Christopher Clarke, as he then was, is extensive in its analysis and extremely instructive as a decision I am bound to follow. I refer in particular for the purposes of this judgment to the reasoning at paragraphs [37-70] and to its application to the facts at paragraphs [71-78].

16. That decision makes plain that the court when reaching an assessment under ***section 2 of the 1978 Act*** must:

    a) First assess the total amount of the "same" damage by determining the damage suffered by the claimant but limiting it to damage for which the person claiming the contribution and the contributor were each liable – *"the same damage"* (I will call this "**the Principal Liability Question**"); and

    b) Second, apportion that assessed liability between those liable for *"the same damage"* according to what is just and equitable having regard to the extent of the person's responsibility for the "same" damage (I will call this **"the Apportionment Question")**.

17. Although the facts and issues arising in ***Nationwide Building Society v Dunlop Haywards Ltd*** (above) are very different to this case, it is informative to understand how the Judge reached his decision for that case. His task was to decide how much solicitors, Cobbetts, who were negligent, should be able to recover from valuers, DHL, who had provided fraudulently overstated valuations of a property to a Building Society claimant, as a contribution towards the damage of the Building Society for which they were all liable. Having decided the Building Society's loss was circa £20 million (all figures being rounded down for convenience) the Judge adopted the following approach:

a) First, that loss was reduced to circa £13 million because that was the figure for which Cobbetts was liable subject to defences of contributory negligence and contractual limitation. Cobbetts was not liable for the balance and, therefore, that balance was not *"the same damage"*.

b) Second, that sum was reduced for Cobbetts by the Building Society's contributory negligence. Only Cobbetts could rely upon contributory negligence against the claimant because DHL, the intended contributor was liable in fraud. However, it was right/just and equitable when considering Cobbetts' contribution that the damage should be reduced by the claimant's contributory negligence. The consequence of fraud should not be placed upon Cobbetts. This reduced the sum to circa £6 million.

c) Third, Cobbetts settled for less in the context of a contractual £5 million limitation provision. However, DHL had no such provision to rely upon. It would not be right/just and equitable to confer the benefit of Cobbetts' contractual provision upon DHL when DHL could not have reduced their liability even had they been innocent because they had no such contractual provision to rely upon. No deduction should be made from the circa £6 million when apportioning the responsibility for the "*same*" damage taking into consideration the purpose of the statute and the provisions of ***sub-section (3)*** (for a detailed explanation see paragraphs [74-75]).

d) Fourth, the circa £6 million figure was to be apportioned justly and equitably. In that case "moral blameworthiness" and "causative potency" were assessed between the fraudster and the negligent Cobbetts so that the figure of circa £6 million should be shared 80:20%.

e) Fifth, that apportionment needed to be applied to the settlement figure because it was for this lower liability that Cobbetts sought a contribution. The contribution of 20% of circa £6 million was circa £1.2 million and, therefore, Cobbetts was entitled to a contribution of circa £5 million minus £1.2 million.

18. The decision of ***Dubai Aluminium Co Ltd v Salaam*** [2002] UKHL 48, [2003] 2 A.C. 366 must also be applied. The House of Lords considered a case where all the partners of solicitors' firms (treated as though one entity) except one were innocent of any wrongdoing but vicariously liable for the actions of the wrongdoer partner. As to him, it was assumed under ***section 1(4) of the 1978 Act*** that he had knowingly and dishonestly assisted a fraudulent scheme of persons who had used the legal services of the partnership to achieve the fraud. He had not benefited from the fraud except to the extent that the partnership had received modest fees. All relevant parties, including the partnership and the two fraudsters, settled with the claimant. The partnership sought a contribution from two of the fraudsters. They had received £20.3 million and £16.5 million from the fraud respectively.

19. For the purposes of the assessment under ***section 2 of the 1978 Act***, it was decided by the House of Lords that because vicarious liability placed the partnership in the shoes of the partner who assisted the fraud, it was not relevant to take into consideration the personal innocence of the other partners. This meant there was a substantial measure

of equality when it came to responsibility between the two fraudsters, the dishonest partner and the other partners. However, to achieve equality the court was also entitled to take into consideration the extent to which one or other remained in possession of the receipts of the fraud. As a result, the assessment should bring into account the sums the two main fraudsters retained having accounted for the payments all made respectively pursuant to the settlement.

20. Lord Nicholls (with whom Lords Slynn and Hutton agreed) explained (ignoring personal innocence because of vicarious liability) that [52-53]:

a) *"The object of contribution proceedings under the Contribution Act is to ensure that each party responsible for the damage makes an appropriate contribution to the cost of compensating the plaintiff, regardless of where that cost has fallen in the first instance. The burden of liability is being redistributed …".*

b) *" … of necessity, the extent to which it is just and equitable to redistribute this financial burden cannot be decided without seeing where the burden already lies. The court needs to have regard to the known or likely financial consequences of orders already made and to the likely financial consequences of any contribution order the court may make. For example, if one of three defendants equally responsible is insolvent, the court will have regard to this fact when directing contribution between the two solvent defendants. The court will do so, even though insolvency has nothing to do with responsibility. An instance of this everyday situation can be found in* ***Fisher v C H T Ltd (No 2)*** *[1966] 2 QB 475, 481, per Lord Denning MR."*

c) *"… In the present case a just and equitable distribution of the financial burden requires the court to take into account the net contributions each party made to the cost of compensating Dubai Aluminium. Regard should be had to the amounts payable by each party under the compromises and to the amounts of Dubai Aluminium's money each still has in hand. As Mr Sumption submitted, a contribution order will not properly reflect the parties' relative responsibilities if, for instance, two parties are equally responsible and are ordered to contribute equally, but the proceeds have all ended up in the hands of one of them so that he is left with a large undisgorged balance whereas the other is out of pocket."* (my underlining for emphasis)

21. As a result, Lord Nicholls analysed the position by taking the benefits each relevant party gained from the fraud and individually deducting the sums paid in settlement to identify the benefit retained. Although the partnership was to be treated (vicariously) as equally responsible with each fraudster, it had to be recognised that as matters stood the two fraudsters after payment of settlement sums had still gained circa £13 and circa £7 million respectively, whereas the partnership had gained nothing and paid out £10 million. It would be just and equitable for them to indemnify the partnership. The split between the two fraudsters was apportioned to circa £7.5 million and £2.5 million but on the basis that each should bear the risk of the other's insolvency. The first instance Judge's decision of a joint liability for an indemnity of £10 million subject to a £5 million liability for the party who retained circa £7 million should be upheld.

22. Lord Hobhouse agreed but his speech specifically described the obligation to contribute by reference to their gains as being a statutory application of the principle of unjust enrichment. He also observed that it was a factor relevant to their responsibility because they had not returned the benefit gained. The fraudsters could not claim from the dishonest partner because they were not out of pocket. As to insolvency, he agreed that should the vicariously liable partnership not be able to

recover the contribution from one of the fraudsters because of their insolvency, they should be able to recover it from the other to the extent that the other would otherwise still be in pocket from the benefits received.

23. Lord Millett (with whom Lord Hutton also agreed) emphasised that the Court needed to consider the relative responsibility of the parties personally liable and apportion the liability to contribute/indemnify accordingly. In doing so it is plainly right to take into consideration net receipts. As he said: *"The more a defendant has taken, the more the plaintiff has lost, and the greater is the degree of the defendant's responsibility for the loss"*. It would also be unfair not to give credit for payments made. As to insolvency, he concluded that the party to whom that applied *"simply passes out of the picture"* (as occurred in the decision of ***Fisher v CHT Ltd (No 2)*** referred to below in which the Court of Appeal was concerned as a result of that departure from the scene with the question of how the other two liable parties had to bear the damages between themselves) and said this:

> *"The plaintiff may well not proceed against him at all; but whether he does or not the whole of the liability of meeting the judgment falls to be apportioned between the other defendants, as otherwise the deficiency arising from the insolvency is borne by whichever defendant happens to satisfy the judgment, a result which it is the purpose of the 1978 Act to avoid: see* ***Fisher v CHT Ltd (No 2)*** *[1966] 2 QB 475 . If the impact of a known insolvency can be taken into account in the assessment of contributions, it is difficult to see why the prospect of a possible future insolvency should not be reflected in the order …"* (my underlining for emphasis).

C) The Main Issues

24. Mr Peter Shaw K.C. (who was not instructed on behalf of SBL at the liability trial) submitted that the starting point should be the terms of the order sealed on 6 December 2022 ("the 6 December Order"). It gave effect to the findings made in the Liability Judgment handed down on 1 December 2021. He submits that the 6 December Order, in accordance with the judgment, prescribes that the purpose of this hearing was only to assess the amount of the consideration paid for the CHL shares attributable to the true value of the Goodwill sold by SICA to SBL less the £1.00 received. The only riders being that the Court should in addition address the issue of joint liability between Mr and Mrs Munn, and the Insolvency Issue. This, he submitted, is plain from paragraphs 5-9 of the 6 December Order which specify the matters for assessment and for the evidence directed to be filed.

25. Mr Shaw K.C. therefore submitted that the only issues to be addressed are: (i) how much of the price paid for the CHL shares was attributable to the value of the Goodwill taking into consideration whether any part of it secured instead the continuing involvement of Mr Munn and Mr Rees in SBL's business **("the Retention Value Issue"**); (ii) whether Mr and Mrs Munn, as joint owners of the CHL shares, should be jointly liable or their liabilities limited to the amount each in fact received (**"the Joint Ownership Issue**"); and (iii) the Insolvency Issue.

26. As a result, he submitted, none of the following issues, which have been raised (principally at least) during the second hearing day of the assessment should be addressed:

a) Whether the fact that SBL nevertheless became the owner and therefore received the value of the Goodwill should affect the decision ("**The Goodwill Transferred Issue**")?

b) Whether account should be taken of the fact that Mr and Mrs Munn will not upon making any contribution receive back any appropriate portion of their CHL share sold to ETL ("***the Restitution Issue***")?

c) Whether any impact should flow from SBL's decision to seek a contribution from Mr and Mrs Munn but not from Mr Rees as a director of SICA at the date of transfer of the Goodwill and/or as a vendor of CHL shares ("**the Mr Rees Issue**")? He was appointed a director of SBL on completion of the Agreements on 6 February 2015, from which date it started trading. He was SBL's managing director when the Part 20 claim was made and remains a CHL shareholder. Mr and Mrs Munn's CHL shares have been forfeited in circumstances which fell outside the scope of the main trial and of this assessment.

d) Whether Mrs Munn should now be able to raise and, if so, should succeed with a case that the court when fashioning a remedy under ***s423 IA*** should exclude from consideration the return of any money or benefit received if she has changed her position so that it is no longer available to her ("**the Change of Position Issue**")?

27. Whilst that appears to be a potential, literal construction of the 6 December Order, it does not reflect the Liability Judgment or the intention and purpose of the Order. The Liability Judgment decided that the causes of action relied upon by SBL gave SICA claims against Mr and Mrs Munn which meant they were liable to contribute for *"the same damage"* that SBL had caused SICA because of the implementation of the Arrangement. The Liability Judgment and the 6 December Order made clear for the assessment that the liability to contribute would be determined by the amount of the consideration paid for Mr and Mrs Munn's CHL shares that was attributable to the true value of the Goodwill sold by SICA to SBL less the £1.00 received. In doing so, the 6 December Order sought to make plain to Mr Munn, as a litigant in person, the nature of the evidence that could be relied upon. The context for that being to avoid him (intentionally or otherwise) seeking to present evidence and/or argument addressing matters already decided in the Liability Judgment. In particular, his defence that the Goodwill was personal goodwill. However, the Liability Judgment did not address quantification whether by the Principal Liability Question or the Apportionment Question. There was no intention to restrict the statutory requirements needed to be applied to decide the relief to be ordered under ***s.423 IA*** or the just and equitable amount to be contributed pursuant to ***the 1978 Act***. Nor could there be any such restriction of statute.

28. I do not disagree that the 6 December Order could have made that clearer. For example, by expressly providing that the assessment of the contribution should be subject to the exercise of those statutory requirements. That it was not clearer is no doubt attributable to the fact that counsel when preparing the draft order for approval or the court when approving the draft did not consider this would be an issue. That

was because the Liability Judgment had not addressed those specific statutory requirements for the purpose of quantification of the contribution and it is obviously binding upon the court to do so. In my judgment the 6 December Order is to be read subject to those requirements being applied. Therefore, I do not consider it necessary to review its drafting, and plainly it would be wrong, in any event, to proceed on the literal construction submitted.

29. As a result I have decided that all of the issues identified 25-26 above are "main issues" for the purposes of this judgment. I should add for completeness that the Change of Position Issue arose in circumstances of the absence of that potential case having been remarked upon in the Liability Judgment at paragraph 169. Mrs Munn explained during the first day of the assessment hearing that she had not known there was any such potential case. As a result the draft judgment (circulated before the second day) and the hearing on 1 July 2022 addressed whether she could proceed with her case. As will appear below, that was permitted in part and directions given for further evidence. That approach was not, as I understood it, in issue.

D) Findings and Evidence

30. The assessment and the submissions/arguments concerning the main issues have proceeded on the bases of the findings of the Liability Judgment and of evidence either filed for the original trial or specifically for the assessment (to the extent that it did not apply to the issue of liability).

D1) Key Findings In the Liability Judgment

31. The following are facts, matters and findings of the Liability Judgment to be drawn to attention for the purposes of the assessment because they are binding upon the parties:

a) The underlying knowledge of Mr Rees set out within its paragraphs 38-39.

b) The financial position of SICA leading to and at the date of the transfer of the Goodwill as set out within paragraphs 42-51.

c) The knowledge of Mr Munn and Mr Rees as directors concerning the financial position of SICA in paragraph 52.

d) ETL's approach to valuation within paragraphs 53-58.

e) SICA's creditor position at the date of the Agreements considered in paragraphs 59-66 including knowledge of Mr Munn and Mr Rees.

f) The approaches and knowledge of the parties leading up to execution of the Agreements set out in paragraphs 67-77 and 124-125.

g) The finding concerning SICA's ownership of the Goodwill and the involvement and importance of Mr Munn and Mr Rees in particular at paragraphs 78-80, 82, 135 and 136-143.

h) The structure and terms of the Agreements within paragraphs 81-93 and at 144 and the existence of a prohibited purpose set out at paragraphs 151153.

i) The settlement between SICA and SBL was in good faith addressed at paragraphs 107-110.

j) The finding that the purpose of the Agreements was to enable the value of the Business without its liabilities to be transferred to SBL with that value being paid to CHL's shareholders and with the Goodwill having been put out of the reach of SICA's creditors. SICA has suffered the loss of the true value of the Goodwill (paragraph 110).

D2) Liability Trial Evidence - SBL's Accounts

32. The following points concerning SBL's filed accounts are also of potential note for the purposes of the assessment:

a) The 2015 year end accounts show SBL to have been a dormant company during 2014 with only £2.00 of capital. The balance sheet for 2015 valued the Goodwill at £1,294,100. This was attributed to "customer relations" valued at £1,429,100 less £135,000 for amortisation. The sum of £1,380,000 was credited as a reserve to *"reflect the fair value of customer relationships acquired"*. There were net current assets of £45,657.

b) In 2015 SBL made a profit of £76,510 after payment of £100,000 dividends (£40,000 to ETL, £18,000 to Mr Rees and £42,000 to Mr and Mrs Munn).

c) From 2016 there are only abbreviated accounts which, therefore, do not record dividend payment. They show a reduction in the profit and loss account to £22,325 but an increase in 2017 to £98,450.

d) By the 2018 year end the net current assets had increased to £833,782 and the profit and loss account increased to £118,549. By the end of the 2019 year the net assets had decreased to £702,180 but the profit and loss account increased significantly to £756,497. There was a further increase in 2020 to £946,731. However, in both 2018 and 2019 the reserve of £1,380,000 was reduced to £406,000 and £203,000. This has not been explained either in the notes to the accounts or in evidence.

D3) Further Witness Evidence - Mr Munn

33. There was no cross-examination of Mr Munn, no doubt because most, if not all, of his witness statement of 17 January 2022 either repeats evidence presented for the liability trial or introduces evidence which should have been so presented. He did not

approach his assessment evidence from the basis of the findings of fact in the Liability Judgment. I will only refer to the content of this further statement to the extent necessary within the main body of this judgment.

34. However, I should note that a new matter raised is the proposition that SICA had no value because it had no business or assets. He asserts that it did not have a work force, service companies having been used (a fact noted within the expert Goodwill valuation evidence), and repeats that its client data base did not belong to it. If this was correct, it would raise serious questions concerning the accounts he approved and signed, but it is not. The experts have addressed the value of SICA and all agree with the figure of £2,755,000 subject to the Retention Value Issue and further matters addressed by Mr Mesher. Therefore, I have not taken this new argument into consideration. Mr Munn also draws attention to the SBL pre-pack sale from which £150,000 was raised but I do not consider this subsequent sale in different circumstances assists valuation.

D4) Further Witness Evidence - Mrs Munn

35. Mrs Munn having addressed the finding that she acted in good faith now asks the Court to take into consideration the fact that she has changed her position since receiving the consideration for the CHL shares. She states she has no savings, her remaining CHL shares were forfeited and she has to *"live hand to mouth"*. She identifies various items of significant expenditure in both her witness statements and in her skeleton argument. She explains that her home is now at risk, although provides no indication of value. The extent of her evidence and its adequacy with regard to the issue of change of position was the subject of considerable criticism by Mr Shaw K.C. but there was no cross-examination.

36. Mrs Munn's evidence remains unsatisfactory because there are matters of significance which she omitted. This became apparent when she responded in argument to the criticisms of Mr Shaw K.C. to be within his oral submissions. An obvious example being that she did not disclose that she had received all of the consideration for the sale of their CHL shares but for some £300,000. Not only is that an obviously relevant fact in itself but its omission also arises in the context of her not having addressed beneficial ownership of the money which was paid for the sale of their jointly owned shares. Her explanations raise argument not evidence, although that argument may of course be based upon existing evidence. I will refer to the relevant details of Mrs Munn's evidence and argument when reaching a decision upon this change of position case.

D5) Mr Starkins

37. The former joint liquidator, Mr Starkins, provided evidence in answer and drew attention to the following facts and matters (amongst others): the entry for "Customer Relationships" in SBL's 2015 year end accounts of £1,294,100; and the increase in sales after Mr Munn resigned as a director of SBL on 18 July 2017 through to 2021 with goodwill as a fixed asset. Mrs Munn's evidence was also addressed noting that the payments to the liquidators of SBL she relies upon (in part) for her change of

position did not result from the claims in issue in these proceedings. There was no cross-examination.

D6) Expert Valuation Evidence

38. Mr Holland's expert opinion addressing valuation of the Goodwill on behalf of SBL may be summarised as follows:

a) His starting point is the conclusion of the earlier joint opinion of Mr Ballamy for SICA and Mr Stringfellow for SBL that the value of the Goodwill sold by SICA to SBL was £2,755,000.

b) On the basis that ETL purchased 40% of CHL's shares, that would mean the minimum value of the Goodwill attributable to the price paid by ETL would be £1,102,000.

c) However, ETL paid £2,880,00 for that 40% interest. This consisted of a payment on completion of £2,304,000 and deferred consideration which would depend upon SBL's turnover being or exceeding £4,000,000 over two years. That future performance consideration produced a payment of £576,000.

d) In his opinion that means the value of the Goodwill attributable to the £2,880,000 ETL paid (less 40% of the sum paid for the £140,000 fixed assets, i.e. £57,000) must be considerably more than £1,102,000.

e) The lowest figure, addressing only the initial consideration of £2,304,000, would be £1,573,000. That was calculated by deducting the £57,000 in respect of fixed assets and then apportioning the product by the 70% received by Mr and Mrs Munn.

f) However, he also opined that because the deferred consideration resulted from performance, some of the £576,000 should be attributed to the Retention Value. He considered it relevant in this context to take note of the fact that the salaries of Mr Munn and Mr Rees were both relatively low at £100,000 plus an employers' pension contribution. He opined that a figure closer to £150,000 would better reflect an arm's-length cost. Whilst that was not Mr Stringfellow's opinion, he considered a gross salary of £101,150 each as reasonable for a salaried role.

g) He concluded that 60% of the deferred consideration was also attributable to the value of the Goodwill producing the total sum of £1,814,820 (out of the total £2,016,000 received) for the value of the Goodwill attributable to the price paid by ETL to Mr and Mrs Munn for the shares they jointly owned.

39. Mr Mesher's report on behalf of Mr and Mrs Munn, also expressly accepts the joint £2,755,000 valuation of Mr Ballamy for SICA and Mr Stringfellow for SBL. On a literal application of his report, this appears to accept that figure as the valuation for the purposes of assessing Mr and Mrs Munn's liability. However, that is plainly not

what he intended because he moved on to also consider the relevance of the ETL purchase price. His report is to be read accordingly.

40. Mr Mesher concluded that ETL must have valued CHL at £7,200,000 when agreeing to pay £2,880,000 for 40% of the issued share capital. Assuming no minority discount, this would accord with a multiplier of 6 on a £1,200,000 EBITDA, which he understood from information received from Mr Munn was the basis for his agreement with ETL. His resulting and important observation is that the price of £2,880,000 for 40% does not accord with the £2,755,000 valuation of the Goodwill by Messrs Ballamy and Stringfellow. If the tangible asset value (£142,000) is deducted and 40% applied to their valuation, ETL purchased the Goodwill for £1,045,000.

41. Mr Mesher presented three propositions to explain why ETL paid £2,880,000 for 40% of the issued share capital when CHL's value was dependent upon SBL's value, which in turn was dependent upon the business purchased from SICA, which the experts agreed was (effectively) the Goodwill valued at £2,755,000. He also observed that his approach was in line with the pre-pack sale by administrators of SBL's goodwill and intellectual property rights for only £150,000 as shown in a statement of proposals dated 21 November 2021. Those propositions and his favoured resulting figures are (although not in this order):

    a) First, applying 40% to the expert valuation of Mr Ballamy and Mr Stringfellow less the £140,000 paid for the tangible assets, the value of the Goodwill was £1,045,000. From that is to be deducted £927,750 paid for the Retention Value. This is calculated on the basis that the importance of Mr Munn and Mr Rees being retained should be valued at 75%. The balance (i.e. £1,045,000 - £927,750) is the value of the Goodwill adhering to SICA when sold to SBL, namely £117,250. Mr and Mrs Munn received 70% and, therefore, only benefited by £82,075.

    b) Applying the same approach but using Mr Holland's calculation of the total goodwill value of £2,823,000 (i.e. the £2,800,000 less 40% of the tangible assets), the sum attributable to Retention Value at 75% is £1,211,250. Therefore, the total of the Goodwill adhering to SICA when sold to SBL was £561,750. Mr and Mrs Munn's 70% share was £393,225.

    c) Third, there is evidence in a pre-sale document that a sum of around £1,400,000 million was paid to allow Mr Munn and Mr Rees to reinvest in CHL for the purpose of its further acquisitions. If that sum is applied to Mr Holland's calculation of the total goodwill value, the total goodwill is £1,423,000 and the 75% Retention Value £1,211,250. This means the Goodwill adhering to SICA when sold to SBL was £211,750 and Mr and Mrs Munn's 70% share was £148,225.

42. However, Mr Mesher in reaching his conclusions did not engage with the findings of fact in the Liability Judgment concerning the importance and retention value of Mr Munn and Mr Rees. Instead, relying on the witness statements of Mr Munn and Mr Rees, he opined an expectation that they would be able to take a significant number of clients with them should they leave. He concluded that:

> *"4.36 … based on £880k of fees being related to Messrs Munn and Rees's clients and the expected level of EBITDA being £1.2m, I consider that ascribing at least 75% of the total goodwill to personal goodwill would be reasonable.*
>
> *4.37 Further, my view is that the deferred consideration is essentially designed to retain and motivate the sellers (i.e. Messrs Munn and Rees). Accordingly, I consider that potentially all of this element represents personal goodwill."*

43. There is in addition, a joint report but no significant agreement within it. The findings of fact within the Liability Judgment mentioned above concerning Personal Goodwill/Retention Value were referred to Mr Mesher but he preferred his own assessment.

44. There was no cross-examination of either expert. Mr Shaw K.C. chose not. Mr Munn only wished to raise three questions of his own expert, which for reasons given at the time I refused, but not to cross-examine Mr Holland.

E) Submissions and Arguments

45. Mr Shaw K.C.'s submissions were made with reference to his skeleton argument. They will be identified in this judgment in nutshell form and their further substance will be identified when necessary to do so in the context of the issue being addressed. However, there will be more detail at this stage than the reference to Mr Munn's and/or Mrs Munn's arguments. That is because the matters Mr and Mrs Munn raise are identified within "The Main Issues" at section C above and their arguments will be principally addressed to the extent necessary within the main body of this judgment. Inevitably, I will not address every matter raised on behalf of and by the parties but I have taken into consideration the submissions as a whole.

46. Mr Shaw K.C. submitted that there are two distinct issues for valuation purposes. First, what was the value of the Goodwill when transferred to SBL for £1.00? Second, how much of the consideration paid by ETL for 40% of the CHL shares was attributable to the Goodwill? He identified the starting point as the £2,755,000 valuation of Mr Ballamy and Mr Stringfellow, which SBL accepts. He emphasised that this value cannot be reduced for personal goodwill value because of the findings of fact in the Liability Judgment. He submitted that the findings also establish that the significance of the involvement of Mr Munn and Mr Rees for any employer was at best exaggerated by Mr Munn. For example, there is no suggestion that Mr Munn had any connection with the London office. In addition, he pointed out that there is no reference in any of the Agreements or in the pre-contractual or post-contractual documentary evidence to establish any basis for reducing that value by reference to the Retention Value. There is no "lock-in" period within the service contracts agreed with Mr Munn and Mr Rees before or after the sale of the CHL shares.

47. As to the expert evidence, he submitted that Mr Mesher has double discounted by starting with £7.2 million (based on ETL's agreement to pay £2,880,000 for 40% of the issued share capital), discounting it by 40% and then discounting it by a further 40%. In any event, he submitted that Mr Mesher's approach of identifying Mr Munn

and Mr Rees as being responsible for £800,000 of client fees, applying that to a £1.2m EBITDA and opining that 75% of personal goodwill should be attributed to personal goodwill is impermissible in the light of the findings of fact at the Main Trial. Whilst there may have been an element of the price paid by ETL for 40% of CHL's shares that took into account their continued involvement, and that is a wholly different concept to the exclusion of alleged personal goodwill from the sale. His assessment of the Retention Value is in any event based upon incorrect figures. The fee income was £3,903,642 which means that £800,000 (even if correct) would only be 20% not 75%.

48. Mr Shaw K.C. referred to evidence from Mrs Brassington of ETL at trial explaining the calculation for the purchase price for the CHL shares: namely, that the ETL Group expects to recover its initial investment plus interest at the rate at which the ultimate parent can borrow money, usually around 3% within 6 years. The trigger for the payment of the deferred consideration was solely whether SBL reached a turnover of £4m in each of the two years following the sale of CHL shares. The sum was payable whether or not Mr Munn or Mr Rees remained as an employee participating in SBL's business. There was no lock in of either of them. The terms of their respective service contracts provided that they were terminable by either party on six months' notice and for relatively minimal non-compete restrictive covenants for a period of twelve months – clause 18. Whilst clause 17 of the Asset Sale Agreement provided for a restrictive covenant for a period of three years on the Seller (SICA) and any member of 'the Seller's Group', this was not an obligation imposed on either Mr Munn or Mr Rees. Further, the Share Sale Agreement was wholly silent on the imposition of any restrictive covenants.

49. Mr Shaw K.C. submitted that the Court should accept the opinion of Mr Holland as the most reliable. The comparison with the subsequent pre-pack sale of the goodwill existing at the time of administration is not meaningful.

50. Mr Shaw K.C. also submitted that the entire rationale of the Arrangement was that ETL's funds would be paid to Mr and Mrs Munn and Mr Rees and not to SICA via SBL. Had the transactions been properly conducted (i.e. not for a prohibited purpose and not in breach of Mr Munn's duties to SICA), then the entirety of the £2.88m made available by ETL would have been provided to SBL for it to acquire SICA's goodwill and net assets, which together had a value of approximately £2.9m. That would have ensured that monies were available to SICA to pay its creditors, rather than being diverted for the benefit of Mr and Mrs Munn and Mr Rees.

51. Mr Shaw K.C. submitted that Mr and Mrs Munn are in the position of a single owner. Each is liable for the same contribution. As to Mrs Munn's change of position case, to the extent allowed to be raised, it must be limited to the evidence filed and served. In her change of position evidence available for the first assessment hearing, she gave evidence of payments totalling approximately £499,000 that she made to discharge Mr Munn's liabilities. These were principally from realisation of property interests. However, nowhere in her evidence (contrast her skeleton argument) does she link those payments to the joint receipt by her and Mr Munn of the circa £2 million paid jointly to them by ETL for the sale of their CHL shares. Nowhere in her original evidence for the first, one day hearing does she state or provide any supporting evidence for the proposition that had it not been for the sale of the shares, she would not have made the payments. The necessary 'but for' causal element is entirely

missing from her witness statement. He submitted that there is simply insufficient evidence for her to establish that she changed her position to her detriment as a consequence of her joint receipt of the £2m. Whilst Mrs Munn may have been an innocent recipient of the monies, the court has already determined that she could be liable for the benefits received. Mrs Munn seeks to pray in aid a claim that she no longer has any savings and is living *"hand to mouth"* but there is no evidence to support these statements. Furthermore, what is notable by its absence from her statement, is any evidence of what became of the £2m sale proceeds paid to her and Mr Munn from the sale of the CHL shares.

52. As mentioned, Mr Shaw K.C. was extremely critical of Mrs Munn's further evidence provided for the second hearing. He criticised her evidence for its failure to make clear where the share sale consideration money had been paid to and whether it was treated as continuing to be joint funds, funds held by her for them both or funds that became her own. He drew attention to the absence of any change of position if the funds were received and used for their joint benefit to purchase a joint asset or to pay a liability of Mr Munn. This would include the case if the joint asset was used to raise funds to pay Mr Munn's liability. He relied upon the decision of ***Stanbridge v Stanbridge*** [2012] EWHC 1009 (Ch) at [73-86] but observed that in any event Mrs Munn could only rely upon a change of position to the extent of 50% of the joint funds used. Mr Shaw K.C. also drew attention to the absence of evidence to support propositions such as that the money had been used to pay for one off expenditure which would not have been incurred without that money. He pointed to the absence of relevant bank statements and to statements which on their face showed the money was used for other purposes than she had asserted.

53. In any event, he submitted, as a matter of principle, that the general financial circumstances of a transferee pursuant to a ***s.423 IA*** claim are not to be taken into account in determining the scope of remedy. Whilst the Court has accepted that a change of position case can be relied upon in a ***s.423 IA*** claim (see ***4 Eng Ltd v Harper*** [2010] BCC 746 at [91-92] and ***BAT Industries plc v Sequana SA*** [2016] EWHC 1686 (Ch), [2017] BCLC 453), they were not insolvency cases and the court ought as a matter of general principle when determining a ***s.423 IA*** claim to order the restoration of the benefits received if the transferor is insolvent applying the decision of Mr Justice Trower in ***Re Fowlds (a bankrupt)*** [2021] EWHC 2149, [2022] 1 W.L.R. 61.

54. Mr Munn's approach in his submissions for the purposes of the first hearing date was based upon two key points. First, the fact that the price paid for 40% of ETL's shares could not be justified if restricted to the Goodwill. Second, he and Mr Rees had to accept the golden handcuffs of deferred consideration as terms of the sale, enter into restrictive covenants under its terms and enter into contracts of employment with restrictive covenants. Putting those two points together, the consideration received for the sale of the CHL shares principally represented the sum paid to ensure that he and Mr Rees would remain with the business and was not money SICA would have received upon the sale of its business whether to SBL or anyone else.

55. At the second hearing he argued that the answer to the Apportionment Question should take into consideration the benefits SBL received. These being not only the value of the Goodwill without payment (other than £1.00) but also the subsequent

profits which should also be treated as increased by the deductions of goodwill amortisation since these were not real costs and did not represent cashflow. An appendix to his skeleton argument set out the profits before dividends and amortisation for the years ending 31 December 2015 – 31 August 2021. The retained profits total £1,177,861 but should be increased, he argued, by up to £1,369,969 to establish the benefit SBL received from resulting trading in cash terms. Applying that analysis, there should be no contribution because SBL's benefit exceeded the loss and damage for which it is liable to SICA.

56. Mrs Munn adopted the arguments of Mr Munn but concentrated upon her lack of knowledge and her change of position. She contended that the references to lack of evidence were absurd when in reality it was plain she had nothing left. In any event such deficiencies were attributable to her position as a litigant in person. Mrs Munn also addressed her change of position case and the criticisms of Mr Shaw K.C. but I will turn to that, insofar as it is necessary to do so, when deciding the Change of Position Issue.

F) The Principal Liability Question - SICA's "Same" Loss and Damage

F1) Introduction

57. Applying the law within sub-heading (B) above, the starting point for the Principal Liability Question is to identify the loss and damage sustained by SICA for which SBL and Mr Munn and SBL and Mrs Munn are equally liable. That is not the settlement sum of £2,650,000. Whilst this sum marks the maximum contribution recoverable because SBL is only liable for damage in that amount, Mr and Mrs Munn argue (as they are entitled to) that the loss represented by the difference in value between the true market value of the Goodwill and the £1.00 paid which resulted from the causes of action relied upon against them is considerably less than that settlement figure.

58. Resolution of this argument will identify how much of that settlement sum constitutes the *"same damage"*. This will require a comparison between SBL's liability for a purchase at an undervalue and (i) the quantum of damage for which Mr Munn is liable to SICA as a result of his breach(es) of director's duties, and (ii) the restorative remedy for which Mr and Mrs Munn are liable to SICA under ***section 423 IA***.

59. The Liability Judgment included the following findings relevant to determining SICA's damage:

    a) SICA had goodwill of a significant value to sell to SBL even if any ultimate sale price might need to take account of the terms Mr Munn and Mr Rees would negotiate to stay with the Business. The payment of £1.00 was clearly an undervalue. This conclusion is entirely consistent with the valuation of goodwill/customer relations in the accounts. Although that valuation resulted from historic cost, there is no cause to conclude that the value represented by cost had declined to £1.00 since purchase because of the Retention Value (see paragraph 139).

b) That conclusion is also sustained by the fact that there is no express reference within any of the negotiations for or in the terms of the Agreements to the value of the Goodwill being affected by the decisions of Mr Munn and Mr Rees to remain as directors and/or employees under new terms (see further at paragraph 140).

c) As at 31 December 2015 SICA's fixed assets were valued at £3,183,147 based on cost less depreciation. They consisted principally of intangible assets valued at £3,135,040. Its stocks were valued at just over £545,000 and its debtors exceeded creditors falling due within the year by not far from £100,000. The cash flow insolvency test could be viewed with reasonable confidence. However, SICA carried long term debts due after more than one year of £3,426,179 (see paragraphs 42-43).

60. The importance of the value of the intangible assets is apparent both for the purposes of solvency and for any sale of those assets to another. The reduction of the value of the intangible assets to £1.00 upon the sale by SICA of its business to SBL on 6 February 2015 plainly resulted in insolvency for SICA and left its creditors without recoupment from future realisation of the Goodwill. Indeed this potential outcome was recognised by Mr Munn at the trial. When the issue of whether a debt of circa £1.8 million was owed by SICA to Candco was raised, his evidence was that he believed it would be paid after the sale of the Goodwill because he would inject the required capital into SICA, whether personally using the money to be received from the sale of his CHL shares or by refinancing (see paragraph 62 of the Liability Judgment). The point being in this context, that the transfer of the Goodwill for £1.00 meant SICA was left without the resources it would otherwise have had to make payment to its creditors and needed an injection of funds to sustain solvency because it had not received full consideration for that transfer.

61. Assuming at this stage of the judgment that £3,135,040 was the true market value of the Goodwill, the measure of damage to be compensated to SICA as a result of a director's breach of duties would be £3,133,039. That is because that compensation would restore SICA's asset value by providing the money it ought to have been paid upon the sale of the Goodwill had the duties been fulfilled. That money will be required to pay creditors and, therefore, there would be no deduction to allow for any part of it being otherwise distributed to SICA's shareholders in the liquidation.

62. Whilst that assumption is useful, however, it is to be emphasised that asset valuations within financial statements will probably not be the same as the market value unless there has been a recent revaluation. In this case, the market value can be expected to have changed between the original acquisition dates and 6 February 2015, and it would not be surprising if the amortisation policy did not reflect that change. However, the accounting values nevertheless stand as a useful cross-check against the reasonableness of the opinions of the experts upon market value, bearing in mind that the directors did not consider it necessary or appropriate to revalue the intangible assets before approving the 2014 year end accounts. Its usefulness as a crosscheck here is particularly apparent when a value of £2.3 million can be traced within the 2013 financial statements to the original acquisition of goodwill from Sinclairs Registered Auditors and to the payment of just under £1.85 million for the goodwill of

Carston & Co Limited in 2013. SICA's business being a combination of those two entities.

63. In contrast, SBL's accounts do not provide assistance. Their valuation of the Goodwill, called "customer relationships", for the year ended 2015 of £1,429,100 as cost is unsustainable when viewed from the perspective of a purchase price of £1.00 and/or of the valuation in SICA's 2014 year end accounts. There is no explanatory note to assist.

64. The cross-check can be borne in mind when addressing the expert evidence. The 9 June 2021 Joint Expert Report of Mr Bellamy and Mr Stringfellow opined that the market value of the Goodwill sold by SICA to SBL was £2,755,000. This was based upon SICA's maintainable annual gross recurring fees (£3,800,000) with the appropriate multiplier (0.725) identified by comparisons with the multiplier used for similar businesses that had been sold. This is slightly lower than the cost less depreciation valuation but it is not inconsistent with it. In any event this is the value of the Goodwill accepted by all experts as reasonable subject to the further considerations of Mr Holland and Mr Mesher.

65. My understanding from their joint report is that Mr Mesher reached that conclusion still subject to his original opinion that the £2,755,000 valuation should be reduced in the light of the evidence of market value provided by the sale of the CHL shares (see paragraphs 39-42 above). I am concerned by that proposition, however, because the ETL purchase appears to be bespoke. The price paid for 40% of CHL's issued share capital is out of line with the cross-check, accounting values. It causes potential confusion. In particular:

    a) The main asset of CHL was SBL at the time of the sale of 40% of its shares. Therefore, CHL's value was principally the value of SBL's Goodwill. However, the price paid by ETL does not correlate at all with the expert evidence of Mr Bellamy and Mr Stringfellow. 40% of £2,755,000 is £1,102,000 and yet ETL paid £2,800,000. This has led the expert evidence of Mr Holland and Mr Mescher reducing (to varying degrees) the value of the Goodwill as opined by Mr Bellamy and Mr Stringfellow. However, the obvious rationale for the difference is that the approaches to valuation were substantially different. Mr Bellamy and Mr Stringfellow applied a 0.725 multiplier to SICA's maintainable annual gross recurring fees of £3,800,000. In contrast, whilst the evidence at trial from SBL concerning how they valued the shares was opaque, Mrs Brassington of ETL referred to an underlying group policy to recover any initial investment plus interest at the rate at which the ultimate parent can borrow money, usually around 3% within 6 years. Mr Munn's evidence of his understanding was that ETL used a multiplier of 6 on an EBITDA figure of £1.2m divided by 40%. They were very different valuation approaches to the one adopted by Mr Bellamy and Mr Stringfellow.

    b) Second, the structure of the ETL share purchase consideration included deferred consideration which related purely to future performance. Whilst this could be ascribable to value at the date of completion, it could also be attributable to a quasi-bonus success fee which would not (or at least not in full) relate to the value of the Goodwill.

66. Nevertheless, Mr Mesher opined that the total price paid by ETL of £2,880,000 (remembering it was paid for only 40% of the issued share capital) should be decreased to take into account constituent parts of the price ETL paid to Mr and Mrs Munn for the CHL shares which should not be attributed to SICA's damage. As will be seen, Mr Holland also agreed there should be a deduction but far smaller and based upon a different approach.

67. That approach of the experts is consistent with the position Mr Munn has maintained throughout. Namely that the Goodwill valuation should be reduced because of "Personal Goodwill" owned by and/or the Retention Value attributable to himself and Mr Rees. Mr Munn failed to establish the existence of Personal Goodwill at trial but is still able to rely upon Retention Value at this assessment. The essence of his argument, the Retention Value Issue, is that the majority of the ETL purchase price for CHL shares represented the sum required to ensure he and Mr Rees were retained within the SBL business after purchase whether in terms of lump sum "golden handcuff" payments or by increasing their emoluments or otherwise (see paragraph 130(b) in the Liability Judgment). His case is that the Goodwill was in fact of little value because the value of the business depended upon their continued participation. He argues that this was not taken into consideration by Messrs Ballamy and Stringfellow but should have been and will establish SICA's damage for his breach of duty. That argument and the market value attributed by ETL need to be considered when assessing the merits of the expert evidence of Mr Holland and Mr Mescher against the background of the findings of the Liability Judgment.

F2) Assessment of the Expert Evidence of Mr Holland and Mr Mesher

68. Both experts should have opined in the context of the findings of fact within the Liability Judgment concerning the potential effect of Mr Munn and Mr Rees choosing to leave SICA/SBL. Those facts recognise that their departure would have had some impact upon the value of the Business reflected in the Goodwill but nowhere near that proposed by Mr Munn (see paragraph 80 of the judgment). Their future involvement would be important (paragraph 136) but the business was far larger than just them (paragraph 138). In addition, the sale of the Goodwill by SICA to SBL was not based upon a scenario, potential or actual, that either of them would leave in the foreseeable future. There is a Retention Value Issue but on a far smaller scale as a result of those findings of fact.

69. As previously stated, both experts identified the £2,755,000 valuation opinion as reasonable. Mr Holland in the course of his report recognised the potential for Retention Value. His reduction, however, is relatively modest in contrast to the opinion of Mr Mesher. Namely, to £2,524,600 by deducting 40% of the deferred consideration paid by ETL from £2,755,000. Whilst I am not necessarily sure that is the right approach in the light of the matters set out at paragraph 68 above, SBL has advanced its case on the basis that it will accept this deferred consideration reduction with the result that the product of £2,524,600 should be used insofar as Mr Holland's evidence is accepted. I will proceed accordingly.

70. Mr Munn's case is that it should be considerably lower. He obviously relies upon Mr Mesher's opinion, whose acceptance of £2,755,000 as a reasonable valuation was subject to the fact that no account was taken of (i) the intended use within the context of the ETL purchase of £1.4 million for future investment and/or (ii) of the Personal Goodwill or the Retention Value. Whilst there appears to be overlap between those two intangibles within his report, I need not find that to be the case because his opinion, which produced values for the Goodwill "adhering" to SICA of only £117,250, £561,750 or £211,750 (see paragraph 36 above), cannot be accepted in any event for the following reasons:

a) First, his attribution of £1.4 million as a payment to enable Mr Munn and Mr Rees to reinvest in future acquisitions is not borne out by the facts. Mr Munn accepted during the assessment that whilst this possible payment was raised during negotiations, it was not pursued and was not a factor for the consideration ETA paid at the date of its purchase of 40% of CHL's shares.

b) Second, insofar as his opinion relies upon Retention Value alone, his allocation of 75% of the Goodwill as Retention Value is entirely unrealistic within the context of the binding findings of fact referred to in paragraph 34(g) above and summarised within paragraph 70 above. No consideration appears to have been given to those findings and Mr Mesher's opinion attributes an importance to Mr Munn and Mr Rees to justify a very substantial reduction in the value of the Goodwill which is unsustainable.

c) Third, it is at odds with the expert evidence of Mr Bellamy and Mr Stringfellow. Neither of them identified any such Retention Value. If they had done so, the Goodwill's £2,755,000 valuation would have been reduced or they would have identified a higher valuation from which they would have deducted the Retention Value to reach £2,755,000. The whole point about Retention Value is that a purchaser in negotiations will argue for a lower valuation than would otherwise have to be paid because the purchaser will have to pay the cost of retention whether directly to a third party or through the increased expenditure of the business being purchased. There is no reference or provision for this in the valuation of Mr Bellamy and Mr Stringfellow.

d) Fourth, it is flawed because the fact that ETL paid considerably more than the value of 40% of the Goodwill as opined subsequently by experts does not mean that the increase is attributable to Retention Value. It may simply be because ETL paid too much whether that was due to them working on a different formula to assess value, misunderstanding, being misled about relevant facts, simply being keen to ensure they achieved the purchase or otherwise. There is no direct evidence that the price they agreed was attributable to Retention Value (see paragraphs 34(g), 67 and 70 above and the findings in the Liability Judgment at paragraph 140).

e) Fifth, connected to or perhaps illustrative of the fourth reason is the use of a 75% apportionment to a figure which can change significantly depending upon whether £1,400,000 was paid to allow Mr Munn and Mr Rees to reinvest in CHL for the purpose of its further acquisitions. Whilst the mathematics are understood, there is an underlying absence of factual material to explain how it

can be concluded that the exclusion of £1,400,000 led to that figure being included within the value he attributed to the Goodwill and its Retention Value element. That is unsatisfactory.

f) Sixth, the 75% figure in itself does not reflect the proportion the £800,000 he attributed to the fee earning of Mr Munn and Mr Rees would have had to a total fee income in 2014 of £3,903,642.

g) Seventh, no measure of comparison can be drawn with the price of £150,000 for goodwill sold by SBL's administrators in October 2021, a sale which took place in a completely different scenario at a significantly later date.

h) Eighth, in any event it was a finding of the Liability Judgment that there was no express reference within any of the evidence concerning the negotiations or the Agreements themselves relevant to the purchase of the CHL shares to the effect that the value of the Goodwill (i.e. the price to be paid for those shares, their value being attributable principally to the Goodwill) was affected by the decisions of Mr Munn and Mr Rees to remain as employees with SBL after its purchase under new contractual terms. As set out in paragraph 140 of the Liability Judgment:

i) No-one has been able to point to any evidence concerning the negotiations to establish that the price of the Goodwill was reduced to £1.00 because of the terms offered to Mr Munn and Mr Rees to ensure they stayed with the Business and that the Business would be protected in the event of a future departure (see the finding of fact at paragraph 76 above).

ii) There was no exclusion of Internal Personal Goodwill within any of the Agreements (see paragraph 93 above).

iii) In the Asset Sale Agreement, as previously mentioned, the Goodwill was defined … in the widest of terms including the exclusive right to use the names and represent that the Business continues "in succession", which I emphasise. The payment for the Goodwill was for the right and ability to continue in succession and therefore to use (amongst other assets) the relationships built up with clients and other intangible assets which together formed its goodwill (see paragraphs 83-86 above).

iv) Mr Munn proposes that the evidence to support his case can be found in the fact that there was a need to retain himself and Mr Rees and that the consideration for the purchase of their shares reflects the fact that ETL valued their future involvement accordingly and, as a result, valued the Goodwill at £1.00. He proposes support for this is provided by the facts that the £1.00 valuation came from ETL, it was a last minute valuation and was not discussed. However, not only is there no evidence as mentioned above or evidence to sustain the result that the Goodwill was only worth £1.00 even if that was correct but that proposal must be pushed off the wall by the finding [that the Agreements effected an arrangement to achieve payment of ETL funds to Mr and Mrs Munn and Mr Rees and not to SICA (see paragraphs 68-74 and 124 of the Liability Judgment)]."

F3) SICA's "Same" Loss and Damage – Mr Munn's Breach of Duty Decision

71. Rejection of Mr Mesher's opinion leaves the original joint valuation of the Goodwill by Messrs Ballamy and Stringfellow subject to Mr Holland's reduction to £2,524,600 (see paragraph 72 above). There is no evidence of fact to salvage the position for Mr

Munn's case relying on retention value. The fourth and eight points in paragraph 70 above make that clear. SICA's loss and damage resulting from it receiving £1.00 for the Goodwill was £2,524,599.

72. SBL is liable to SICA for more than that amount because its settlement figure (£2,650,000) is higher (although in practice that may result from interest and costs). However, SBL cannot recover more than the sum for which the contributor will be liable. The answer to the Principle Liability Issue for Mr Munn insofar as a contribution is claimed in respect of his liability for breach of duty is, therefore, that he and SICA are liable for "the same damage" totalling £2,524,599.

73. This being a decision assessing the sums due to SICA based upon its loss, the Goodwill Transferred Issue and the Restitution Issue do not arise at this stage. Plainly that is also the case for the Joint Ownership Issue, the Mr Rees Issue, and the Insolvency Issue. It should also be stated, for the avoidance of doubt, that this quantum of damage should not be reduced to £1,814,820 (see paragraph 38 above). That sum measures the benefit received by Mr and Mrs Munn and will be relevant to the quantum required as compensation for the purposes of restoration under ***section 423 IA***. It does not measure the market value of the Goodwill lost to SICA as a result of breach of duty, which is what Mr Holland was addressing when opining that the value was £2,524,599 and Mr Mesher's opinion that there should be a lower valuation (including his reliance upon the consideration paid for 40% of the CHL shares) has been rejected (see paragraph 70 above).

F4) SICA's "Same" Loss and Damage – Mr and Mrs Munn's s.423 Liabilities

F4i) Introduction

74. The position is more complicated for the liabilities of Mr and Mrs Munn under ***s423 IA***. They are not quantified on the basis of market value assessed with reference to expert opinion having considered but rejected ETL's purchase price for 40% of the CHL shares as the market value because of its bespoke nature. That is because the court must decide what order it thinks fit for the purposes of (i) restoring the position to what it would have been if the Arrangement had not been entered into and (ii) protecting the interests of the persons who were victims of the Arrangement, SICA's creditors ("**the Purpose of the *s423* Compensation**"). Restoration concerns the sums received from ETL attributable to the Goodwill.

75. The Liability Judgment addresses the case law concerning the relief that may be granted at paragraph 116(d), but the decision of the court is discretionary: *"the court may … make such order as it thinks fit"* ***(s.423(2) IA)***. Not only is the word *"may"* used but the phrase *"such order as it thinks fit"* in itself confers an overall discretion. As the Court of Appeal explained ***In re Paramount Airways Ltd*** [1993] Ch 223 at 239 when addressing ***section 340 IA***, the discretion resulting from those words is *"wide enough to enable the court, if justice so requires, to make no order against the other party to the transaction or the person to whom the preference was given"*. Although expressly referable to preferences, that principle is of general application subject to specific statutory context.

76. The relief that may be granted includes the power under ***section 425(1)(d) IA*** to *"require any person to pay to any other person in respect of benefits received from [SICA] such sums as the court may direct"*. ***Section 425(2) IA*** expressly provides that an order may be made under ***s.423 IA*** which affects the property or imposes an obligation upon any person whether they were a party to the transaction which defrauded the transferor's creditors unless they acquired a benefit in good faith, for value and without notice of the relevant circumstances. This exception's cumulative conditions do not assist Mr and Mrs Munn. Mr Munn cannot rely upon good faith or absence of notice. Mr and Mrs Munn did not acquire the consideration they received for their CHL shares which resulted from the £1.00 valuation of the Goodwill for value. The question is: what, if any, restorative remedy would it be fit to make against them (or either of them) to achieve the Purpose of the ***s423*** Compensation?

77. It is a question which brings into play the Joint Liability Issue and the Change of Circumstances Issue but not the Goodwill Transferred Issue or the Restitution Issue. That is because it cannot be argued by Mr and/or Mrs Munn that the order the court would think fit to make ought to take into consideration when determining the liability they would owe to SICA under ***section 423 IA*** if sued the facts that: (i) SBL received the value of the Goodwill and/or (ii) that Mr and Mrs Munn will not, if they repay that value, be restored to the position they were in since they will no longer own their part of the 40% shareholding in CHL sold to ETL. Those matters will only be relevant when answering the Apportionment Question, which considers the position of contribution between SBL and Mr and Mrs Munn. There is a straight forward reason for that conclusion to be applied to the Goodwill Transferred Issue. The fact that SICA has a separate claim against SBL because it received the Goodwill does not prevent SICA obtaining the relief it is entitled to against Mr and Mrs Munn. The reason for the Restitution Issue is equally straightforward: ***section 423 IA*** is intended to protect SICA's creditors and they should not lose out by receiving back less of the benefit SICA lost in order to compensate Mr and Mrs Munn.

78. It is necessary, therefore, next to quantify the benefit received by Mr and Mrs Munn from the sale of their CHL shares that was attributable to the Goodwill having been sold to SBL for £1.00 in order to decide what restoration order the court would make to achieve the Purpose of the ***s423*** Compensation. Consideration will then be given to the Joint Liability Issue and, if appropriate because Mrs Munn can be treated separately, the Change of Position Issue. This will decide how much Mr and Mrs Munn would be required to restore to SICA, and lead to the Apportionment Question which views the matter from the perspective of SBL's right to recover a contribution. The Insolvency Issue will then be considered.

F4ii) SICA's "Same" Loss and Damage – *section 423 IA* Quantification

79. The starting point for restoration quantification is £2,016,000 because that is the sum Mr and Mrs Munn received for their jointly owned CHL shares. It then needs to be decided whether all of that sum was attributable to the value of the Goodwill lost to SICA and received by SBL. This raises similar issues to those concerning the Retention Value Issue addressed within the context of valuing the damage sustained by SICA, but the position is different. What is now to be considered is the breakdown of the price paid within this specific transaction not the market value of the Goodwill.

Therefore even though Mr Mesher's opinion has been rejected, there is still the point, as Mr Holland recognised, that a 40% apportionment of the £2,755,000 value of the Goodwill opined by Mr Ballamy and Mr Stringfellow produces a value of £1,102,000. In contrast, the total price including deferred consideration paid for the 40% of CHL's issued share capital sold by Mr and Mrs Munn and Mr Rees was £2,800,000.

80. Mr Holland opined that £1,102,000 is the minimum amount of the CHL share purchase price attributable to the Goodwill. He increased that sum by concluding that: (i) the price payable on completion (£2,304,000 net of £57,000 net assets), namely £2,247,000, of which Mr and Mrs Munn received 70%, namely £1,573,000, was for the Goodwill; plus (ii) 60% of the deferred consideration of £576,000 (see paragraphs 3.39 and 4.7 [which incorrectly refers to 3.31 instead of 3.39] – 4.8 of his report). The product is £1,814,820 (i.e. 70% of £2,247,000 + 60% x £576,000) (see paragraph 4.9 of his report).

81. Two potential difficulties exist in practice for the purpose of challenging Mr Holland's approach when Mr Mescher's opinion has been rejected. First, he was not cross-examined. Second, there was an absence of detailed explanation from ETL for the price it paid within a context of: (i) a rather adverse assessment of their witnesses (see paragraphs [23-29] of the Liability Judgment); (ii) the fact that SBL's evidence does not give much away concerning ETL and its decision making processes within the Arrangement (see paragraphs [54-55] of the Liability Judgment); and (iii) there having been relatively little evidence before the Court in these proceedings concerning the negotiations resulting in the Agreements (see paragraph [67] of the Liability Judgment).

82. In those circumstances the only cause for rejecting Mr Holland's opinion would be if I found it errs in principle, or it does not fully apply the facts of the Liability Judgment, and/or that it is inconsistent with the further evidence presented for the assessment concerning the Retention Value in so far as it concerns the factual break down of the consideration paid by ETL. I do not consider that any of those options apply. Indeed, a fundamental point is the absence of evidence (whether within the context of the negotiations or when considering the contractual terms) to establish that the consideration paid by ETL was calculated with reference to Retention Value. Therefore, whilst the Court has a wide freedom to disregard the views of experts if it is appropriate to do so, I do not have cause to reject Mr Holland's approach. I might feel, for example, that attribution of Retention Value to 40% of the deferred consideration is low but I do not have evidence or argument to cause me to conclude that his opinion should not be accepted. It appears soundly based in principle, technique and assumptions. I have found his opinion to be reliable.

83. That reduces the sum from £2,016,000 to £1,814,820 as the quantum for the *"same damage"* suffered by SICA for which Mr and Mrs Munn are liable with SBL as a result of their ***section 423 IA*** liability.

84. Mr and Mrs Munn argue that such a result would produce an inconsistency between their respective treatment. That is because, Mr Munn explained, his contribution is based on the "same damage" of £2,524,600, whereas Mrs Munn's liability is based on £6,281,500 (i.e. £1,814,820/28%). However, this distinction only arises because different measures are being considered. The £2,525,600 relates to SICA's loss based

on an open market value. The £1,814,820 is the calculation for the amount received for the Goodwill from ETL under the terms of the Arrangement within the agreed CHL share price. Therefore, I do not accept their argument. The answer to the Principal Liability Question is that the total sum received from ETL by Mr and Mrs Munn jointly that is attributable to SICA's sale of the Goodwill at an undervalue of only £1.00 was £1,814,820.

F4iii) The Joint Ownership Issue

85. In a skeleton argument for the November 2022 hearing Mr Munn argued that Mrs Munn only sold 140 shares, 14% of the issued share capital and, therefore her share of the £2,524,600 loss suffered by SICA should be £353,444 applying the same percentage. However, this remedy is concerned with restoration of the assets received from the Arrangement and the protection of SICA's creditors accordingly. The shares were owned and sold jointly and the consideration paid to them jointly. The fact that Mr and Mrs Munn owned their shares jointly means they had a joint obligation to sell them, and the proceeds were paid to them jointly. As a result they were in the position of a single owner and, as a matter of law, each is to be treated as having received the whole benefit of the consideration.

86. The appropriateness of the application of joint liability can be tested by considering whether Mrs Munn's accepted defence of innocence, in that she had no idea of any wrong doing, would be relevant to the restorative, ***section 423 IA*** relief to be obtained by SICA if, for example, the money which SICA "lost" remained in a joint account or in her Lloyd's Bank account, whether held on trust for herself and her husband or not. Plainly not. The money would have to be returned.

87. There is, however, the other side of the coin: the example of a husband having control of the joint account or of his wife's sole account and spending the funds for his own benefit without her knowledge or agreement. Whilst as a matter of law there is still joint liability, section 423 IA confers upon the court a wide discretion when deciding the restorative remedy that it is fit to order in all the circumstances of the case. Plainly, in that type of scenario the court would be expected usually to decide only to make an order against the husband. Those contra-examples demonstrate, therefore, that whilst the joint liability conclusion is normally to be applied, the court, in an appropriate case, may take into consideration distinctions between those jointly liable when deciding the order to be made to fulfil the Purpose of the ***s.423*** Compensation. This leads to the Change of Position Issue.

F4iv) The Change of Position Issue

F4iv(a) Introduction

88. As mentioned, the Change of Position Issue was not raised during the Liability Trial but arose after Mrs Munn had considered the Liability Judgment. She submitted evidence for the first hearing of the assessment. The concept that Mrs Munn should be able to present and argue a change of position case after the Liability Trial was not challenged by SBL provided the court would address the issue of delay and SBL

would have a reasonable opportunity to address the Change of Position Issue both in terms of evidence and submissions. As a result, Mr Shaw K.C. addressed her evidence on a summary basis at the first hearing, seeking directions to the extent that Mrs Munn established a reasonably arguable case. The result was that (for reasons previously given and set out below) I found her change of position case had reasonable prospects of success only in respect of: (i) the expenditure for holidays incurred because of receipt of the CHL share sale consideration; and (ii) payment of Mr Munn's personal liabilities which she would not otherwise have paid. Directions were given for further evidence to enable an effective hearing. It has been effective but it has been far from easy to identify the details of her case from her combined evidence. I will first explain her original evidence and the decision excluding various elements of expenditure from consideration when deciding the relief SICA would have been granted.

F4iv(b) Mrs Munn's Original Evidence/The First Decision

89. Mrs Munn's position in her first witness statement addressing this issue is straightforward. She thought she was receiving a large sum to which she was entitled. Its receipt enabled her to incur large items of expenditure and to pay her husband's liabilities. She did not at that stage state she would not have otherwise incurred such expenditure but she argued during the July hearing that this was inevitably to be implied from the facts concerning her financial history. She had previously had such a limited income and assets that the conclusion was obvious. Her case is that the expenditure of the share sale consideration received means she cannot pay back the sum she received. She has paid and no longer has:

    a) £499,278.47 plus interest paid out under a May 2018 settlement agreement entered into with SICA's liquidator for her husband's liabilities, having raised that money from re-mortgages of two investment properties and the sale of a property.

    b) £60,000 used to repay her husband's director's loan account with SBL.

    c) Sums used to support her husband financially from 2017 and/or to pay the majority of the household bills and the mortgage interest on loans used to pay SICA's liquidator.

    d) £704,999.75 used to pay her husband's debts.

90. In a skeleton argument for the purposes of the July assessment hearing, she stated that she had received a post-tax amount of £706,714 in good faith and spent it all. She *"believed the ETL monies were hers to spend as she saw fit, she spent it on home improvements, holidays and an investment property (which was subsequently mortgaged), in addition to making payments in respect of her husband's liabilities. [She] would not have made those payments without the receipt of the ETL monies"*. She has no savings, only a pension of £5,000 a year, and might be required to sell the family home if a contribution has to be made.

91. Her skeleton argument included an Appendix identifying the following expenditure: Garden upgrade £43,898.17; Kitchen upgrade £140,845.80; Purchase of an investment property £275,314.16; its renovation £65,665.71; tax payments £177,176.69; Holidays

£108,025.98; Payment to SICA's liquidator £200,000 net of mortgage £24,316.00; Payment to SBL £60,000; and payment to purchase a business £50,000; Payment of her husband's personal tax £68,000; and payment of her husband's loan from a third party £26,500.

92. I decided having looked at the expenditure which might qualify for the purposes of a change of position that:

a) Mrs Munn had a sufficiently arguable case of change of position in respect of the significant expenditure on holidays which she asserted would not otherwise have been taken applying the example provided by Sales J. in ***4Eng v Harper*** [2009] BCC 746 at [14(1)] when he said:

> *"In my view, if the transferee in the example has changed his position on the basis of the receipt in a way that would make it unfair to require him to repay the money (e g thinking it was a completely valid gift, he has spent the money on a world cruise which he would not otherwise have taken) it would not be appropriate for the court to make an order under section 425(1)(d) requiring the transferee to pay back a sum equivalent to the amount he received".*

b) However, insofar as the money was spent on a garden upgrade or a kitchen upgrade or the purchase of an investment property and its renovation or the purchase of a business, whilst her evidence is that she would not otherwise have spent the money, the money was not "lost" by those purchases. Mrs Munn gained the benefit of the resulting assets and those assets may in themselves be investments. There was no evidence to the contrary whether dealing with the position upon investment or as it had changed by the date of the July 2022 assessment hearing.

c) Payment of her tax liabilities was not a change of position, although there may be an issue for a stay pending repayment of tax which should be reversed upon payment of compensation. Subject to that she will have replaced one liability with another.

d) Payment of her husband's debts was more difficult. On the one hand, she may have used her assets to assist in any event both because of emotional commitment and for the benefit of her family's economic position. On the other hand, she may not have been able to do so. On balance there was a reasonably arguable case this was a potential area of qualifying expenditure for a change of circumstances case but its merit would be dependent upon further information and that information being accepted or tested by SBL.

93. Directions for further evidence concerning the two permitted heads of expenditure were given; they being the only items of expenditure for which a reasonably arguable case had been established. It was made clear at the hearing, however, that Mrs Munn had not yet provided sufficient financial information for the case, including concerning her overall assets and liabilities both at the material times of expenditure and currently. It was apparent that Mrs Munn was struggling without legal advice to understand what she needed to do. As she stated at the July, she had never heard of a "change of position" argument before reading a brief mention to it in the Liability Judgment and even then misunderstood its meaning. However, a court cannot provide legal advice and assistance and the onus was on her to present the evidence required.

F4iv(c) Mrs Munn's Further Evidence

94. Mrs Munn's further evidence, in a witness statement dated 19 August 2022, addressed her financial position prior to her receipt of the CHL share purchase funds. She had a salary of circa £10,800 (£900 a month) and received circa £9,600 (£800 a month) from Mr Munn's income for housekeeping. She does not say how much of the CHL share proceeds she received but exhibited a Lloyds' Bank sole account statement to show it was spent by June 2022. She stated that she has no other savings. Mrs Munn had owned properties before the share sale but these had been sold. Currently she anticipated bankruptcy as a result of summary judgment having been obtained against her in proceedings brought by ETL. I note there has been no suggestion of a cross-over between the claims affecting this assessment.

95. Dealing with holidays, Mrs Munn provided a summary of expenditure from the share sale funds totalling £253,233.37. She said she paid directly from her own Lloyds Bank account except for the payments shown in a schedule totalling £40,000. Those payments were made via the National Westminster Bank joint account held with Mr Munn. She stated that the payments would not have been made but for the receipt of the share sale funds.

96. As to the payment of Mr Munn's debts, she stated that litigation against Mr Munn caused her to pay over £1.7 million to SICA's liquidators, as set out in her previous evidence. That evidence, however, identifies total payments to them of £499,278.47 plus a further £60,000 to SBL, although she also stated in that 17 January 2022 witness statement that she incurred another £704,999.75 paying Mr Munn's debts.

97. In the 19 August 2022 statement she specifically referred to a £200,000 settlement payment to SICA on 22 July 2018. This was raised by a mortgage over a property purchased in 2016 with the CHL share sale funds. With regard to the payment of Mr Munn's tax liabilities, Mrs Munn explained that a payment of £94,009.27 was for a 2014/15 tax year liability resulting from the share sale. This payment would not have been made but for the receipt of the share sale funds. Mrs Munn also referred to two other payments. £50,000 was paid in respect of Mr Munn's liability to Goldsmiths Practice LLP (**"Goldsmiths"**) and was linked to receipt of the CHL share sale funds. £60,000 was similarly made in respect of a liability of Mr Munn to SBL.

98. She identified other payments by reference to a schedule. They consist of: £12,373.40 consisting of (i) payments to Kuits (SBL's solicitors) totalling £6,807.50; (ii) £4066 being payments to Hopkins Law (the solicitors who acted for Mr and Mrs Munn on property sales and re-mortgages) and re-mortgage fees and (iii) a payment to a Jeff Thomas of £1500. In addition £23,218.50 is detailed within a table entitled "R Munn payments from Lloyds Account 2018" which lists a number of "KMM" paid liabilities but without explanation. A further £159,080.46 is described as "Indirect Payments via Nat West joint account". These appear within a table listing the amounts and their recipients but without further detail except to the extent that "KM Tax" and "KM Loan LDF" are referred to. The total of these other payments "discharging K Munn's liabilities" is £398,681.48. Added to that are the £200,000 to SICA, the £94,009.27 for tax, the £50,000 to Goldsmiths and the £60,000 to SBL making a total of

£802,690.75. This figure does not correlate with the figures in her 17 January 2022 statement or with the above-mentioned £1.7 million figure.

F4iv(d) Submissions/Argument

99. Mr Shaw K.C.'s approach to the evidence started with the general, overall submission that a fundamental problem for Mrs Munn was that her change of position case had to be presented in the context of her having been a joint owner of the shares. He made the overriding submission (referring to the decision of His Honour Judge Dight sitting as a High Court Judge in ***Stanbridge v Stanbridge*** [2012] EWHC 1009 (Ch), [73-77]) that it was unclear from her evidence where the net proceeds of sale went or that in truth whether any of the funds were treated other than as joint funds. As such, the money could be drawn upon for both or either of their benefit with the result that the payment of the holidays and the payment of Mr Munn's liabilities did not change her position.

100. Mr Shaw K.C. also submitted that the holidays and properties relied upon to support the change of position case were purchased for the joint benefit of Mr and Mrs Munn. That brings into play the general submission above and the factual conclusion that the Lloyds Bank account in her sole name was in truth operated as a joint account for their joint benefit. In any event, insofar as holiday expenditure was relevant, only half of it should be considered hers, the other half was for Mr Munn's benefit. In addition, he submitted that the holiday expenditure was not proved. There were schedules prepared by Mrs Munn to purportedly explain how the money had been used but this was largely without bank statements. Although bank statements were provided concerning the £40,000 paid into the National Westminster Bank joint account, there was no explanation for this or an exit trail pointing towards its use for holiday expenditure. Insofar as necessary, he observed, the court should bear in mind that some £50,000 was used for holidays after Mrs Munn became aware of claims by ETL and the liquidators of SICA and of Candco.

101. Similarly, Mr Shaw K.C. submitted that the payments made towards Mr Munn's liabilities should be viewed as having been paid from jointly owned funds and from the proceeds of jointly owned properties purchased with the jointly owned proceeds of the CHL shares. In any event such payments were not "lost" but replaced by her right to recoup them from Mr Munn. Transactions are not detrimental if they can be unwound (see ***Atkinson v Varma*** [2021] EWHC 2027, [75]), he submitted. As to her schedule of payments, his submissions are clearly set out in his skeleton argument to be summarised as follows:

    a) There is no identification of what the £50,000 identified as a payment on 2 June 2015 of a liability to Goldsmiths was for. There are numerous debits and credits to and from Goldsmiths but no evidence that this has anything to do with the share sale.

    b) It is to be inferred that a tax payment of £94,009 is for income tax and wholly unrelated to the share sale.

c) The £60,000 identified as a repayment of Mr Munn's overdrawn loan account with SBL on 9 August 2017 was unrelated to the share sale.

d) £12,373 consists of (i) payments to Kuits (SBL's solicitors) totalling £6,807.50; (ii) £4066 being payments to Hopkins Law (the solicitors who acted for Mr and Mrs Munn on property sales and remortgages) and re-mortgage fees and (iii) a payment to a Jeff Thomas of £1500 but there is no evidence as to what these items were except that (ii) were clearly joint expenses in respect of Mr and Mrs Munn's jointly owned property.

e) £23,218.25 consists of payments to Mr Thomas and some to accountants, Hacker Young but there is no evidence as to what these items were.

f) £159,080 from Mrs Munn's sole account to their joint Natwest account, is not clearly identified, although they appear to be funding payments made by Mr Munn to various third parties, principally his solicitors, DJ Murphy, loan repayments to Ratesetters and payments to Mr Thomas.

g) An indirect payment to the liquidator of SICA of £200,000 was made out of the refinance of 15 Cefn Coed Road, acquired in March 2016 out of the proceeds of sale of the shares and the refinance to enable payment of the £200,000. There has been no qualifying detriment to Mrs Munn that would enable her to claim a change of position.

102. Mrs Munn took great objection to these criticisms of her evidence. She said she had understood that the purpose of her evidence was to identify the money used and for SBL to raise before the hearing any objections or issues they had identified. This would have enabled a response but nothing had been said until the skeleton argument/submissions of Mr Shaw K.C.. Insofar as corroborative evidence was required and missing, that did not mean she had not proved her change of position claim. No-one had suggested she was dishonest, she had stated in her witness statement her use of the money, and SBL had not sought to challenge her by cross-examination. This applied, for example, to the £40,000. She had said it was used for holidays and should be believed. Had this been challenged, she would have stated under oath that the payments were needed for new accommodation to which they had had to move whilst they were away. The only or easiest way to achieve that in the context of currency exchange had been to transfer the money first to the joint account and then to SBL's business account. If necessary she could provide bank statements but had tried to keep everything simple knowing that further evidence could be called for if required. Similarly money would be transferred to the joint account to pay her husband's liabilities because that was the account with the payees already listed and set up. In addition, the fact that different claims were made at different times and she had knowledge of them could not lead to the conclusion that this claim would be made.

F4iv(e) Findings of Fact

103. Although Mrs Munn has only herself to blame for the confusion and lack of clarity within her evidence, including the lack of supporting documentation observed by Mr Shaw K.C., she has her point that her evidence has not been challenged through a request for cross-examination. I refer as a result to the words of Lord Justice Rimer in ***Coyne v DRC Distribution Ltd*** [2008] EWCA Civ 488, [2008] BCC 612 at [58]:

> *"... it is well-settled practice that if a court finds itself faced with conflicting statements on affidavit evidence, it is usually in no position to resolve them, and to make findings as to the disputed facts, without first having the benefit of the cross-examination of the witnesses. Nor will it ordinarily attempt to do so. The basic principle is that, until there has been such cross-examination, it is ordinarily not possible for the court to disbelieve the word of the witness in his affidavit and it will not do so. This is not an inflexible principle: it may in certain circumstances be open to the court to reject an untested piece of such evidence on the basis that it is manifestly incredible, either because it is inherently so or because it is shown to be so by other facts that are admitted or by reliable documents .... [Counsel] said that these principles apply equally to the case in which the evidence is given by witness statement rather than by affidavit, and I agree. I said as much in my summary of the principles in* ***Long v Farrer & Co and Farrer*** *[2004] EWHC 1774 (Ch); [2004] BPIR 1218, at paragraphs 57 to 61."*
>
> (see also the recent decision of the Court of Appeal in ***Kireeva v Bedzhamov*** [2022] EWCA Civ 35, [2022] 3 W.L.R. 1253)

104. Nevertheless, whilst I appreciate that Mrs Munn has struggled with the concept of a change of position case and the presentation of evidence in support, it was incumbent upon her to present her claim. It should not have been that difficult to set out the sums received into the joint account, the sums paid into her sole account, why she received those sums (i.e. sufficient facts to enable the court to decide whether they were intended for her sole or for joint/family use), and which sums were used to pay which liabilities. Therefore, whilst I must apply the approach identified by Lord Justice Rimer, I must still bear in mind that the burden of proving a change of position is upon her.

105. At this stage I will proceed on the basis that I can identify from her evidence the following expenditure: (i) £1,057,924.12 represents the total claimed holiday expenditure and the payments made towards Mr Munn's liabilities (i.e. £253,233.37 + £802,690.75); (ii) £555.723.84 is for the expenditure upon the items rejected during the July hearing (garden and kitchen upgrades, investment in and renovation of a property, and the purchase of a business); and (iii) the resulting total of £1,633,647.96 leaves a further £382,352.04 paid for other purposes, presumably from the joint account, and is not part of her case. I will consider the law before making findings of fact.

F4iv(f) The Law

106. The basis for the court granting relief to a party who has changed their position having received the benefit which a claimant now seeks to recover is explained by the editors of Goff & Jones, "The Law of Unjust Enrichment", 9th ed, Part 6 at 27-03 as follows:

> *"To develop the defence in a principled way the courts must understand its rationale. The defence generally applies where the benefit transferred from the claimant to the defendant has been irretrievably lost so that the courts must choose which of the parties should bear this loss. In making this choice, the courts must strike a fair balance between the claimant's interest in restitution and the defendant's interest in making spending decisions freely, without fear that a claim in unjust enrichment might later invalidate his assumptions about the means at his disposal. When undertaking this exercise, the courts can reduce a defendant's liability pro tanto where his position has only partly changed, and can make restitutionary orders on terms, e.g. where a defendant's dealings with third parties have to be unwound before he can make restitution to the claimant, or where a defendant has bought property, the immediate sale of which would create particular difficulties."* (my underlining for emphasis)

107. It is a defence which does not apply to expenditure which would have been incurred in any event. It must be extraordinary (out of the norm) which would not have been paid but for the enrichment. In the context of holidays, this includes a more affluent style of relaxation provided it is attributable to the enrichment. It will obviously not apply if, or to the extent, that the defendant retains assets of value from the expenditure, nor if the expenditure was to pay debts which would have to be paid in any event. The approach to be taken is not one of sympathy. The court may balance the interests of the claimant and the defendant. This approach includes a power for the court to give time to the defendant to recover from their current financial position before making restitution (see generally paras 27-02 to 27-17 of Goff & Jones).

108. Applying those principles to ***s423 IA***, Sales J., as he then was, in ***4Eng v Harper*** (above) said this (an approach followed by Rose J., as she then was, in ***BAT Industries plc v Sequana SA*** [2016] EWHC 1686 (Ch), [2017] BCLC 453 at [520-525] and by Gwynneth Knowles J in ***Akhmedova v Akhmedov*** [2021] 4 WLR 88):

> *"12. … Once the trigger conditions defined in the statute are satisfied, a creditor of the transferor will have a claim against the transferee. A wide jurisdiction is then conferred upon the court to fashion a suitable remedy. The broad objective of the remedy is set out in s.423(2) (to "restor[e] the position to what it would have been if the transaction had not been entered into" and to "protect[] the interests of persons who are victims of the transaction"), but leaving a wide margin of judgment to the court to decide what order is appropriate (it is to "make such order as it thinks fit for" the defined objective) …*
>
> *13. In my judgment, the nature of any order and the extent of the relief granted by the court under s.423(2) and s.425 should take into account the mental state of the transferee of property under a relevant transaction (or of any other person against whom an order is sought) and the degree of their involvement in the fraudulent scheme of the debtor/transferor to put assets out of the reach of his creditors. The principles in the application of this statutory regime should reflect in this respect general principles inherent in other areas of the law, which treat the mental state and degree of involvement of a defendant in wrongdoing as relevant to the extent of recovery available against him … Although the trigger conditions for liability to make restoration under s.423 set out the basic balance to be struck between the interests of the creditors and of a transferee as established by Parliament, the making of an order under s.423(2) and s.425 necessarily requires some further balancing of the interests of the transferor's creditors and of the transferee to be determined by the court, since by the time the court has to take action events will have moved on from the transfer and the balance of the equities between creditors and transferee may well have been affected by changes in circumstances over time.*
>
> *14. For example: (1) A transferee who has received money in good faith without knowing the transferor acted with a relevant purpose in making the gift. In such a case a broad analogy may be drawn with claims based on unjust enrichment, such as a claim for money paid on the basis of a mistake of fact, where the recipient's interest in being able to rely on the security of his receipt is overridden by the unfairness to the transferor of being held bound by a payment*

> *made by him by reason of a mistake. In relation to such claims a defence of good faith change of position on the part of the recipient applies (Lipkin Gorman v Karpnale Ltd [1991] 2 A.C. 548)…*
>
> *15. Across the range of cases, the position may become more complex if, after the transfer, transferee has become insolvent, so that the competing interests of the transferor's creditors and the transferee's creditors have to be taken into account (not a complication which arises [here]) …*
>
> *16. In choosing what relief is appropriate in a given case, a great deal will depend upon the particular facts. One of the reasons the court is given such a wide jurisdiction as to remedy under this regime is to allow it flexibility in fashioning relief which is carefully tailored to the justice of the particular case. Helpful analogies may be drawn with other areas of the law to guide the court in reaching its conclusion, but given the wide range of situations which the statutory regime is intended to deal with it would be wrong to be unduly prescriptive in trying to lay down hard and fast rules for the application of these provisions …"* (my underlining for emphasis).

109. The cases of ***4Eng v Harper*** (above) and ***BAT Industries plc v Sequana SA*** (above) established, therefore, that a court when determining the relief to be granted to achieve the Purpose of the ***s423*** Compensation may take into consideration the respondent's change of position to the extent that it is appropriate to do so. That extent will need to be assessed bearing in mind the interests of the transferor's creditors. The assessment may be more complicated if the transferor becomes insolvent.

110. The issue of law raised by Mr Shaw K.C. is whether it is appropriate to take change of position into consideration when fashioning a ***section 423 IA*** remedy if the transferor is insolvent. He submitted that a change of position cannot be relied upon if the victim company is, as here, insolvent. That in the circumstances of an insolvent company the following approach of Mr Justice Trower on an appeal in the case of ***Re Fowlds (a bankrupt)*** [2021] EWHC 2149, [2022] 1 W.L.R. 61 should be followed as applied by him at [93] to a preference or to a transaction at an undervalue:

> *"it will rarely be possible to give weight to a change of position by the preferee or the transferee, while at the same time honouring the policy which is reflected in the statute, the normal operation of the statutory insolvency scheme and the restorative nature of the relief (if any) it is required to grant"*

111. To support his submission, Mr Shaw K.C. also relied upon the opinion of the Privy Council when considering a preference claim in ***Skandinaviska Enskilda Banken AB (Publ) v Conway*** [2019] UKPC 36, [2020] AC 1111, at [103-111], a unanimous judgment of the Board. He submitted that this decision identifies essential principles of insolvency law which mean there can be no room for a change of position defence when the transferor is insolvent.

112. It is a decision upon a Cayman Islands' statute, the terms of which apply within insolvency. The statute provides that a preference is voidable but without including a statutory remedy for recovery. As a result, proceedings relying upon a restitutionary common law remedy would be required. To that extent, and because it is not a binding decision, the application of this to be highly respected judgment is limited. However, its importance to Mr Shaw K.C.'s submission are the reasons why the Privy Council decided a change of position defence would not be available:

113. A decision not to award the insolvent company compensation to which it would otherwise be entitled because of a change of position would conflict with the requirement of ***the IA*** that an insolvent company's assets should be collected and distributed in accordance with its statutory waterfall including a pari passu distribution among its unsecured creditors. This prerequisite should prevail over any detrimental impact to the person who should be under an obligation (of any kind) to make restoration or payment to the company. It would also be contrary to insolvency law policy to refuse restoration when the requirements of a statutory remedy for the return of assets have been met. Therefore, application of the change of position defence in the context of an insolvency and specific restorative remedies would have the effect of breaching the anti-deprivation rule and undermine the pari passu principle. The interests of the general body of creditors should prevail over the interests of the individual recipient. The following passage from the judgment of the Board explains the importance of the office holder's claim being brought pursuant to a statutory provision which intends to protect creditors as a class:

> *"[111] … a claim designed to restore to a company in liquidation the assets which ought to be available for distribution among its creditors is different in nature from a conventional claim to restitution of a benefit transferred from one individual to another by a defective transaction. In the latter situation, it is the private interests of the two parties which are mainly in issue, and the equitable considerations requiring the benefit to be returned to the plaintiff can be cancelled out by equitable considerations arising from a change of position on the part of the defendant. In the former situation, on the other hand, the liquidator's claim is brought in order to give effect to a statutory scheme which has been enacted by the legislature mainly in the public interest for the protection of creditors as a class.*

114. The Privy Council whilst drawing attention to academic criticism did not address the reasoning of ***4Eng v Harper*** (above) and ***BAT Industries plc v Sequana SA*** (above). Those decisions were addressed by Mr Justice Trower in ***Re Fowlds (a bankrupt)*** [2021] EWHC 2149, [2022] 1 W.L.R. 61, within the context of a ***section 340 IA*** preference claim. However, before turning to that important decision, it is worth referring to the ***s.339 IA*** (transaction at an undervalue) decision of Mr Justice Mann in ***Stonham v Ramratten*** [2010] BPIR 1210. It too concerned a restorative statutory insolvency provision requiring the court to make *"such order as it thinks fit"*. It is to be noted because it addressed the application of the resulting discretion within the context of a remedy only available within an insolvency and for the purpose of ensuring the creditors as a class would be able to share the insolvent company's assets in accordance with the scheme of ***the IA***. The Judge's clear-cut analysis plainly applies to other similar insolvency, general discretionary contexts, for example ***ss 340 and 423 IA***, subject to their application to the specific statutory provision.

115. Albeit as obiter dicta, Mann J. explained with regard to the exercise of the court's discretion and with consideration of the one case which counsel had found where the discretion was exercised against the insolvent estate (***Singla v Brown and Another*** [2007] EWHC 405 (Ch), [2008] Ch 357, [2007] BPIR 424 – noting that this decision and ***Stonham v Ramratten*** do not appear to have been referred to the Privy Council) the following:

> *[34] … If s 339 allows the court a discretion, then <u>any attempt to circumscribe the exercise of that discretion by describing some matters as inevitably within and some as inevitably without is a dangerous exercise</u> …*

> *[40] … The purpose of s 339 and its allied sections is to prevent a bankrupt from defeating the aim of a pari passu distribution of his assets by certain transactions; in the case of s 339 a transaction of an undervalue, in the case of other sections a voidable preference. The thesis underlying those sections is that the creditors are entitled to a pari passu distribution not merely of assets of which the bankrupt is owner at the date of his bankruptcy, but also those which he has otherwise put beyond the reach of his trustee in bankruptcy by virtue of transactions which are gratuitous or ill-motivated. Gratuitous transactions within the relevant timeframe are to be brought back within the bankruptcy fold. That is clearly the underlying basis of s 339. Since that is the underlying principle it will require something unusual, to put it at its lowest, for the court to decide that, notwithstanding the fact there is an ostensibly qualified transaction on the facts of the particular case, those assets can and should properly be left outside the scope of the bankruptcy. It would be a departure from the norm to allow that to be the case … There has to be something unusual, and, bearing in mind the wide scope of the norm, it might be thought very unusual, to allow the court to decline to exercise a jurisdiction which prima facie it ought to be exercising … If one chooses to use the word 'exceptional' to describe that, then I would not necessarily gainsay that myself.*
>
> *[41] I do not think that the discretion is exercised on the basis of some overall cauldron which is stirred and into which the court peers in order to discern some discretionary result. The starting point is always going to be that the court will, unless there is something very different about the case, going to be granting the relief which follows on a finding that the requirements of s 339 are otherwise fulfilled. [42] One could view the matter in another way. Section 339 and its allied sections clearly have built within them a form of presumption. Gratuitous transactions will normally be set aside. They effectively create, at the very least, a shift of burden. If the conditions appropriate to the exercise of s 339 are fulfilled and nothing more is proved, it is impossible to see why the court would not exercise its discretion other than in favour of granting relief unscrambling the transaction in question. The fulfilment of the conditions is effectively going to shift the burden to the respondent to establish why, notwithstanding the fulfilment of those conditions, the discretion should not be exercised in favour of the trustee. That is simply another way of looking at the matter."* (my underlining for emphasis)

116. Mr Justice Mann therefore emphasised the importance of pari passu distribution, as required by the ***IA's*** statutory waterfall for distribution, and the recovery of assets which should not have been previously disposed of by the insolvent party to achieve that distribution (for convenience I will refer to this as the **"Distribution Principle"**). In his judgment their application in the context of a restorative statutory provision subject to an underlying discretionary determination of the appropriate relief meant that exceptional circumstances (a departure from the wide scope of the norm) will be needed before a decision not to make a restorative order will be made in the exercise of the court's decision.

117. That leads me to the decision of Mr Justice Trower. Bearing in mind that Mrs Munn is unrepresented and that SBL had the considerable benefit of the submissions of Mr Shaw K.C., I will start with the first instance decision to highlight where the Judge (me) erred as Mr Justice Trower explained. Whilst I would normally avoid such analysis and refer only to the decision on appeal, I believe it helps explain my decision in this case in the context of Mrs Munn's arguments based upon the proposition that she should not be required to restore money she "innocently" spent on expenditure she would not have incurred but for the CHL share proceeds when that would force the sale of the matrimonial home because her equitable interest is her only real asset.

118. ***Re Fowlds*** (above) was concerned with payments to a relative who was owed the money pursuant to a genuine, commercial retainer. Ironically she received less than the unconnected creditors who were paid in full around the same time. A ***section 340 IA***, preference claim could only be made against her because the time limit had expired for connected persons. The Judge considered the following factors took the case out of the norm: (i) the debt arose from a commercial relationship and represented a fair amount for the work carried out - payment was not influenced by "association" and, in real life, it was an arm's length transaction and payment; (ii) she acted in good faith having played no part in the making of the preference other than receiving the payment; (iii) the payment was no longer available to her and she dissipated without knowing it might be recoverable; and (iv) restoration would have a significant and wholly disproportionate effect upon her when compared with the receipt into the bankruptcy estate of less than £50,000 taking into consideration the details of her existing financial position, inability to provide restoration without sale of her family home, and the particular consequences of that sale upon her family and business which she depended upon. The decision to refuse relief was based upon factors (i) and (ii) being insufficient to reach that decision on their own but that the case was taken out of the norm when they were combined with factors (iii) and/or (iv).

119. Mr Justice Trower recognised the potential tension existing between the application of the Distribution Principle, the unfettered discretion, and the application by analogy of the defence of change of position. He dismissed the appeal of the trustees in bankruptcy but in doing so reached his own decision because the Judge had over-emphasised the weight to be given to a change of position by describing it as potentially a strong factor with significant weight. Trower J. said this:

> *94. … the right approach is as follows: (i) Change of position does not operate as a defence under sections 339(2), 340(2) and 342. (ii) There will be exceptional circumstances in which the facts that would establish a change of position defence (if it had been available) will weigh in the balance when the court is determining how to exercise its discretion as to the order it thinks fits for restoring the position to what it would have been if the transaction had not been entered into or the preference had not been given. (iii) In any event, change of position is not the strong factor which the judge considered it to be. To characterise it in that way is to give insufficient weight to the underlying policy considerations illustrated by [the Privy Council's decision in] Conway [2020] AC 1111 and the difficulty of balancing the interests of a class against the interests of an innocent transferee.*
>
> *95. It also follows that I do not consider that it is necessary for me to decide on this application whether I think that 4Eng was wrongly decided, because the context of section 423 is different from section 340. Although the world cruise example given by Sales J might be read as a finding that change of position operates as a complete defence, that is not how his judgment has been read in subsequent authorities. It operates as no more than one of the factors that might affect the balance of equities between creditors and transferee (in*

> *circumstances where it is possible to carry out that balancing exercise) when the court is determining the relief if any to be granted. The policy that underpins the statute means that the balance is only likely to come down in favour of the transferee where the circumstances are sufficiently out of the norm to be exceptional."* (my underlining for emphasis)

120. Whilst each case will turn on its own facts it is helpful as a guide to the operation of that approach to identify the facts which caused Trower J. to decide that ***Re Fowlds*** (above) was an exceptional case, and to uphold the appeal. He concluded that the Distribution Principle was outweighed by the following out of the norm circumstances: (i) the only reason a claim could be brought against her was that unlike the other creditors paid at the same time she was paid as an associate and she had not been paid because she was an associate; (ii) she had acted as a commercial creditor in good faith without knowledge of the payment being a preference; (iii) she no longer had access to the payment or its proceeds; and (iv) there was only one creditor of the insolvent estate and, therefore, the significant adverse effects of recovery on her and her family should weigh in the balance together with the principle of proportionality which should take into consideration the comparatively modest amount to be recovered (see in more detail paragraphs [133-139] of his judgment).

121. Therefore, I cannot accept Mr Shaw K.C.'s umbrella submission that there is no room for the application of any change of position factors when fashioning the ***section 423 IA*** relief required. I am bound to follow the approach of Mr Justice Trower. It is not for me to decide whether ***4Eng v Harper*** (above) is correctly decided and whether the decision of the Privy Council points in that direction. Equally, it is not for me to consider (had Mrs Munn been represented and it been argued) whether the decision in ***4Eng v Harper*** (above) might indicate that the approach to the law should be more favourable towards the position Mrs Munn finds herself in that identified within ***Re Fowlds*** (above). The approach I should adopt is the one set out in paragraphs 94-95 of the judgment of Mr Justice Trower.

F4iv(g) Change of Position Decision

122. Mrs Munn's position can be summarised as being that a successful ***s.423 IA*** claim by SICA would require her to find assets to realise which, insofar as she has any, have nothing to do with the money she received for the sale of her jointly owned CHL shares as part of the Arrangement. That would not be just and equitable relief when she would lose her interest in the matrimonial home. An interest she held before receipt of the CHL share sale funds and which she would otherwise have continued to hold whether she had sold the shares or not. That this should not be the result when she spent the money upon expenditure which she would never have incurred but for its receipt. Her conceded innocence means she should not be left in a position which will be far worse than she would have been in had she never received the money she is being asked by SBL (treated at this stage as SICA) to restore.

123. As to the facts: Applying the principles identified by of Lord Justice Rimer in ***Coyne v DRC Distribution Ltd*** (above) and bearing in mind SBL's acceptance of Mrs Munn's innocence concerning the Arrangement and my conclusion that Mrs Munn should be considered a truthful person, I accept her evidence, unchallenged by cross-examination, that the money spent on holidays and on Mr Munn's liabilities is to be

treated as expenditure which she would not otherwise have incurred. It is not easy, however, to identify the sum that should be included in that conclusion. That is because there is no account addressing which sums were paid to her sole account and why/upon what basis she received them insofar as they exceeded half of the consideration paid for the jointly owned CHL shares. Fortunately for that problem, the total sum for holidays and payment of Mr Munn's liabilities comes to £1,057,924.12 which is more or less half of the proceeds. However, that does not end the matter because it is necessary to consider what the other half was used for. As a hypothetical example, Mrs Munn could not necessarily rely upon "not otherwise incurred" holiday expenditure of £100,000 if £100,000 retained in the joint account had been used to pay her personal tax liability. Account would potentially have to be taken of the benefit she received from the money not paid into her sole account. The problem is, and therefore the use of the words "not necessarily" and "potentially", that no such account has been provided.

124. The conclusion to be drawn on the facts is that whilst I largely agree with many of the criticisms of the lack of corroborative proof, I consider Mrs Munn's evidence sufficient to establish on the balance of probability that she would not have paid for the holidays and the liabilities but for the receipt of the CHL share proceeds. I am satisfied that such payments have been "lost". They cannot be unwound. However, whilst I am satisfied there was significant expenditure which falls within the change of position case, it would not be right or fair to SBL to decide that this totalled £1,057,924.12 without an account being taken unless they chose otherwise for commercial reasons.

125. However, applying the law I also conclude that the need for an account is academic. That is because the approach identified by Mr Justice Trower leads me to the decision that this is not an out of the norm case whatever the quantification. The Distribution Principle weighs heaviest. Mrs Munn prays in aid the consequence of the loss of her beneficial interest in the matrimonial home. However, whilst that is obviously a harsh result, the decision should not be based on sympathy. Furthermore, I do not see this case as being different to the many cases where that is the consequence of litigation including within ***section 423 IA*** cases. I cannot conclude that she has established her case to be out of the norm. This is not a case where other factors combined with the change of position to do so. ***Re Fowlds*** (above) is the type of case which does but it has far more and different factors which took it out of the norm. Whilst the facts of each case must be looked at on their own and not compared, it provides a guide to the benchmark that must exist before a case can be viewed as being exceptional. This case does not reach that standard. It is a case where SICA is entitled by statute to seek recovery, where recovery is needed to enable creditors to receive the pari passu distribution to which they are statutorily entitled and where the Distribution Principle must be given the weight that the matters relied upon by Mrs Munn cannot outweigh. I should add, bearing in mind Mr and Mrs Munn's skeleton argument, that the delay in bringing the claim does not affect that outcome. Mr Justice Mann in ***Stonham v Ramratten*** (above) made clear that whilst this could be a factor, it would not be a relevant reason in itself if the limitation period had not expired. As a factor, it does not alter the balance.

126. The decision of how much should be restored to SICA as a result of the application of **s423 IA** falls to be determined without any deduction for Mrs Munn's change of position.

F5) Answer to the Principal Liability Issue – Mr and Mrs Munn's s.423 Liabilities

127. This leads to the conclusion that the restorative remedy upon an application by SICA pursuant to ***section 423 IA*** would be for Mr and Mrs Munn to pay as a joint liability the sum of £1,814,820 representing the amount the consideration they received for the sale of their jointly owned CHL shares was attributable to the sale of the Goodwill at an undervalue. That amount is "the same damage" for which SBL has accepted liability to SICA upon acceptance of the larger settlement sum. It is now necessary to decide whether SBL should succeed in its application for an order for contribution or indemnity under ***the 1978 Act***.

G) The Apportionment Question

G1) Discussion

128. This claim for a contribution has arisen because SICA chose not to bring a claim against Mr and Mrs Munn. The principle underlying ***the 1978 Act*** is that it would be unfair for SBL following its settlement with SICA for £2,650,000 to have to make payment alone, and at the same time discharge the liabilities of Mr and Mrs Munn to the extent they are liable for the same damage (£2,524,599 and £1,814,820 respectively) because of SICA's choice. The burden should be redistributed in an allocation which is just and equitable having regard to each person's responsibility for the damage in question (see paragraphs 9-14 above). That will involve the court considering in particular causative potency and moral blameworthiness, the benefit each gained and the benefit retained (unjust enrichment) together with the financial consequences known and likely (see paragraphs 15-24 above).

129. Applying that approach, key facts relevant to the redistribution decision in respect of each party are:

a) SBL had the knowledge of Mr Munn, and benefited from his breach of duty to SICA through the receipt of the Goodwill for only £1.00. It acquired a business for nominal consideration, its own value increased accordingly and the acquisition provided the opportunity for it to profit in the future. It should have paid the open market value of the Goodwill.

b) Mr Munn is clearly responsible for the fact that SICA only received £1.00 for the Goodwill. He was the or an initiator of the Arrangement, a director of SICA and a director of SBL. He also benefited. He was a joint recipient of the proceeds derived from the sale of the CHL shares attributable to the value of the Goodwill which SICA did not receive. In addition, the value of the CHL shares he retained increased. He would benefit from any dividends to be distributed by CHL as a result of distributable profits made due to the ongoing business of SBL. The CHL shares retained would also potentially increase in value as a result of SBL's business.

c) Mrs Munn was in the same position of benefit as Mr Munn as a result of her joint ownership of the CHL shares sold and retained. Her action of selling the jointly owned CHL shares caused the damage SICA suffered. However, the obvious distinction between her, Mr Munn and SBL is the conceded absence of moral blameworthiness.

d) SBL is now in insolvent liquidation. There is no evidence concerning whether it will be able to pay a dividend to SICA as an unsecured creditor in the sum of £2,650,000. However, indications at trial have been that it is unlikely any dividend will be other than nominal. This insolvency is not attributable to the Arrangement. SBL was solvent and making profits for at least the next 4 years.

e) Mr Munn's financial position has not been the subject of specific evidence. It may well be, however, that his assets are limited to the value of his beneficial interest in the matrimonial home, whilst he has significant liabilities owed (at least) to ETL.

f) Mrs Munn's financial position appears to be equivalent to Mr Munn's subject to her liabilities being (potentially academically) less.

g) If that summary of the financial position is true, as it appears to be, this claim for a contribution arises in circumstances where SBL will not be discharging its liability to SICA and any recovery by SICA and/or SBL will have to be made as unsecured creditors in a future bankruptcy of Mr and Mrs Munn.

130. Despite the overhanging veil of commercial unreality attributable to an absence of resources, those facts give rise in the context of determining a just and equitable contribution for SBL, not the recovery of a claim by SICA, to the Goodwill Transferred Issue, the Restitution Issue, and the Mr Rees Issue. Whilst they will need to be addressed individually, they are to be viewed cumulatively (to the extent relevant) within the final just and equitable decision. It will also (to the extent necessary) address the Joint Liability Issue and the Change of Position Issue when considering Mrs Munn's contribution. The decision will be subject to the overlying shadow of the Insolvency Issue.

G2) The Goodwill Transferred Issue and the Restitution Issue

G2i) The Further Propositions/Submissions/Argument

131. I was concerned after the July hearing that Mr and Mrs Munn, as litigants in person, had not sufficiently considered the relevance of the facts that SBL received the benefit of the Goodwill for £1.00, and that a contribution is also sought from them on the basis of their receipt of £2,016,000 without taking into consideration that the Arrangement meant they no longer held the CHL shares they sold. I addressed those concerns in the draft judgment subject (of course) to considering further submissions.

132. In principle, there should have been no loss for SICA because SBL on 6 February 2015 would have paid the market value for the Goodwill transferred to it and

compensated SICA accordingly. If principle had played out in practice, the question of an indemnity or contribution for SBL would not have arisen. It would have left an issue between Mr and Mrs Munn and ETL at the time of the Arrangement concerning the rationale for ETL paying £2,800,000 on the basis that SBL had been gifted the Goodwill for £1.00.

133. In practice, however, not only did that scenario not arise because no payment was made by SBL, it could not have arisen except to the extent that SBL became able to pay SICA from future profits. That is because as at 6 February 2015, SBL had no liquid assets. The SBL balance sheet for 31 December 2015 only shows equity share capital of £2.00 for the year ending 2014. It needed funding. The only source was the Arrangement but the ETL money which might have been used to pay the market value to SICA was diverted to Mr and Mrs Munn and Mr Rees for the purchase of their CHL shares. If that had not occurred, the amount they received for their CHL shares which represented the true value of the Goodwill would and should have been available to pay SICA for that value. The probable alternative being that there would have been no sale of the CHL shares and, therefore, no sale to SICA of the Goodwill.

134. Taking those matters into consideration, a basic approach towards the just and equitable assessment of the contribution SBL may recover having regard to responsibility would be to order a contribution from Mr Munn for breach of director's duty equal to the amount ETL paid for the CHL shares but with a maximum liability of £2,524,600. Similarly to order payment by Mrs Munn of the £1,814,820, ***s243 IA*** "same damage" liability. Those sums being subject only to further consideration of moral blameworthiness and financial consequences. In essence that is SBL's approach. In particular, Mr Shaw K.C. submitted:

a) Such payments would reflect the fact that but for the breach of duty SICA would have received the market value for the Goodwill, there would have been little or no value in its shares for CHL and Mr and Mrs Munn and Mr Rees would have received little or no value from the sale of 40% of CHL's shares.

b) If there had been no breach, SBL would still have received the benefit of the Goodwill and earned profits as a result. That was always the intention of the transaction. The difference being that it would have done so without the breach and subject, therefore, to its obligation to pay the market value (whether directly through deferred payment dependent upon available profits or from a loan from ETL). Its receipt of the Goodwill and future profit was not the offending part of the transaction. That would always have occurred. The offending part was the receipt of the consideration by Mr and Mrs Munn and Mr Rees which in truth was for SICA's Goodwill.

c) The consideration for the Goodwill ended up in the wrong hands and it is that diversion to Mr and Mrs Munn and Mr Rees that the contribution addresses. The equitable apportionment required is to disgorge the resulting profit.

d) Further, it would be unfair for SBL and, therefore, its creditors to forego an amount equal to the settlement sum owed to SICA.

e) In addition, ***s.2(1) of the 1978 Act*** provides that the amount of the contribution recoverable from any person *"shall be such as may be found by the court to be*

> *just and equitable having regard to the extent of that person's responsibility for the damage"*. Responsibility is attributable to Mr Munn conducting a scheme to benefit Mr and Mrs Munn and Mr Rees. In the language of ***s.2(1)***, he was 100% responsible for the damage suffered by SICA.

135. Those submissions were emphasised at the November hearing in the light of the proposition made in the draft judgment for the purpose of further submissions that such a "basic" approach and result would potentially create unfairness. It would not address The Goodwill Transferred Issue or The Restitution Issue: assuming Mr Munn had paid £2,524,600 or Mrs Munn £2,016,000/£1,814,820 on 6 February 2015 to SICA (whether via SBL or not), SBL would still have received the Goodwill for £1.00, and would still have been able to use the Goodwill to make profits. In contrast, Mr and Mrs Munn would no longer have the consideration received on completion for their jointly owned CHL shares and would no longer have the shares sold to ETL. It was proposed that the better analysis would be that the assumed payment of £2,524,600 or £2,016,000/£1,814,820 should be treated as a loan to SBL.

136. That analysis would potentially accord with the evidence of Mr Munn at trial. He acknowledged that he had to inject funds into SICA to enable it to repay a debt of circa £1.8 million it owed to Candco, although he chose not to do so. That obligation arose because he did not provide the funds to SBL to purchase the Goodwill for its true value on 6 February 2015. It was an obligation that would apply to all SICA's creditors who lost the value of the Goodwill through its assignment to SBL for £1.00. He referred to it as "a capital injection" but there is no evidence ETL or the other members would have agreed to this, whether generally or with reference to specific terms. As a consequence, it is appropriate to conclude he would have had to lend SBL the funds required by SICA for its creditors. The loan being for repayment when SBL was financially able to do so.

137. That led to the proposition that the restorative remedy should take account of the fact that SBL should and to some extent would have repaid the loan over the course of time taking into consideration the profits it made. What could be concluded from SBL's accounting information is that it benefited considerably from its purchase of the Goodwill to the extent (at least) that profit reserves stood at £946,731 by the 2020 year end. Part of those profits, it can be argued, should have been used to repay his loan. Plainly the whole of that sum would not have been available because SBL would need to continue to trade, but an anticipated reduction by £600,000 down to 31 December 2020 might appear fair in round terms. It was also observed that this did not take account of dividends received during that period because of an absence of their evidence. Nor was account taken of the £150,000 received from the sale of the Goodwill because this is a fund held in the liquidation. It would not have been paid to Mr Munn to repay his loan.

138. Mr and Mrs Munn adopted that approach but advanced it further. First, because SBL's accounts for the period 1 January to 31 August 2021 were produced. They record an increase in retained profits of £1,177,861. Second, because the profits were always reduced in SBL's accounts by amortisation of the Goodwill. Therefore the true benefit received from the £1.00 acquisition, in cash terms, ought to be increased by an additional £1,369,969. That being so, they argued, SBL's benefits exceeded the "same damage" of £2,524,600 by £23,230.

G2ii) The Goodwill Issue and the Restitution Issue Decision

139. The Goodwill Issue and the Restitution Issue only arise as part of the process required to achieve a just and equitable contribution decision. The propositions, submissions and arguments above will inevitably be based upon speculative facts. In reality there is no evidence from which to conclude that the Goodwill would have been sold and that the Arrangement, therefore, would have been entered into if SBL was to pay the open market value for the Goodwill. The process is being undertaken as best it can because justice and equity requires the court to consider the benefits gained and the benefit retained together with the financial consequences in accordance with (in particular) the decision of ***Dubai Aluminium Co Ltd v Salaam*** (above at paragraphs 19-24), including the observation of Lord Millett that *"The more a defendant has taken, the more the plaintiff has lost, and the greater is the degree of the defendant's responsibility for the loss"*.

140. One pragmatic way to approach this exercise is to conclude: SBL and Mr and Mrs Munn gained the value of the Goodwill. SBL by its receipt and Mr and Mrs Munn through the CHL share sale consideration. SICA sustained the same causative loss (the variations in quantum attributable to the cause of action applied having already been applied when assessing the "same damage"). Therefore, a 50 [SBL]:50 [Mr and Mrs Munn] apportionment of the "same damage" suffered by SICA would be just and equitable subject to considering the other relevant factors, such as moral blameworthiness, unjust enrichment, Mr Rees and insolvency when reaching the overall decision.

141. In my judgment this is to be preferred when determining what is just and equitable to the approach urged by SBL. It ignores the Goodwill Transferred Issue and the Restitution Issue. That would not produce a just and equitable result. It is also preferable to what may be considered a half-way house, the assumption that Mr and Mrs Munn would have lent the money they had received to SBL with the consequences considered above. That approach is too speculative to be just and equitable. It also ignores the fact that ETL would not have paid the same consideration for CHL based upon a valuation of SBL with a balance sheet including the loan. It would not be just and equitable to do so.

142. Therefore, in my judgment the right approach is to recognise that both SBL and Mr and Mrs Munn benefited from the Arrangement to the detriment of SICA by the purchase of the Goodwill for £1.00. Whilst SBL benefited more in financial receipt terms from the transfer of the Goodwill than Mr and Mrs Munn from the sale of the CHL shares they jointly owned, Mr and Mrs Munn also benefited from SBL's benefits because he remained a CHL shareholder. In my judgment a 50:50 apportionment would be just and equitable subject to considering the other relevant factors required to reach a final decision. That final decision will need to have considered the Mr Rees Issue and the Insolvency Issue.

G3) The Mr Rees Issue

143. The Mr Rees Issue raises the potential for unfairness in the circumstances of the decision of SBL not to seek a contribution from their own director despite the facts that he was (i) a director of CHL before and after the Agreements; (ii) a director of SICA from its incorporation on 13 August 2010 until completion of the Agreements; and (iii) appointed a director of SBL on completion of the Agreements on 6 February 2015, from which date it started trading.

144. Whilst those facts certainly raise the potential for Mr and Mrs Munn to claim a contribution from Mr Rees (a matter for them), I do not consider them factors to be taken into consideration when addressing the just and equitable contribution between him and SBL. The liability of Mr Munn to SICA for breach of his director's duty owed to SICA is a several liability even if responsibility should be shared with Mr Rees. The liability under ***s423 IA*** is limited to restoration of the consideration Mr and Mrs Munn received. The real question is whether they should obtain a contribution from Mr Rees and that question does not arise on this assessment. Mr Munn sought an adjournment of the main trial to enable him to do so but that application was far too late and for reasons given at the time was dismissed. I will next reach a just and equitable decision before considering the impact of the Insolvency Issue upon the outcome.

G4) The Just and Equitable Decision subject to the Insolvency Issue

145. It is convenient first to consider redistribution between SBL and Mr Munn within the context of the "same damage" resulting from SBL's settlement of its ***s.423 IA*** liability and Mr Munn's liability for breach of his director's duties. Their respective liabilities for SICA's £2,524,599 loss arise as a result of them both having entered into the Arrangement as individual legal personalities, and both having benefited. However, a 50:50 apportionment (see paragraph 142 above) would fail to recognise that SBL's responsibility stems from Mr Munn's mind, his design and planning. That factor moves me to a 75:25% split in favour of SBL to achieve a just and equitable contribution based upon their same damage liability of £2,524,599.

146. Next to consider is the position between SBL, Mr Munn and Mrs Munn. The principal distinction to be drawn is between the moral blameworthiness of SBL and Mr Munn, and the conceded innocence of Mrs Munn. Assuming at this stage that each will pay the contribution apportioned to them, a proportion must be found that produces a just and equitable result weighing responsibility in terms of knowledge and action producing moral blameworthiness and responsibility in terms of causative outcome. In addition, the House of Lords in ***Dubai Aluminium Co Ltd v Salaam*** (above) has emphasised the relevance of the known or likely financial consequences of a contribution order. The effect of insolvency upon the just and equitable distribution decision between "A", "B" and "C" when one of the two contributors is insolvent was considered. The point made, assuming as an example that there would otherwise be an equal apportionment, was that the party claiming the contribution should not have to settle for 1/3 from "B" if "C" is unable to contribute. The distribution between "A" and "B" should still be equal, which is why "C" should "pass out of the picture".

147. As I understand the position based on the evidence before me (untested by cross-examination): SBL is seeking a contribution towards a liability it has agreed but which it is unlikely to pay (at least not in any substantial amount). Mr Munn cannot pay a sum anyway near his contribution liability resulting from the "same damage" that flowed from his breach of director's duties. He is likely to become bankrupt and potentially with his interest in the matrimonial home being his only asset. Mrs Munn has changed her position without knowledge of the liability to restore, leaving her beneficial interest in the matrimonial home as potentially the only significant asset.

148. SBL's financial position can be left to the Insolvency Issue below. The position of Mrs Munn would be academic if Mr Munn were able to pay his total liability of 75% of £2,524,599 (£1,893,449.25). In that circumstance, Mrs Munn's innocence can be marked by providing that Mr Munn should indemnify her for any contribution she has nevertheless to make. She can be granted a stay of execution against her assets to the extent that the indemnity will be effective. However on the basis of Mr Munn's insolvency (whether having made some payment or not), he "passes out of the picture" to the extent that he does not make his contribution (see paragraph 146 above). A just and equitable distinction needs to be drawn between SBL's responsibility and Mrs Munn's innocence.

149. The distinction produces a contrast in terms of benefit gained from the Arrangement. Mrs Munn received £1,814,820, whilst SBL received an additional £709,779 (£2,524,599 – £1,814,820). In addition, SBL (through Mr Munn) knew exactly what was happening and used the benefit received without making any payment to SICA. That was despite it being obvious that the Goodwill was worth far more than £1.00, and that the sale at £1.00 left SICA insolvent to the detriment of its creditors. Mrs Munn, on the other hand, should be treated as receiving the £1,814,820 because of joint ownership but be distinguished by her lack of moral blameworthiness.

150. Taking into consideration all the factors addressed but subject to the Insolvency Issue, in my judgment the resulting, just and equitable proportion for SBL to recover as a contribution from Mrs Munn should be 25% of the £1,814,820 to the extent that it is not paid by Mr Munn as part of his £1,893,449.25 contribution to SBL (i.e. 75% of £2,524,599). Insofar as Mrs Munn makes payment she should be entitled to an indemnity (albeit probably academic) from Mr Munn.

151. That division for redistribution has been reached on the basis, as understood from the evidence before me but untested by cross-examination, that no-one has retained any benefit. The only exception appears to be the consideration received by SBL for the sale of the Goodwill whilst in administration. However, I do not consider that £150,000 should change the percentages. It should be treated as a sum available to meet SBL's 25% assessment.

152. It has also been reached on the basis that there should not be any further reduction because of the facts relied upon for the Change of Position Issue. That is because the just and equitable apportionment is not a determination of Mrs Munn's liability when change of position may potentially be relied upon as an analogous defence. It is a division of the liabilities that result from the fact that she, SBL and Mr Munn are liable to SICA for the "same ascertained damage". Even should that be incorrect, it would not be right to apply a change of circumstances factor in the context of SBL's

insolvency for the same reasons as it was not right to take change of position into account when addressing her liability to SICA. I would not in any event have considered it right to reduce Mrs Munn's apportionment to below 25%.

153. It is now appropriate, therefore, to consider the Insolvency Issue in the context of the following apportionments: Mr Munn 75% of £2,524,599 (£1,893,449.25); and to the extent that is unpaid, Mrs Munn 25% £1,814,820 (£453,705).

G5) The Insolvency Issue

154. The purpose of a contribution, whether pursuant to ***the 1978 Act*** or at common law, is to ensure that SBL will not have to pay its liability for the "same damage" owed to SICA without being able to recover a just and equitable contribution from Mr and Mrs Munn to the extent that they are respectively liable for the "same damage". However, SBL's insolvency presents two problems.

155. The first is that SICA will presumably prove in the liquidation of SBL but will only receive such sum as is available (if any) for a distribution amongst the unsecured creditors on a pari passu basis. This factual scenario means contribution is being sought in this application without SBL being able to pay its just and equitable share of the liability. The second problem is that if Mr and Munn pay their just and equitable contribution to SBL as part of the assets of its insolvent estate, they will not be discharged from their liability to SICA. That is not only because SBL will not be honouring its obligation to pay but also because Mr and Mrs Munn's contribution will form part of the pool of funds to be distributed in accordance with ***the IA's*** statutory waterfall. SICA will only be paid part (if any) of that contribution from the pari passu dividend

156. Therefore, two issues arise from the fact that SBL is in liquidation: (i) whether an order should be made without SBL contributing its share; and, if so, (ii) can and should the Court make an order for payment directly to SICA.

157. It is convenient to set out Mr Shaw's submissions addressing those issues on behalf of SBL from his skeleton argument:

> *1. First, the whole purpose of the Part 20 Claim was to enable SBL to pass on to Mr and Mrs Munn the liability that SBL incurred to SICA;*
>
> *2. Second, as found in the Main Judgment, Mr Munn, in breach of his duties to SICA had engineered the February 2015 transactions such that the entire benefit of the sale of SICA's goodwill was paid to himself, Mrs Munn and Mr Rees;*
>
> *3. Third, as a matter of principle, the contribution claim against Mr and Mrs Munn is not a free standing cause of action which is capable of giving rise to an asset in SBL's liquidation. It is parasitic upon SBL's own liability to SICA being determined. In a case, such as the present in which the contribution claimant has not paid the principal claimant, implementation of the 1978 Act leads to the conclusion that the contribution sums be paid to SICA;*
>
> *4. There is implicitly within s.1(1) and (4) of the 1978 Act a fundamental linkage between the liability of the claimant for contribution (SBL) and the contributor (Mr and Mrs Munn). The contribution is directly in respect of the liability established or agreed to be paid. It would offend the implicit statutory purpose if the primarily liable person (SBL) who had not itself*

paid the claimant (SICA) was entitled to recover a contribution but apply it for some purpose other than the payment to the claimant (SICA);

5. Fourth, for the contribution claim to be treated as an SBL asset and thus to be distributed in its liquidation, it would need to have the characteristic of property beneficially owned by SBL. In Lomas v JFB Firth Rixson [2011] 2 BCLC 120 Briggs J (as then was) considered whether provisions in a swap agreement entered into by Lehmann Brothers impermissibly interfered with the statutory scheme in the IA86 for the distribution of assets. At [108] he said:

> *"Where the asset of the insolvent company is a chose in action representing the quid pro quo for something already done, sold or delivered before the onset of insolvency, then the court will be slow to permit the insertion, even ab initio, of a flaw in that asset triggered by the insolvency process. By contrast, where the right in question consists of the quid pro quo (in whole or in part) for services yet to be to be rendered or something still to be supplied by the insolvent company in an ongoing contract, then the court will readily permit the insertion, ab initio, of such a flaw, there being nothing contrary to insolvency law in permitting a party either to terminate or adjust what would otherwise be an ongoing relationship with the insolvent company, at the point when it goes into an insolvency process."*

6. The upshot of this distinction is that if the insolvent company had a cause of action for something sold or delivered or paid before liquidation (or administration) then that cause of action would form part of the insolvent estate. If by contrast, the company had at the date of commencement of the insolvency process not yet paid or performed, its cause of action would not generally form part of the insolvent estate.

7. Applying that reasoning to the present case, if SBL had actually paid the Settlement Liability to SICA, then its right to contribution from Mr and Mrs Munn would be an asset within the liquidation. On that scenario SBL would have performed its obligation and would have been enforcing a right of reimbursement. The fact however that it has not paid renders the chose in action (its contribution claim) outside of SBL's pool of assets.

8. Fifth, additionally any payments that are made by Mr and Mrs Munn if paid to SBL would be paid for the specific purpose of contribution to SBL's liability to SICA. They are not payments freely available to SBL. As such, if paid to SBL, they would fall to be treated as payments subject to a specific purpose trust - see Bellis v Challinor [2015] EWCA Civ 59 at [56-60].

9. Sixth, the court has in any event concluded at [160-161] that it has powers under s.423 to order Mr and Mrs Munn to make payment directly to SICA for the benefit received by them.

158. To address the two issues, it is best to start with the anti-deprivation principle and the pari passu rule of distribution. The judgment of the Court of Appeal in ***Lomas v JFB Firth Rixson*** [2012] EWCA Civ 419, [2013] 1 BCLC 28 explains:

> *"[96] The relationship between the anti-deprivation principle and the pari passu rule is both dependant and autonomous. The former is concerned with contractual arrangements which have the effect of depriving the bankrupt estate of property which would otherwise have formed part of it. The pari passu rule governs the distribution of assets within the estate following the event of bankruptcy. It therefore invalidates arrangements under which a creditor receives more than his proper share of the available assets or where (as in the British Eagle International Airlines case [1975] 2 All ER 390, [1975] 1 WLR 758) debts due to the company on liquidation were to be dealt with other than in accordance with the statutory regime.*
>
> *[97] The anti-deprivation principle therefore protects the value of the estate from attempts to evade the insolvency laws and, as a consequence, facilitates the application of the pari passu rule. But their areas of operation are distinct and it is clear that the pari passu rule is only engaged in respect of assets of the estate as at the commencement of the bankruptcy or liquidation. This was why in the British Eagle International Airlines case the decisive issue was whether a debt was owed to the company when the resolution for voluntary liquidation was passed.*

159. Those paragraphs of the judgment sustain Mr Shaw K.C.'s submission that an order to pay a contribution directly to SICA will only offend the pari passu principle (as a result of depriving SBL's estate of the sum ordered to be paid as a just and equitable contribution) if the contribution is an asset of SBL's insolvent estate at the date SBL's liquidation commenced. That was the date SBL moved from administration to liquidation but in other circumstances would be the date of a voluntary liquidation resolution or the date of presentation of a winding up petition which produced the usual compulsory order. The circumstances in which a chose in action would or would not be an asset of the insolvent estate at the commencement date was considered in that case at first instance. That is why Mr Shaw K.C. specifically referred in his skeleton argument to the decision of Mr Justice Briggs, as he then was.

160. Mr Shaw K.C. in reliance upon the passage quoted at paragraph 5 of his skeleton argument submitted that SBL's chose of action (its right to sue for a contribution) was linked to SBL's payment obligation. As a result: had SICA been paid by SBL before the liquidation, the contribution from Mr and Mrs Munn would be paid to SBL and would be part of its distributable estate. If not, "*The fact … that it has not paid renders the chose in action (its contribution claim) outside of SBL's pool of assets"*.

161. I agree that Mr Justice Briggs made clear in the passage quoted in the skeleton argument that there is such a "before and after" payment distinction. Mr Shaw K.C.'s main submission being that the right to claim would not have the characteristic of property beneficially owned by SBL until payment (see paragraphs 4 - 6 of the skeleton argument). That will need to be considered further when determining the second issue. However, its application clearly depends upon whether the court should make a contribution in the first place if SBL will not be paying its share of the "same damage" liability.

162. Surprisingly, no authority has been found which determines the first issue whether in the context of the second issue or otherwise. However, it is interesting to note that the equitable principles applied by the court before statute extended the right of recovery to a wider category of cause of action. These were reviewed by Mr Justice Wright in ***Wolmershausen v Gullick*** [1893] 2 Ch. 514 (see Chitty on Contracts, 34th edition at 19-028). Care must be taken both because these decisions pre-date statute and because many concern co-sureties for whom the law has often evolved specially for their contractual position and some concern indemnities. Nevertheless an overview of the equitable jurisdiction can be identified without needing to present an essay addressing the specific cases referred to and distinguishing their contexts. It is clear that the underlying equitable doctrine was to ensure that in practice one debtor was not left to pay the whole debt without a contribution from those also liable if this could be achieved, and that this would be applied when appropriate to the creditor as well as those liable.

163. Obviously that was easy to achieve when one debtor had paid more than their fair share. However, it was also considered right (subject to the circumstances) to give appropriate relief if execution by the creditor against one debtor only for the whole debt was imminent. For example, as evidenced by a creditor obtaining judgment. The decisions referred to by Mr Justice Wright establish that the remedy could include orders that the other debtors should pay their shares to the creditor. The point being that this should prevent the creditor executing for the whole debt against an individual

debtor with the result that those paying might be ruined before they were able to obtain a contribution for repayment of the amount exceeding their fair share.

164. However, it was important that the creditor's right had been established, and that any order of payment to the creditor would achieve discharge of the contributor's liability. This required payment in full of the liability owed to the creditor by all those liable in accordance with the equitable apportionment. Mr Justice Wright applied those principles in a case where the creditor had not obtained judgment and was not a party to the contribution proceedings. As a result, he declined to order payment to the creditor or to prevent enforcement against one debtor alone or to order the co-debtor to pay that debtor their half share. Instead he decided that all he could and should do was make a prospective order for an indemnity against payment or liability in excess of the half share the debtor seeking the contribution should pay.

165. Whilst ***the 1978 Act*** must be applied on its own terms, it is apparent that its terms and purpose appreciated this pre-statutory approach. ***The 1978 Act*** is concerned with recovery by and contribution to the debtor who has made payment or agreed or been ordered to pay the main creditor. The phrase *"recover a contribution"* connotes the debtor seeking a contribution towards their "same damage" liability regaining something. The phrase *"make a contribution"* is concerned with adding to the amount that debtor paid or will pay. The wording does not suggest a contribution should be ordered without the debtor seeking the order making theirs.

166. Nor would an obligation to make a contribution without the debtor seeking the order paying their justly and equitable share be consistent with the statutory purpose. Namely, to ensure the order or agreement to pay does not lead to one liable party bearing the liability alone and to achieve the discharge of all liable for the "same damage" by payment together of the full amount as just and equitably apportioned (see paragraphs 9-13 above). This is frequently emphasised by case law. It cannot have been intended that this statutory purpose would only apply to the parties from whom a contribution is sought and not from the liable party seeking the contribution. That it would not matter if the outcome would be that those ordered to contribute would end up meeting and discharging the whole liability because the debtor who had sought the contribution did not pay their share of the liability. The statutory purpose is not to ensure that the creditor recovers from the person it has not sued.

167. That is not to lead to the conclusion for the purposes of the second issue that the court cannot make a prospective contribution order anticipating later payment by the debtor seeking the contribution than by those ordered to contribute. Whilst ***the 1978 Act*** does not refer to an express power to order payment directly to the main creditor, it is not difficult to imply that power. The court is empowered to reallocate (control the position) between those liable for the same damage. It has the widest jurisdiction to do so to achieve the statutory purpose by applying equitable principles. That enables, for example, a prospective order to be made. The expected event being payment to the creditor of the just and equitable share allocated to the party claiming the contribution. That being so, the discretion must include the power to make an order for payment directly to the creditor pending payment by the debtor who obtained the prospective order; provided such payment will be made.

168. In this case, settlement of SICA's claim against SBL establishes sufficiently that SICA is intending to pursue SBL for payment of the whole of its loss and damage. Applying equitable doctrines, a just and equitable contribution could be ordered under ***the 1978 Act*** against Mr and Mrs Munn for payment directly to SICA (if permitted by ***the IA***) to prevent SBL having to make earlier payment to SICA of more than its just and equitable share. That would be just and equitable because it would prevent SBL paying the whole debt, and it should ensure that Mr and Mrs Munn will be discharged from liability to SICA as a result of their payment and the future payment by SBL of its share.

169. However, that conclusion depends upon SBL paying its share, and Mr and Mrs Munn being discharged by payment of theirs. If that will not occur, in my judgment, it would be contrary to the wording and purpose of ***the 1978 Act***, and inconsistent with the equitable doctrines which are to be taken into consideration when determining a just and equitable contribution, to make an order requiring contributions to be paid to SICA, as asked. The court should not order a contribution if the debtor seeking the order will not be paying their share. After all, there is no order or agreement which enables SICA to claim recovery against Mr and Mrs Munn. The liability determined by this application is between Mr and Mrs Munn and SBL. It should not be permitted to lay a burden of payment upon them by an order for recovery of a contribution apportioned to take into consideration their liability for the "same damage" when SBL will not pay its share, and when payment of their contribution will not discharge them.

170. The appropriate order in those circumstances is for an indemnity by Mr and Mrs Munn substantially in the following terms:

a) shall be indemnified by Mr Munn for its liability to pay to SICA £2,524,600 but only for any sum in excess of £631,150 (£2,524,600 x 25%) provided the £631,150 is or is going to be paid by SBL.

b) SBL shall be indemnified by Mrs Munn for its liability to pay to SICA £1,814,820 but only for any sum in excess of £1,361,115 (£1,814,820 x 75%) provided the £1,361,115 is or is going to be paid by SBL.

c) Mr Munn shall indemnify Mrs Munn for any payments she must make.

171. Mr Shaw K.C. submitted that the requirement of a threshold payment by SBL (either to occur or made) before Mr and Mrs Munn should have to contribute is neither equitable nor consistent with the reasoning of the judgment. The basis for that is illustrated by the following example which he helpfully hypothesised:

> *"If (after payment of costs and expenses of the liquidation and distributions to preferential creditors), SBL was able to make a distribution of £630,150 to SICA as an unsecured creditor (ie £1,000 less than the threshold), then on the court's reasoning, Mr Munn would be required to pay nothing – either to SBL or directly to SICA for the simple reason that the threshold had not been met. If, by contrast it paid £632,150 (ie £1,000 more than the threshold) then it would be entitled to recover by way of indemnity the £1,000. In that scenario, as between it and Mr Munn, SBL would have borne 99.8% of the total liability to SICA. This is very different from the 25% envisaged by the court's*

reasoning at Paragraph 142. Indeed, SBL would be required to pay the entire £2,524,600 before it could recoup 75% of that sum from Mr Munn."

172. Mr Shaw K.C. submitted, based upon the logic of the judgment, that Mr Munn should be ordered to pay directly to SICA (or to SBL for SICA's benefit) three times and Mrs Munn (assuming no payment by Mr Munn) one third of whatever sum is paid to it by SBL. He submitted that this is consistent with the decision that Mr Munn should bear 75% and Mrs Munn 25% of the liability of SBL applicable to each of them.

173. This too is a submission which needs to be decided in the absence of authority and in the context of Mr and Mrs Munn not having the assistance of a lawyer to present their case. The issue needs to be addressed from the perspective (already identified and addressed in the judgment) that the purpose of ***the 1978 Act*** is to achieve redistribution of the burden of paying the sum the party seeking the contribution has to pay in a manner which is just and equitable between them. It does not relieve SBL of its liability to SICA but should produce a result that SBL does not have to pay more than its just and equitable share or can recover any sum obtained from it by SICA in excess of that share. Mr Shaw's submission, it seems to me, subtly changes that perspective. His proposal is that SBL should always be entitled to recover the just and equitable allocation for any payment made or to be made.

174. The distinction can be seen by reference to the illustration. It proposes that if SBL paid £632,150 (ie £1,000 more than the threshold) then it would be entitled to recover by way of indemnity the £1,000. However, the outcome would in fact be that it would be entitled to obtain the whole of the balance of its liability to SICA from Mr Munn to ensure a fair distribution as between itself and Mr Munn (whether by payment direct to SICA or by a payment to be held by SBL for payment to SICA). That is because once SBL paid or is in the position that it will pay its, for example, 25%, it should be entitled to ensure SICA does not recover the 75% from its assets. It does that by ensuring payment to SICA by Mr and Mrs Munn (as appropriate) of their respective share of the total liability.

175. That outcome is consistent with the pre-legislative approach of Mr Justice Wright in ***Wolmershausen v Gullick*** (as considered at paragraphs 162-164 above to which paragraphs 165-167 apply). In simple terms, the redistribution is addressed by dividing the shares to be paid not by dividing the amount of the payment in fact made or to be made by the liable party seeking the contribution. The purpose is to prevent SBL having to pay more than its share not to avoid it paying less than its share. I consider this to be consistent with the approach taken in ***Dubai Aluminium Co Ltd v Salaam*** (above) and, therefore, I do not accept Mr Shaw K.C.'s submission (using his example at paragraph 7 of his Note) that "if say SBL were to make a distribution of £300,000 to SICA [not the full share of £631,150], Mr Munn would be liable to make a payment of £900,000".

176. I accept this is not straight forward in the context of a liquidation because SICA will potentially prove for the settlement sum not the apportioned share, and the pari passu distribution calculation will be affected accordingly depending upon recovery by SICA and/or SBL from Mr and/or Mrs Munn. However, that difficulty would also arise on Mr Shaw K.C.'s alternative proposition. In any event it is a difficulty I have not been asked to address either with specific reference to apportionment or with

general reference to the conduct of the liquidation. No doubt that is because the issue of distribution has not yet arisen. It is a difficulty which may after all have a trivial effect upon the quantum of the dividend, and its potential relevance will also depend upon the financial position of Mr and Mrs Munn which is apparently dire. It would be inappropriate for me to opine in those circumstances. Plainly the liquidator can seek directions under the ***Insolvency Act 1986*** if required.

177. The fact that it appears that the threshold for the contribution will not be met (the Estimated Outcome Statement prepared by SBL's former Administrators estimated a surplus of assets after payment of Administration costs and expenses and dividends to preferential creditors of £489,950 but this needs updating, not least to include costs and expenses of the liquidation) means it is unnecessary to further consider the second issue, namely whether an order to pay directly to SICA would offend the pari passu principle. However, I will do so in case that is not so.

178. SBL's right to sue Mr and Mrs Munn for a contribution (its chose in action) existed at latest when SBL settled SICA's ***section 423 IA*** claim against it. The chose in action does not exist only when the court decides a contribution should be paid or when payment is made. In any event, if SBL pays more than its just and equitable share before or during the liquidation, Mr and Mrs Munn should obviously pay the over-paid amount to SBL as (part of) their contribution. SBL will be recovering (regaining) the sum it over-paid. Mr and Mrs Munn will be fulfilling their liability to SBL. The sums paid will form part of the realisations to be distributed in accordance with the statutory insolvency waterfall.

179. Insofar as SBL is seeking a prospective order (i.e. before it makes any payment exceeding it just and equitable share, as it will), there is no reason why the court cannot exercise its jurisdiction to order payment directly to SICA. Mr and Mrs Munn's payment will not be a recovery that will form part of SBL's insolvent estate and, therefore, be subject to ***the IA's*** statutory waterfall. It will be a payment of their fair share of a liability the court has decided is owed to and should be paid by them to SICA, albeit before SBL pays the balance of the liability. It will not a liability owed by them to SBL.

180. The second issue will only present difficulty if SBL was not going to pay its just and equitable share. Then it might be argued that a contribution to be paid by Mr and Munn would represent a payment of SBL's liability. That being because there is no liability established between SICA and Mr and Mrs Munn and no payment of SBL's liability. If that argument is correct, the liability should be paid to SBL because SICA is an unsecured creditor and should only receive its pari passu share of any distributable realisations. However, the difficulty and argument can only arise if the court decides to order a contribution in circumstances of SBL not going to pay its just and equitable share. That will not happen for the reasons given in answer to the first issue addressed under this the Insolvency Issue.

H) Conclusion

181. For the reasons set out above I have decided:

(1) The answers to the Principal Liability Question are:

(a) SICA sustained loss by receiving only £1.00 for its Goodwill when the market value was £2,524,600. This decision is based upon the expert evidence of Mr Holland. He accepted the £2,755.000 market valuation of Messrs Bellamy and Stringfellow less a deduction of 40% of the deferred consideration paid by ETL for its purchase of the CHL shares sold to it, which he opined was appropriate to reflect Retention Value. This valuation was accepted by SBL. Mr Mesher's lower valuation is rejected.

(b) £2,524,600 is "the same damage" for which both SBL and Mr Munn are liable based upon its ***section 423 IA*** liability and Mr Munn's liability for breach of duty as a director of SICA. It is less than the settlement figure agreed by SBL but contributors cannot be required to contribute towards or indemnify against a sum which is more than the "same damage" for which they are liable.

(c) £1,814,820 is "the same damage" for which both SBL and Mrs Munn are liable. Mrs Munn's liability to SICA under ***section 423 IA*** is to restore the sums received from the sale of the CHL shares she jointly owned with Mr Munn that were attributable to the value of the Goodwill. Mr Holland's expert opinion upon valuation of that amount is accepted. It is based upon the sum received on completion of the sale of the shares, 70% of (£2,304,000 net of £57,000 net assets) plus 60% of the deferred consideration.

(d) This is a joint liability. Whilst that fact does not prevent consideration of relevant factors attributable only to Mrs Munn, she cannot rely upon any change of circumstances to reduce or extinguish that sum. That is because her case is not exceptional, which is the requirement to be met because SICA is insolvent.

(2) The answers to the Apportionment Question are:

(a) The Goodwill Issue and the Restitution Issue only arise as part of the process required to achieve a just and equitable contribution decision. SBL and Mr and Mrs Munn gained the value of the Goodwill. SBL by its receipt and Mr and Mrs Munn through the CHL share sale consideration. The starting point should be a 50:50 apportionment of the "same damage" suffered by SICA subject to considering the other relevant factors. The Mr Rees Issue is irrelevant.

(b) A just and equitable split between SBL and Mr Munn when taking into consideration the other factors of causative potency and moral blameworthiness is a 75:25% split of the £2,524,600 in favour of SBL.

(c) Assuming payment can be made by Mr Munn, Mrs Munn's joint liability for the £1,814,820 will be subject to an indemnity by Mr Munn. In practice she should not have to make any payment and should be

protected from having to do so on the premise that Mr Munn can and will pay £1,814,820.

(d) To the extent that Mr Munn will not or cannot pay, as appears probable from the evidence, he passes out of the picture. The liability for the "same damage" will need to be apportioned between SBL and Mrs Munn alone.

(e) A just and equitable split requires Mrs Munn to contribute 25% of £1,814,820 or of such balance of that sum left after payment by Mr Munn of any part of his contribution liability.

(f) However, SBL's financial position means it appears probable that it will not pay its apportioned share of the "same liability". No contribution recovery should be ordered if that is the case. To do so would be contrary to the provisions and purpose of ***the 1978 Act***.

(g) The correct order of apportionment to make in those circumstances is that SBL should be indemnified by Mr Munn for its liability to pay to SICA £2,524,600 but only for the sum in excess of £631,150 (£2,524,600 x 25%) provided the £631,150 is or is going to be paid by SBL. SBL should be indemnified by Mrs Munn for its liability to pay to SICA £1,814,820 but only for the sum in excess of £1,361,115 (£1,814,820 x 75%) provided the £1,361,115 is or is going to be paid by SBL. Mr Munn shall indemnify Mrs Munn for any payments she must make.

(h) Therefore, Mr Munn's indemnity will not take effect should SBL not pay to SICA it's just and equitable share of £631,150. The same applies to Mrs Munn except the just and equitable sum in respect of the activation of her indemnity is £1,361,115.

(i) Should SBL pay its just and equitable share, Mr and Mrs Munn (as appropriate) should pay their contributions either directly to SICA or to SBL on terms that it will be held for SICA and not form part of SBL's insolvent estate.

(j) Should SBL pay more than its just and equitable share, Mr and Mrs Munn should first pay the sum equal to the excess to SBL to form part of the insolvent estate, and second (or at the same time) the balance of the liability either directly to SICA or to SBL on terms that it will be held for SICA and not form part of SBL's insolvent estate.

Order Accordingly