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Claim No: BL-2023-001158

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

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

Date: 27 March 2026

Before :

RICHARD SPEARMAN K.C
(sitting as a Deputy Judge of the Chancery Division)

Between :

THE WINE ENTERPRISE INVESTMENT SCHEME LIMITED (In Liquidation)
(acting by FINBARR O'CONNELL and COLIN HARDMAN in their capacity as Joint
Liquidators)

Claimant

- and -

CROWE U.K. LLP (formerly CLARK
WHITEHILL LLP)

Defendant

Patrick Lawrence KC and Dan Stacey (instructed by Fieldfisher LLP) for the Claimant

Helen Evans KC (instructed by Clyde & Co LLP) for the Defendant

Hearing dates: 14-17, 20-24 October 2025, 10-11 November 2025, 15-16 December 2025

JUDGMENT

This judgment was handed down remotely at 10.30am on 27 March 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Richard Spearman KC:

INTRODUCTION AND NATURE OF THE DISPUTE

1. This claim arises out of the relatively short and ultimately unhappy existence of The Wine Enterprise Investment Scheme Limited ("the Company" or "TWEISL"). The business of the Company was marketed to investors as providing them with an opportunity to invest in wine while also obtaining Enterprise Investment Scheme ("EIS") tax relief on their investments. Edward FitzGerald's translation of the Rubaiyat of Omar Khayyam speaks of ending up "*sans* wine" and "*sans* song". The investors are already without wine. If this claim fails, they will also have little reason for song.
2. The Company had two directors, Mr Andrew della Casa ("AdC") and Mr Rodney Birrell ("RB"). They also ran other wine-related investment companies or operations. These included The Wine Investment Fund Limited ("TWIFL"), Huntsman Wine EIS Ltd ("Huntsman"), and The Wine Investment Fund ("TWIF"), as well as Anpero Capital Limited ("Anpero"), which was the Scheme Manager. They were the ghosts at the feast in this litigation. In materials issued by the Company to prospective investors, AdC was said to be a law graduate from Oxford University with over 25 years' experience in the financial sector, who held or had held directorships in a number of investment funds and European pension fund and fund management companies. RB was said to have a degree in economics from Queen's University as well as two law degrees from McGill University, to have practised corporate and finance law for five years, and to hold or have held directorships in a number of international companies and investment funds. They were both stated to be directors of Anpero, which also had two further employees.

3. The Company raised money by issuing shares, starting in 2012 and ending in 2016, before (as had always been the intention) entering into Members' Voluntary Liquidation ("MVL"). This happened pursuant to a resolution passed at a general meeting of the shareholders on 10 January 2020. AdC signed a declaration of solvency which appended a statement of the Company's assets and liabilities as at 9 January 2020 showing £4,515,339 cash at bank. Mr Pittman and Mr Higley of Price Bailey LLP were appointed as MVL liquidators. They subsequently discovered that, in truth, the Company had only £6.50 in the bank. Attempts to trace or recover further sums or assets proved fruitless, the shareholders became dissatisfied and replaced the MVL liquidators, and the Company entered into Creditors' Voluntary Liquidation ("CVL") on 27 October 2020.
4. The claim is brought in the name of the Company by the CVL liquidators, Mr O'Connell and Mr Hardman of S&W Partners LLP. In substance, it is brought for the benefit of the shareholders, as the Company appears to have no, or no substantial, creditors.
5. The Defendant ("Crowe") is the firm which audited the Company for the financial years ending ("Y/E") 31 December 2012 to 31 December 2018. The claim alleges negligence in all 7 audit years. The heart of the Company's case is that both AdC and RB were dishonest; that the Company was, in truth, operated as nothing (or little) more than a form of "Ponzi" scheme (as, it seems, were other similar ventures run by AdC and RB, such as TWIFL and Huntsman); that in the course of carrying out the audit in each of the 7 years Crowe ought to have spotted that improprieties existed and that (or at least that there were grounds to suspect that) AdC and RB were perpetrating a fraud; and that the position was so serious that Crowe ought to have resigned. The Company contends that the result of Crowe acting as it ought to have done is that the findings or concerns that it ought to have made or had would have been acted on, and all its losses avoided.
6. This brief summary flags up two unusual features of the present case, each of which significantly complicated the issues for trial.
7. First, a claim to recover all the sums that were lost by the Company is made in relation to each of 7 successive audit years. There is no claim for trading losses, so the lion's share of each of these claims comprises the total sum subscribed by shareholders. According to the Company's quantum expert, Mr Pearson, that sum was £4,235,160. In calculating the Company's losses, Mr Pearson then added various other sums in respect of each of the 7 years, including (a) a figure for recoveries of cash, to which he attributed a 90% prospect of success if Crowe had "blown the whistle" at Y/E 31 December 2012, falling to a figure representing a 50% prospect of success if that had not happened until the time of the audit for Y/E 31 December 2018, and (b) interest at 8% on various sums up to 1 October 2025. In the result, according to Mr Pearson's calculations: (i) the Company's largest potential claim (on the basis that the operative date is the end date of the Company's financial year on 31 December 2012) is

£8,423,666; (ii) the value of that claim declines steadily as time moves forward; and (iii) the claim reaches its lowest value in relation to the audit for Y/E 31 December 2018, in the amount of £3,352,635.

8. Mr Patrick Lawrence KC, who appeared with Mr Dan Stacey for the Company, accepted that the Company could not make double recovery, let alone multiple recoveries. Nevertheless, he contended that the Company had a free-standing cause of action in respect of each of the 7 audit years, and was entitled to an award of damages assessed by reference to the consequences of Crowe's breaches of duty occurring within each period. In the Company's Skeleton Argument for trial, it was submitted that the "practical consequence" was that the Company was entitled to an award of damages "assessed by reference to the year in which Crowe's breaches of duty caused the highest loss". Based on Mr Pearson's figures, at the start of the trial that year appeared to be Y/E 31 December 2012. In this regard, I believe that "highest loss" must be intended to refer to a claim for damages including interest. I cannot believe that the Company's Counsel were seeking to restrict the Company to a claim for the year in which the claim for damages achieved its highest level before interest is taken into account, if a claim for another year would have a higher value once interest has been taken into account.
9. At the end of the first week of the trial, however, Mr Lawrence and Mr Stacey submitted a Note in which they recognised that it made sense for the Company to concentrate on the audit for Y/E 31 December 2016. This stance was driven by the considerations that (i) the audit for that year began in the summer of 2017, (ii) the Company's stock of wine was at a value of £4.375m (almost the highest it ever became) as at 1 December 2017, and (iii) once action fell to be taken, wine afforded a more promising prospect of recovery than cash, because cash could more readily be dissipated by the directors.
10. In addition, although Mr Lawrence did not focus on this point in this context, one argument advanced by Crowe is that the Company has to give credit for the benefits that it received flowing from any breach of duty established against Crowe. In short, Crowe contends that (i) the Company only gained further investments over time because it carried on trading, (ii) on the Company's case, Crowe caused the Company to carry on trading when it would otherwise have been placed into liquidation, and (iii) accordingly, when claiming compensation from Crowe for losses flowing from that state of affairs, the Company also has to give credit for any benefits that also flowed from that state of affairs. This argument, if right, could wipe out the Company's claim for subsequent losses for each of the early audit years. However, it is not available in respect of any breach of duty in relation to the audit for Y/E 31 December 2016. This is because by the time of that audit all the investments by the shareholders had already been made.
11. Mr Lawrence further accepted that, if the Company could not succeed in respect of that audit year, it could not succeed in respect of any year. Among other things, this is

because it was in that year that Crowe first discovered that Lilliput (see further below) was a related party to the Company (a fact not previously revealed to Crowe by AdC).

12. However, at the same time as he suggested that the Court should focus on that audit year, Mr Lawrence also reserved the Company's right to maintain its case that it was entitled to recover on any of its 7 causes of action. This reservation of rights was said to be necessary, first, in case Crowe argued that the Company was restricted to a claim referable to some earlier year, and, second, having regard to the possibility of an appeal.
13. This approach – of inviting the Court to focus on the audit for Y/E 31 December 2016, while reserving the right to rely on any of the other 6 causes of action – seemed to me to be unsatisfactory and fraught with difficulty. As far as I could see, the first ground was circular: it was only because the Company persisted in maintaining claims for earlier years that Crowe might be in a position to say that the Company's claim should be determined by reference to an earlier year. If the Company was not advancing a cause of action in respect of any earlier year, and in light of Crowe's stance on liability and causation, it would hardly lie in Crowe's mouth to say that the Company had a viable claim for an earlier year. As to the second ground (i.e. the possibility of appeal), I was concerned that if I concentrated on the Y/E 31 December 2016 alone and did not make findings of fact in respect of the other years, and there was an appeal against my findings in respect of that year which gave rise to the need to consider one or more of the other 6 causes of action, that might be regarded as unhelpful by the Court of Appeal.
14. In addition, the same Note stated that, even if neither of the grounds that were said to require this reservation of rights materialised, there might still be a need to "determine discrete issues that arise in relation to other audit periods", such as whether "missing cash" would have been recoverable. I did not understand how such issues in relation to any other audit period could arise unless the Company had a cause of action in relation to that audit period, or how any such issues could be resolved without resolving whether the applicable cause of action was made out. Further, the Note made no attempt to address the question of interest (which constituted about £3.8m of Mr Pearson's largest figure for loss of £8,423,666). Without resolving that question, it seemed to me impossible to determine "the year in which Crowe's breaches of duty caused the highest loss", and thus the "practical consequence" of the Company's approach.
15. Accordingly, it seemed to me that, in reality, the Company was still requiring the Court to determine each of the 7 causes of action, including as far as I could see the issue of entitlement to interest, and then only later to strip out any element of double recovery.
16. The second unusual feature of the present case arises from the premise that the only individuals who were in a position to take actions on behalf of the Company – namely

AdC and RB – were fully aware of (and indeed had engineered) all the matters which, it is said, should have caused Crowe to detect (or at least suspect) fraud. Accordingly, if Crowe reported any findings or concerns to them (i) this would not tell them (or indeed the Company) anything that was not already known to them and (ii) there is no rational basis for thinking that this would have resulted in any losses being avoided. As Lady Hale observed in *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd* [2020] AC 1189 at [36]: “The auditor’s duty is to report on the company’s accounts to those having a proprietary interest in the company or concerned with its management and control. If the company already knows the true position (as in *Berg Sons & Co Ltd v Adams* [1993] BCLC 1045) then the auditor’s negligence does not cause the loss”.

17. In order to establish causation, the Company therefore needed to make good a case that Crowe should have taken action which would have brought the findings or concerns that it is said Crowe ought to have made or had to the attention of others, who were in a position to take, and who would in fact have taken, steps to recover existing losses and prevent further losses. The only “others” put forward on the Company’s case were the shareholders. As will be seen, the Company’s case in this regard was protean.
18. The Company’s financial year ended on 31 December. The first set of financial statements covered the period from the Company’s incorporation on 4 November 2011 to 31 December 2012. The remainder each covered a single financial and calendar year.
19. In the first audit year, Crowe was told by AdC that £137,000 of the Company’s money was held with Investec Specialist Bank (“Investec”) in a pooled arrangement. Thereafter, a significant feature of the Company’s way of operating was that substantial sums were claimed to have been deposited with Lilliput Holdings Limited (“Lilliput”), a Bermudan company. In the financial Y/E 31 December 2012 to Y/E 31 December 2016, the financial statements recorded cash and cash equivalents ranging from £189,199 to £2,262,397. In 2016, Crowe learned for the first time that AdC was a director of Lilliput, and the notes in the financial statements for that year refer to the cash amount as being “held on deposit with Lilliput Holdings Limited, a company in which Andrew della Casa is a director”. For financial Y/E 31 December 2017 and Y/E 31 December 2018, amounts of £384,025 and £2,995,150 respectively, allegedly held with Lilliput, were recorded in the financial statements as trade and trade receivables.
20. It later transpired that Lilliput did not even have a bank account. In an interview with the CVL liquidators on 20 November 2020, AdC stated that monies were in fact paid into a suspense account called the Wine Investment Fund (i.e. TWIF) General Account. It also emerged that the only other director of Lilliput was AdC’s sister, who he described to the CVL liquidators as a housewife. It was not apparent that

AdC's sister had any relevant business experience, or any real involvement with Lilliput.

21. Crowe admitted that it was in breach of duty, although not to the extent alleged by the Company. Crowe accepted that in a number of respects its work and enquiries did not go far enough, but disputed that any loss was caused to the Company by any breach of duty by it. Crowe contended that it would only have been appropriate for it to resign as auditor if its enquiries indicated that AdC and RB may have behaved fraudulently, and that the actions that it would have been appropriate for it to take falling short of resignation (such as issuing a qualified audit opinion, or disclaiming its audit opinion) would not have been sufficient to cause shareholders to take steps to protect their investments. As part of its case that it would or might not have made any difference even if Crowe had taken all appropriate steps and made all appropriate enquiries, Crowe suggested (i) that in response to further investigations by Crowe, the Company and/or Lilliput might have produced sufficient evidence to satisfy Crowe, or at least to cause Crowe only to mention in its audit reports matters which would not have prompted the shareholders to take action, and (ii) that even fully appropriate steps and enquiries would not have prevented AdC and RB from misappropriating monies in any event.
22. It was an important feature of Crowe's case, as presented by Ms Helen Evans KC, that the Company was required to prove what would have happened if Crowe had made all the enquiries it ought to have made and had taken all the steps it ought to have taken. Ms Evans relied, among other things, on the judgment of Bryan J in *AssetCo v Grant Thornton* [2019] Bus LR 2291 ("*AssetCo*") at [748]-[751], including the statement at [750] that "the burden of proof is on AssetCo to prove the fact and amount of its loss – see the judgment of Lord Sumption JSC in *Hughes-Holland v BPE Solicitors* [2018] AC 599, para 53. Accordingly, for present purposes, AssetCo bears the burden of proving those facts which it needs to establish on the counterfactual". Ms Evans also relied on passages in the judgment of the Hong Kong Court of Appeal in *Guang Xin Enterprises v Kwan Wong Tang & Fong* [2003] HKCU 2248, which I consider further below, and *Bullen & Leake & Jacob's Precedents of Pleadings*, 19th Edn, at [85-09]:

"The onus of proving causation is on the claimant. Causation of loss often involves more complex issues in a professional negligence case than in an ordinary negligence claim, making it generally necessary to set out the material facts relied upon as connecting the negligence to the damage suffered."
23. This emphasis on the issue of causation was understandable in light of the concessions concerning breach of duty that were contained in Crowe's Amended Defence and in Crowe's Skeleton Argument for trial. These included:

- (1) At [37.7] of the Amended Defence:

- “(a) It is admitted that Crowe did not carry out adequate enquiries to obtain an understanding of the entity, Lilliput, that was said to be holding funds on behalf of [the Company].
 - (b) Had further investigations been carried out once Lilliput had been identified as holding the funds in 2013, it is likely that Lilliput would have been identified as a related party.
 - (c) If this had happened, Crowe would have had to act with scepticism, consider the business rationale for the arrangement and the risk of fraud and other undisclosed transactions, and assess the ability of Lilliput to repay the amounts owed by seeking evidence as to this.
 - (d) Once Crowe identified Lilliput as a related party in 2016 it should have applied further professional scepticism. In particular it should have:
 - i. Questioned the reasons why the disclosure was only made in 2016;
 - ii. Not have accepted the Deposit Trade Certificates and balance sheets provided by [AdC] without further enquiry.”
- (2) In [88] of Crowe’s opening Skeleton Argument for trial Crowe accepted that:
- “(a) It did not obtain sufficient audit evidence as to the existence and recoverability of the sums held by Investec and Lilliput. Whilst Crowe clearly did some work - such as obtaining the “money market trade” document, Lilliput [Deposit Trade Certificates] and/or Lilliput accounts, that did not go far enough.
 - (b) Until Y/E 2017, [the Company] incorrectly recorded the Lilliput balance as a cash balance rather than a debtor balance due from a related party, which was not challenged by Crowe.
 - (c) The emphasis of matter in the Y/E 2018 [i.e. the wording produced by Crowe that “The directors have emphasised the steps they have taken in order to assess the recoverability of the [Lilliput] balance”] did not go far enough in that it did not solve the lack of audit evidence and it read in a way that suggested that Crowe was satisfied as to the position.
 - (d) Crowe did not adequately identify the audit risks in relation to the commingling of funds [this being a reference, in particular, to the fact that the Company’s bank statements, which were obtained by Crowe for audit purposes, contained many counterparty references to “TWIF General”, “TWIF General Deposit” and in one case a counterparty reference to “Wine Inv General”].

- (e) Crowe should have sought audit evidence that was independent of the directors or which independently corroborated the evidence tendered by the directors.”
24. The concessions that, if Lilliput had been identified as a related party, (i) “Crowe would have had to act with scepticism, consider the business rationale for the arrangement [to deposit funds with Lilliput] and the risk of fraud and other undisclosed transactions, and assess the ability of Lilliput to repay the amounts owed by seeking evidence as to this” and (ii) “Crowe should have sought audit evidence that was independent of the directors or which independently corroborated the evidence tendered by the directors [which included the Deposit Trade Certificates (“DTCs”) from Lilliput and the balance sheets of Lilliput]” make an unpromising start for Crowe’s case on liability.
25. On the face of it, quite limited and basic enquiries would, or should, have revealed that the arrangement with Lilliput was a fabrication. For example, it would not have been possible to obtain (i) any bank statements, or any other banking documents, showing that monies were on deposit with Lilliput, because it had no bank account, or (ii) any independent audit evidence that Lilliput held the monies, because it never held them.
26. As to obtaining independent corroboration of the evidence that AdC provided to Crowe, that evidence was untrue. Accordingly, no accurate corroboration of that evidence would have been available either.
27. Although Crowe was nevertheless able to suggest that, if Crowe had acted with scepticism, AdC or some third party might nevertheless have assuaged Crowe’s concerns about the reliability of that evidence, presumably by further fabrications or inaccuracies, Crowe was not able to identify any such third party, or to put together any positive case in this regard. Neither the DTCs nor the balance sheets were impressive to begin with, but once it emerged that Lilliput was not, in fact, holding any of the Company’s money, those documents would be exposed as concerted fabrications. That would have been sufficient in itself to show that AdC was dishonest. People do not lie without a reason, and the obvious likelihood here is that the monies had been misappropriated by AdC, either alone or with others, giving rise to further dishonesty.
28. With regard to the Company’s alleged 7 causes of action, Ms Evans submitted that the proper approach for the Court to adopt is to identify the first date (if any) on which liability and causation are made out, and to quantify the loss at that date, and that “it would be nonsensical for the Court to quantify loss on numerous alternative bases for each year thereafter”. In this context, it is important to recognise that it was the Company’s case that if and when the shareholders had learned of the fraud (or a real risk of fraud) they would have taken steps to protect the Company’s position, and would have put the Company into liquidation. There is no suggestion that, in the circumstances postulated, the Company would have carried on trading. Accordingly,

the Company's case that the Court can and should determine 7 successive causes of action in its favour involved the propositions that: (i) the losses arising from the first year in which liability and causation are made out should be assessed on the basis of the counterfactual that, if Crowe had acted as it should have done, instead of continuing to trade (and thereafter to get in, and ultimately to lose, further shareholder funds) the Company would have been placed into liquidation and would have ceased trading; but (ii) when assessing losses for the next year, the Court should (necessarily) start from the premise that, contrary to that counterfactual, the Company had carried on trading, and then assess losses for that year as in (i); and (iii) the same process should be repeated for each successive year. This approach seemed to me to be wrong in principle. Further, Mr Lawrence did not identify any case in which losses have been assessed in this way.

29. Therefore, at first sight, Ms Evans' submissions seemed attractive. As against that, however, it seemed to me potentially unjust to fix the Company with the consequences of its lawyers choosing to plead and pursue 7 successive causes of action if, in reality, the life of the Company did not come to an end after the audit for Y/E 20[xx], and the Company had a more valuable claim against Crowe in respect of a later audit year. It would also be a bold move to stop the factual analysis after the first year in which I considered that liability and causation were made out, in case the approach advocated by Ms Evans turned out to be wrong, and my decision was subject to appeal. In that event, there would be no findings of fact for later years, and a re-trial might be needed.
30. In the result, I decided that I had no option but to consider the cause of action in relation to each audit year, although this complicated my task and has lengthened this judgment.
31. At the end of the day, all the Company's assets were lost. Moreover, broadly speaking, the only assets that the Company ever had comprised the funds invested by shareholders. There were sums earned as interest (or, more accurately, claimed by AdC to represent earnings by way of interest), and there may have been some minor trading profits. However, the highest value of the wine that the Company was said to hold was £4.465m, and this falls to be compared with a total shareholder investment of £4.235m.
32. Further, if there was a breach of duty in any year which resulted in losses, as a matter of principle those losses would not be limited to any assets that the Company had and lost in that particular year but (on the premise that there was no break in the chain of causation between the breach of duty in that particular year and the losses which were incurred in later years) would extend, in addition, to any further assets that the Company lost in later years. In these circumstances, one would expect the Company's claim to be broadly for the same amount in relation to whichever year(s) it succeeded in establishing breach of duty and causation. Essentially, the comparison is between (i) what it would have had if Crowe had not acted in breach of duty (i.e. in substance £4.235m) and (ii) what it ended up with in light of Crowe's breach(es) (i.e. £0). There

is a larger potential claim for Y/E 31 December 2016, as wine worth £4.375m might have been saved in that year, although this sum falls to be reduced by the cost of sales, which are in dispute.

33. The principal reason why Mr Pearson's calculations produce such disparate figures in relation to different audit years would appear to relate to claims for interest. Thus, in respect of his first date of 31 December 2012 his calculations include a claim for "interest on losses" (at 8% pa) in the sum £3,671,087, and this claim falls inexorably over time and reaches its lowest value in relation to the audit for Y/E 31 December 2018 in the sum of £1,051,105. These figures suggest that, as a starting point, the earlier the year in which the Company is first able to establish breach of duty and causation, the greater the value that its claim will have. However, the Company cannot have lost any assets before it acquired them, and it can only claim interest on lost assets from the date when they were lost. The assets were (i) acquired at the same time and (ii) lost at the same time, regardless of the year(s) in which breach of duty and causation are made out. If the claim for interest on losses declines for each successive year, this only makes sense if the claim for loss of assets also declines for each successive year (presumably on the basis that some assets had been lost before the inception of each successive year).
34. However, this is not how I understood the Company's case to be run by Mr Lawrence. Nor does it accord with the claim to be entitled to recovery in relation to the loss of wine having a value of £4.375m in respect of the audit for Y/E 31 December 2016. The Company cannot claim that wine as an asset unless it owned that wine; it cannot have owned that wine unless it gave consideration for that wine; and it can show no means of making payment other than the shareholder funds of £4.235m (or possibly some slight earnings derived from those funds, such as interest and trading profits). Thus, those funds cannot have been lost until after that wine was purchased by the Company, and indeed until after the Company lost that wine or the proceeds of sale of that wine.
35. The fact that the proceeds of sale of £4.375m of wine were ultimately lost means that, in principle, the Company can claim the entire £4.235m as being a loss that flows from any year(s) in which it establishes breach of duty and causation. In my view, however, it is inconsistent for the Company to run at the same time, not as alternatives but as successive claims, both (i) a case that the £4.235m was lost in stages over time (attracting a greater claim for interest in respect of earlier audit years than in respect of later audit years) and (ii) a case that £4.375m of wine was lost as a result of Crowe's breach(es) of duty in the audit for Y/E 31 December 2016. I had grave reservations about whether the Company was entitled to do this. It is one particular anomaly arising from asking the Court to make an award of damages in respect of each audit year on the basis of the counterfactual that the Company would have stopped trading, then asking the Court to make an award of damages in respect of the next audit year

on the basis that this counterfactual does not apply, and so on for each successive audit year.

36. At all events, whether as a matter of substantive principle, or as a matter of the exercise of the Court's discretion with regard to the award of interest, and especially as the Company invited the Court to focus on the audit for Y/E 31 December 2016 and the loss of the stock of wine worth £4.375m in connection with that year, I consider that the Company's claim to interest on the loss of the £4.235m that was injected by the investors should be confined to a claim starting on the date when that sum was finally lost. This is the same as the date when the Company lost the proceeds of sale of that wine.
37. Turning to Crowe's position concerning the second unusual feature of this case, Crowe maintained that, quite apart from the issue of what should have been reported by Crowe, as it was the Company's case that both AdC and RB were steeped in wrongdoing, it was impossible to see what good reporting to the Company's officers would have done.
38. As there was no obvious answer to that point, much of the trial was concerned with the following issues. First, whether there was available to the Company on the pleadings (i) a case that Crowe had a duty to report the findings or concerns that the Company said Crowe should have made or had directly to the shareholders, or alternatively (ii) a case that if Crowe had acted properly – in particular, by resigning as auditor – Crowe's findings or concerns would have come to the attention of the shareholders in any event. Second, if not, whether the Company should be granted permission to amend to plead either of these cases. Third, if such claims were available, whether, in the particular circumstances of this case, the same were made out. I address these issues below.
39. The contents of the resignation notice or other communication that, on the Company's case, Crowe ought to have composed and sent is a matter in relation to which there was little evidence, and in relation to which I received little help by way of submissions. This point is of some importance, because it has a direct bearing on the issue of what the shareholders would have done upon learning of those contents. This issue was highly contested. In short, Mr Lawrence contended that it is obvious that the shareholders would have taken prompt action, which would have been effective. Conversely, Ms Evans submitted that what the shareholders would have done, and when, was neither clearly nor consistently articulated by the Company, and that the suggestion that any of their putative courses of action would have been effective was unconvincing.
40. Crowe advanced no case on limitation of actions, and abandoned some other points that were raised on the pleadings. However, both sides raised a number of further issues.

41. Accordingly, without ignoring the issues identified above, the main issues for trial were:
- (1) Whether, in respect of each of the 7 successive audit years, Crowe acted in breach of duty to any greater extent than is admitted?
 - (2) What, in relation to each audit year, should Crowe have done, if acting competently?
 - (3) If Crowe had acted competently, what would have happened (including what would the shareholders have learned, and when and how would they have learned it)?
 - (4) What would the shareholders have done on learning that information, and when and how would they have done it?
 - (5) What difference would any actions taken by the shareholders have made?
 - (6) How should the Company's 7 successive causes of action be addressed?
 - (7) Whether, in principle, the Company is required to give credit in its claim(s) against Crowe for the benefit of the shareholder funds that it received?
 - (8) If the answer to (7) is affirmative, (i) whether the shareholders had claims against the Company to recover their investments, and (ii) if they did, to what extent should any such credit be adjusted to take account of those contingent liabilities?
 - (9) What, if any, sums are recoverable in respect of liquidation costs and legal costs (in particular (i) whether the costs claimed by the Company are reasonable, and thus recoverable in principle, and (ii) how those costs compare with the costs of an earlier liquidation, which would have been incurred on the Company's case even if Crowe had acted as the Company claims Crowe ought to have done)?
 - (10) If the Company has a claim for loss of wine, (i) whether the pleaded issues permit Crowe to advance a case that other entities – such as TWIFL and Huntsman – had a claim to beneficial ownership of the wine that was said to be an asset of the Company, such that a discount should be applied to the Company's claim to have lost that wine as a result of Crowe's breach(es) of duty, (ii) if not, whether Crowe should be granted permission to amend to plead such a case, and (iii) if such a case is available, whether it is made out; also (iv) irrespective of the answers to points (i)-(iii), what deduction should be made in respect of cost of sales?
 - (11) What, if any, deduction should be made for the Company's contributory fault?

(12) What sum should be awarded in respect of interest and why? How should the disputes over rate, period and various heads of loss be decided?

42. I am very grateful to all Counsel for their comprehensive written and oral submissions.

THE WITNESSES OF FACT

43. The Company called three witnesses. They were all reliable, and I accept their evidence.

44. Mr Clark is a practising solicitor, who qualified in August 1999. He is currently General Counsel and Chief Compliance Officer for (and partner at) Leadenhall Capital Partners LLP, a global asset management firm. He is also a member of TWEISL's Creditors' Committee. Mr Clark learned of TWEISL through reading an article in the Financial Times of 6 January 2012. Mr Clark discussed the opportunity that TWEISL could offer with AdC, and also carried out his own due diligence on TWEISL. From this he gleaned that the team behind TWEISL had a successful history of investing in wine. He visited TWEISL's offices at 15 Clifford Street, London W1S 4JY to satisfy himself that TWEISL had a physical presence, and was "very reassured" to find most of the team working in the office, including AdC, RB and William Grey (the investment manager for TWEISL). Mr Clark agreed to transfer his existing wine stock to Anpero, and use the proceeds of sale of that wine to acquire shares in TWEISL. He invested £31,400 on 4 April 2012, and a further £16,630 on 4 April 2013. As appears from this brief narrative, and his further evidence that is discussed below, Mr Clark was careful and thorough in his business dealings with TWEISL, both at inception and in terms of monitoring his investment as time went on. The fact that Mr Clark was so impressed by what TWEISL had to offer is a tribute to the plausibility of its "team", in particular AdC.

45. Mr Streather is also a solicitor. He qualified in November 1971, and in 1976 he established his own practice, Streathers Solicitors LLP, which has several offices in London. He was a senior partner at that firm until January 2019, before retiring in 2022 (although he still retains a professional connection with Streathers' offices in Clapham). Mr Streather was first made aware of the opportunity to invest in TWEISL by a family member, who suggested attending a roadshow event at the Oxford and Cambridge Club in London, which was hosted by AdC and RB. Mr Streather was impressed by the presentation, and by AdC. Mr Streather also received and read TWEISL's Information Memorandum dated 20 January 2015. Following the presentation, Mr Streather decided to invest £10,000 on 15 July 2015. Subsequently, at the suggestion of the family member, the two of them decided to "combine business with pleasure" by visiting TWEISL's offices at 15 Clifford Street (next door to the building where Mr Streather had an office for 16 years) to see AdC and RB, meet the staff and see the trading platforms. Following this visit, Mr Streather invested a further £10,000 on 28 January 2016. Later on, Mr Streather met RB for a drink on a couple of

occasions. They also exchanged jovial emails. Later still, when problems emerged, Mr Streather sent RB an email saying “Oh dear, Rodney, this does not look good”. He never heard from RB again. Mr Streather was a charming man. Like others, he did not deserve such treatment.

46. Mr Hillson read Economics at Cambridge, and then trained and qualified as a chartered accountant with KPMG in 1985. Between 1986 and 1998, he held a number of roles in financial management for various UK based corporate entities. In 1999, he set up his own business, which he sold in 2015. After an 18-month handover period, he retired at the end of 2016. He is a member of TWEISL’s Creditors’ Committee. Mr Hillson began investing in fine wine in or about 2007. Among other things, an article in the Investors’ Chronicle in December 2009 caught his attention, as it contained a “detailed and positive description” of TWIF, which “seemed a very professional entity ... that was run by an experienced and dependable team”. Having explored the opportunity further, he invested £20,000 in TWIF’s 2009(1) Tranche. During 2010 and 2011, Mr Hillson built up an investment wine portfolio worth about £400,000. In about April 2015 (after his investment with TWIF had matured), Mr Hillson received a telephone call from AdC explaining that a new investment fund was being set up and that, if he wished, he could roll his TWIF investment (which had fallen in value to £16,333) into this fund. Following discussions, Mr Hillson agreed to sell about £120,000 of his wine stock to TWEISL at market value and then invest the proceeds of sale in TWEISL. In the result, Mr Hillson invested the total sum of £136,887.05 in TWIF, as follows: (a) on 15 July 2015, he purchased 98,802 shares at a cost of £90,933.01; (b) on 21 October 2015, he purchased a further 25,872 shares at a cost of £23,714.90; and (c) on 28 January 2016, he purchased a further 24,358 shares at a cost of £22,239.14. Mr Hillson’s demeanour was balanced and restrained. He was, understandably, appalled to learn of the CVL liquidators’ findings following their investigations, but he also gave the impression of wearing his troubles relatively lightly. When asked in cross-examination about his investment in TWEISL he said: “It was not a huge sum, no. I mean, it was not going to change our lives not having it. It would have been nice, but, you know, I am a pessimistic person, I tend to write things off to nil the moment I invest them anyway so it turns out it was a bonus, but that is my quirky nature really rather than anything else”.
47. As summarised above, the Company’s criticisms of the audit work straddle Y/E December 2012 to 2018. Ms Clarke was the partner for the audits for Y/E 2012-2014, before she went on maternity leave. She was assisted by others, including Ms Kay. Mr Malkin took over for Y/E 2015 onwards, and was the only witness of fact called on behalf of Crowe. Mr Lawrence invited me to draw adverse inferences from Crowe’s failure to call anyone other than Mr Malkin to give evidence. Ms Evans invited me not to do so. As appears below, I consider that the Company is entitled to succeed on liability on the basis of what is shown in the audit files, Mr Malkin’s evidence, and the evidence of the parties’ auditing experts. It is therefore unnecessary to resolve that debate.

48. Although the Company's written Closing Submissions described Mr Malkin as "a very unsatisfactory witness", and suggested that he may only have been called for "tactical reasons" (i.e. to avoid the criticism that Crowe had not called any witness of fact at all), I do not accept these points. I do not consider that Mr Malkin attempted to dissemble or mislead at any time, and, speaking generally, he answered questions fairly and made concessions where appropriate. In many instances, Mr Malkin said that he could not remember matters. I found this unsurprising, and generally believable, although it is possible that on occasions he resorted to this formula as a way of avoiding a concession which would otherwise have been inevitable. In general terms, Mr Malkin was hampered by the contents of the audit files, and in a case such as the present, involving the work of professional persons and no shortage of paper, I prefer to decide matters by reference to the contemporary records rather than by attempting to assess the demeanour of witnesses. Mr Malkin accepted in many instances that if something had happened, that should have been recorded on the audit files. In light of that concession, to the extent that Mr Malkin suggested that various things may have happened although they were not recorded on the files, I reject that suggestion. However, I acquit him of the charge levelled against him by the Closing Submissions of "wholly unsubstantiated and false speculation" in this context. I think such answers were sincere, although unconvincing.

THE EXPERTS

49. Each party called one auditing expert and one expert on quantum. The Company's experts were Mr Ashley and Mr Pearson. Crowe's experts were Mr Main and Mr Conti.
50. Mr Ashley joined Peat Marwick Mitchell & Co (a predecessor to KPMG) as a trainee chartered accountant in 1976. He qualified in 1979 and became a Partner in 1989. He was engaged on bank audits for much of his career, and was involved in the audit of National Westminster Bank Plc ("NatWest") from around 1981 to 1993, as Manager, then Senior Manager, then Partner. He left KPMG in 1995 to become CFO of NatWest Markets, the investment banking arm of NatWest. On his return to KPMG in late 1997, he joined the banking department and spent most of the next fourteen years as an audit engagement partner on major bank audits. In 2006, he became the Head of Quality and Risk Management initially for KPMG UK and later also for KPMG Europe LLP, involving him in key audit and other judgments across the full range of KPMG's work and clients. Following his retirement from KPMG in 2013, Mr Ashley has held a number of non-executive director roles, the main one being with Barclays PLC where he was non-executive director (from September 2013) and the Chair of the Audit Committee (from January 2014) until early 2023. More recently, he has also been engaged as an expert witness in relation to a number of auditor's negligence cases.
51. Mr Ashley was an impressive witness. There were times during his cross-examination when I felt that he was so strident in expressing his disagreement with some of the

points that were put to him as to suggest a measure of defensiveness and a risk of descending into the arena. On reflection, however, I consider that these concerns were misplaced. Ms Evans suggested that Mr Ashley may have fallen into the trap of applying Rolls-Royce standards, gleaned from major banking audits where KPMG's annual bills ran to tens of millions of pounds, to the much humbler task that was undertaken by Crowe, for vastly lower audit fees. Overall, however, I do not consider that is right. Some of the points that Mr Ashley made possibly reflected a counsel of perfection. However, his major criticisms were such as could fairly be levelled at a firm that undertook the responsibility for auditing the Company, regardless of that firm's level of remuneration. Indeed, a number were accepted by Mr Main (and therefore by Crowe) to be made out.

52. Mr Main is a Chartered Accountant (FCA), a Chartered Certified Accountant (FCCA), a member of the Academy of Experts (since 1996), and a founding member of the Expert Witness Institute. He also holds the corporate finance qualification of the Institute of Chartered Accountants. He trained with Thornton Baker, qualifying in 1982. He then left to join Hazlewoods, becoming a partner in 1992. He has extensive experience in the audit of banks, insurance companies, investment trusts, the Isle of Man Government, and (as Engagement Partner for a wide variety of clients including those in the industrial, manufacturing and service sectors, both with AIM listings and with full listings on the London Stock Exchange) in providing audit services, and corporate advisory, corporate finance and litigation support/forensic accounting services. He is also responsible for financial due diligence investigations, including those in connection with private equity investments, take-overs, management buy-outs and management buy-ins. The senior positions that Mr Main has held include (i) Global, European and UK Chairman of the Assurance Services Technical Advisory Committees of Moores Rowland International ("MRI") then the eighth largest association of independent accountancy firms in the world (where, as chairman of the MRI committees, among other things he was responsible for leading the development of quality monitoring processes for auditing across the association, and led the development and maintenance of the UK firms' audit procedures and operating manuals), (ii) member of the UK Auditing Practices Board ("APB") (1994-2002) (where he participated in the development of any Auditing Standards and other guidance notes issued by the APB, which was responsible for developing and issuing all auditing standards in the UK and Ireland during his period of membership), (iii) member of the CCAB working party that developed the first Financial Reporting Standard for Smaller Entities, (iv) member of the authorisation (licensing) committee of the Association of Chartered Certified Accountants ("ACCA") (1996-1998), and member of the Council of ACCA (1998-2004) (which is responsible for the governance of this international accountancy body with over 230,000 members worldwide) and vice-chairman of its Auditing Committee. Mr Main provides expert witness services on a range of matters, and this includes providing expert's reports in professional negligence cases involving accountants.

53. Mr Main was also an impressive witness. He was less forthright than Mr Ashley, but was no less self-assured, and gave his evidence with commendable equanimity and openness. He explained that a company such as TWEISL would be a typical client within his portfolio, many of which were owner-managed entities or entities without sophisticated internal control structures. Mr Main said that delays and misunderstanding of the accounting rules would be “bread and butter” to many clients of this sort.
54. Mr Main had particular knowledge concerning the ISAs, and had been involved in drafting some of them. I preferred the evidence of Mr Main to that of Mr Ashley on the issue of auditor’s reporting responsibilities partly for this reason, and partly because Mr Ashley accepted that he had not known of the existence of the case of *Sasea Finance Ltd v KPMG* [2000] BCC 989 (“*Sasea*”) until (as he said) it was “drawn to my attention by instruct[ing] counsel”, and I considered he had allowed this to influence him to “fly a kite” about auditor’s common law duties which stretched or exceeded his proper remit.
55. As discussed further below: (i) on the one hand, Mr Ashley expressed the view that in the event that an auditor sought legal advice in contemplation of resigning, that advice would cover not only the auditor’s statutory duties but also any other common law obligations that the lawyer considered that the auditor might have in the event that the auditor had concerns that fraud may be being committed, in particular in light of the decisions in *Sasea* at first instance and on appeal, whereas (ii) on the other hand, Mr Main stated that he was not aware of any other reporting responsibilities of auditors apart from through the channels described in the areas of agreement between him and Mr Ashley (which did not include any direct reporting to shareholders).
56. Mr Main explained that his view was not affected by the guidance in [A56] of ISA 240 that “Given the exceptional nature of the circumstances and the need to consider the legal requirements, the auditor may consider it appropriate to seek legal advice when deciding whether to withdraw from an engagement and in determining an appropriate course of action, including the possibility of reporting to shareholders, regulators or others”, because that was dealing with matters on an international basis. In my view, Mr Main was right about that. In particular, the first sentence of [A56] states: “The auditor has professional and legal responsibilities in such circumstances and these responsibilities may vary by country”; and the opening words of the following sentence read: “In some countries, for example ...”. I found Mr Main more reliable on this point.
57. Turning to the experts on quantum, Mr Pearson is a fellow of the Institute of Chartered Accountants in England & Wales (“ICAEW”), a member of the Academy of Experts, an ICAEW accredited forensic accountant, and a previous chairman of the Forensic and Expert Witness Group of ICAEW. He originally trained in audit and accounts. He has around 25 years of forensic accounting experience. He was a partner in a top ten accountancy firm and a US forensic accounting boutique, before joining Quantuma.

Mr Pearson has been instructed as an expert in several hundred cases, and has given evidence on approximately 30 occasions. He has valuation experience encompassing most industry sectors, and, in addition, extensive experience in asset tracing exercises.

58. Mr Conti is a Fellow of ICAEW. He trained as a Chartered Accountant within the general practice group of KPMG before moving into its forensic practice, and has been a full-time forensic practitioner for almost 25 years. He was a partner within the Forensic Accounting Services team of RSM, before moving on to the same position with Moore Kingston Smith LLP. He routinely advises on accounting matters relating to civil and criminal litigation, including breaches of contract claims and the assessment of quantum. He has been instructed or appeared as an expert witness in this country and abroad on a number of occasions, and he provides eight illustrations in his report.
59. A major difference between Mr Pearson and Mr Conti related to recoverability of cash.
60. At [5.23] of his report, Mr Pearson refers to a table contained in [5.22] and states “The above demonstrates that at each of the Relevant Dates, the Cash Deposits balance was significantly overstated, with the amounts allegedly held by Lilliput in fact being transferred to TWIF in the first instance before being dissipated”. At [5.24], Mr Pearson states: “I have reviewed the other bank statements made available to me to assess if, at each of the Relevant Dates, the Associated Bank Accounts may instead have held sufficient funds on behalf of TWEISL to make up for the Missing Cash amounts. Only at 31 December 2012 was this the case.” The heart of Mr Pearson’s reasoning can then be gleaned from [8.33]-[8.38] of his report:

“8.33 As discussed at paragraph 5.23, there was Missing Cash from the Cash Deposits balance at each of the Relevant Dates.

8.34 I consider that it is reasonable to assume that at least some proportion of the Missing Cash would not be recoverable by a hypothetical liquidator throughout the period.

8.35 However, I consider it is conceptually reasonable to assume that the earlier that the alleged fraud had been identified, the higher the probability would have been that recoveries could have been made from related individuals and entities. It would have been less likely that funds would have been dissipated and the value of amounts dissipated would therefore have been lower (with the resulting likelihood that it would be easier for directors and other third parties to repay sums received improperly by them from TWEISL).

8.36 I have therefore assumed that a greater proportion of the Missing Cash would be recoverable at the earliest Relevant Date compared to the

latest Relevant Date. This is to reflect the assumption that, as time passes, amounts would be more difficult to recover owing to the complexity of dissipation and the duration over which the alleged fraud was perpetrated. In the absence of information around the dissipation of funds and the assets held by related entities and individuals at each Relevant Date, this is necessarily a judgemental calculation.

8.37 Based on the above, at the earliest Relevant Date (31 December 2012), I have assumed that all barring 10% of the Missing Cash would be recoverable by a hypothetical liquidator. I have assumed that only 50% of the Missing cash at the latest Relevant Date (1 September 2019) would have been recoverable. For all Relevant Dates in between, I have assumed that the proportion of the Missing Cash that would be recoverable would have decreased linearly. The percentage of Missing Cash that is assumed to be recoverable at each of the Relevant Dates is highly subjective, consequently, these calculations are necessarily “broad brush”.

8.38 This adjustment is set out at Figure H of Appendix 10(a) and Appendix 10(b), where I effectively include the value of cash that I have treated as recoverable at each Relevant Date.”

61. I pause to observe that it is not obvious why Mr Pearson took 31 December 2012 as a relevant date. That is the end date of the Company’s financial year, in respect of which Crowe’s audit was signed off on 6 August 2013, and there is no suggestion that anything that Crowe, acting competently, might have said or done would have enabled the improprieties that are said to have existed to have been brought to an end on that date.
62. It seems that this date was taken by Mr Pearson as a form of benchmark from which he made various extrapolations. For example, when it comes to the claim for the increase in liquidator’s fees that is put forward by the Company as one head of loss flowing from it not being placed into liquidation at a series of earlier dates than in fact occurred, in his table of losses Mr Pearson refers (for the purposes of comparison) to liquidator’s costs of £125,000 “Based on £200k present day expected cost discounted for c60% price increases in the period 31 December 2012 to present day”. It may not be a major point, but it does seem to me to raise a question about a linear progression or tapering off approach, such as that adopted by Mr Pearson, if the start date is not a material date.
63. At [3.2.4] of his report, Mr Conti states that TWEISL’s case that it suffered loss as a consequence of Crowe’s audits for Y/E December 2012 to 2018 give rise to a number of questions from the point of view of an expert on quantum. At [3.2.5], Mr Conti states:

“It will be apparent that certain of these questions concern legal matters, whereas others relate to matters of fact, neither of which are within the expertise of a quantum expert. Nonetheless, assumptions have to be made in order to prepare loss calculations, and in the following paragraphs I outline the assumptions I have made in respect of each question, recognising that should the Court determine that other assumptions should be made instead, then I may have to revise my calculations.”

64. The heart of Mr Conti’s appraisal can be seen from [3.3.38] of his report, where he states that on the basis of a number of points “for the purpose of my loss calculations, I have assumed that no recoveries would have been made in respect of monies said to have been held by Lilliput through an earlier liquidation, on the basis that I have not seen any evidence that those monies would have been recovered at an earlier point in time, and no significant recoveries have in fact been made since the actual liquidation.” The points which led Mr Conti to take that approach are set out in [3.3.29] –[3.3.37] as follows:

“3.3.29... in periods when monies were not invested in wine stock, the Company’s funds were purportedly held on deposit with an offshore entity called Lilliput. The Claimant alleges that these were in fact paid by the Company to third parties for the benefit of the Directors and associates of the Directors. At the point at which the Company entered into MVL, the Company’s SAGE accounting software recorded that £4,515,030 was held on deposit with Lilliput, which is said to have been dissipated.

3.3.30 I understand it to be the Claimant’s case that the Directors were fraudulent. In paragraphs 34 and 35 of the Particulars of Claim, TWEISL states that at interview on 13 November 2020 the Directors admitted that: “over a lengthy period, in fact, the investors’ funds had been taken from TWEISL and paid into various third party bank accounts. Those bank accounts were in the names of Anpero Capital Limited, Huntsman Wine EIS Ltd, Alladin Limited and the Wine Investment Fund Limited and / or the personal bank account of ADC” and “As a result, there were no payments to or deposits with Lilliput. Rather, TWEISL monies had been paid over to Anpero and/or other parties (such as those mentioned above at paragraph 34(b) to be used (by Anpero at least) on day to day expenses and for other purposes and/or not for the benefit of TWEISL.”

3.3.31 The Claimant’s position with respect to payments purportedly made by TWEISL to Lilliput is that they were (1) recoverable as a matter of law in each audit year, and (2) capable of being recovered as a matter of fact in each audit year. Notwithstanding the Claimant’s position, I

understand that no significant recoveries have in fact been made and that monies said to have been paid to Lilliput have been dissipated.

- 3.3.32 In his witness evidence, Mr Hardman provides an account of the investigations undertaken by the Joint Liquidators to establish the movement of monies from TWEISL. He states that “funds were often moved through multiple accounts connected to TWEISL and comingled with other funds before their ultimate dissipation”. Four examples of purportedly illegitimate transactions are exhibited to Mr Hardman’s statement, which are said to show payments made from TWEISL to the TWIF General Account and further onward dissipation.
- 3.3.33 For the purposes of my report, I have been instructed to carry out a review of bank statements disclosed by the Claimants in March and April 2025, including TWEISL’s bank account and the TWIF General Account. I explain the methodology that I have adopted and the results of that analysis in section 6.
- 3.3.34 However, by way of brief explanation, my analysis shows that monies recorded within the Company’s SAGE accounting system as being held on deposit with Lilliput were in fact paid from the TWEISL bank account to the TWIF General Account. It would also appear that the TWIF General Account was used as a general bank account in which monies from various TWIF funds run by the Directors were pooled, or comingled, for example:
- there is evidence of the TWIF General Account having received monies “on deposit” from the accounts of other TWIF entities;
 - there is evidence of receipts and payments between the TWIF General Account and third-party entities appearing to trade in wine, as well as other wine-related TWIF entities;
 - there is evidence of monies having been paid and received from individuals who I understand were shareholders in TWIF, TWEISL or other TWIF entities; and
 - there is evidence of payments from the TWIF General Account to other third party and connected entities, including Anpero.
- 3.3.35 It is reasonably clear from my analysis that payments made to the TWIF General Account from TWEISL and other TWIF entities were used for the purposes of facilitating payments to third parties and/or to other TWIF entities. I consider that any exercise to trace the full movement of funds from TWEISL to TWIF would be a very

significant exercise, and certainly not possible given the documentation to which I currently have access; however, based on the exercise I have conducted, my views are that:

- there is evidence of the pooling, or co-mingling, of funds;
- there is evidence of funds from TWEISL having been paid into the TWIF General Account and subsequently having been paid to other TWIF entities; and
- as a result of this apparent pooling/co-mingling of funds, I am unable to conclude as to the ultimate destination of funds that were paid by TWEISL to TWIF.

3.3.36 As I explain in section 6, the running balance of the TWIF General Account for the most part remained below £200,000, apart from occasional spikes that were subsequently dissipated by transfers to other entities.

3.3.37 I am instructed that the recoverability of the Lilliput balance has significance for the calculation of the Claimant's losses because, if the payments that are said to have gone missing would not as a matter of fact had been recoverable in any event from an earlier liquidation, then any subsequent loss of that amount cannot be attributable to the Defendant as a result of its audits."

65. At [5.22] of their joint statement dated 5 September 2025, Mr Pearson and Mr Conti recorded their agreement that "the recoverability of wine stock and the Lilliput Account are ultimately matters for the Court to determine."
66. Mr Pearson was cross-examined about the points made in Mr Conti's report, including the fact that the balance on the TWIF account "for the most part remained below £200,000, apart from occasional spikes that were subsequently dissipated by transfers to other entities". After the conclusion of that cross-examination, I asked Mr Pearson: "Do you consider, now you have finished giving your evidence, that the appraisal you have put in your expert's report is one you want to stand by?". Mr Pearson replied: "I think the principle of a sliding scale makes sense to me. I accept the percentages could be lower. However, I do not agree with the assertion, or I consider it unlikely that there would be a zero recovery at each of the relevant dates".
67. When Mr Conti was cross-examined about his assumption that "no recoveries would have been made in respect of monies said to have been held by Lilliput through an earlier liquidation" he explained that "the reality is I actually chose zero because I did not have a rational basis for choosing anything else."

68. I agree with Mr Conti that the resolution of factual matters - such as the prospect of recovery of cash that had passed through a co-mingled fund in the TWIF account and (on the Company's pleaded case) been dispersed to Anpero and other entities which had expended it on purposes not for the benefit of the Company – is not within the province of expert evidence on quantum. Indeed, Mr Pearson and Mr Conti rightly accept that these are ultimately matters for the Court. However, if and to the extent that the experts' views on recoverability of cash (and, for that matter, wine) are material to be taken into account, I preferred the evidence and approach of Mr Conti to that of Mr Pearson. On the one hand, I considered that Mr Conti's assessment that there was no rational basis for thinking that the prospects of recovery of cash would have been better in earlier years, or would have been material in any year, was straightforward and sound. On the other hand, while I do not doubt that Mr Pearson believed that the "principle of a sliding scale" was, as he put it in his report, "conceptually reasonable": (i) I considered this approach did not accord with reality, and (ii) in light of his unwillingness to accept that to any greater extent than he did, I found him a less impressive witness than Mr Conti.
69. In any event, I am not persuaded that the claim for "lost cash" in relation to the earlier audit years is, in truth, of any great financial significance to the Company. If a very large sum was lost in one of those earlier years, and one ignored what happened in later years, it is possible that a claim for those lost monies coupled with a claim for interest over many years would yield a claim having a high total value in respect of that year. In reality, however, the cash was not lost, any more than the stock of wine was lost, in the earlier years, because it is the Company's case that during the time of the audit in respect of Y/E 31 December 2016 wine worth £4.375m (or more) was purchased by the Company, and that could only have been achieved by using all the earlier "lost cash". Therefore, even if the loss of the cash that was available to be recovered in one of the earlier audit years but was not recovered at that time is properly to be attributed to Crowe's negligence in that earlier audit year, the loss of that cash did not occur then but instead only occurred much later, after the proceeds of the sale of the wine worth £4.375m (or more) was lost. Accordingly, the Company's claim for interest on that lost cash cannot date back to the earlier audit year, but instead runs from the date of loss of the proceeds of sale of the wine. That claim is picked up by the claim relating to the audit in respect of Y/E 31 December 2016, which is accepted to be the Company's strongest claim. The claim for the earlier year thus adds nothing to that later claim.
70. Indeed, it is possible that the Company obtained a benefit relating to that "lost cash" in the intervening years, because, although the Lilliput deposits were fictional, in order to maintain the credibility of that fiction payments attributed to "interest" may have been paid to the Company. This point was not explored at trial, and any such benefit would not have been retained in the long run, because at the end of the day all the Company's money, whether it represented principal or interest, was stolen by the directors; but it does serve to underline the fact that the true loss occurred near the end and not earlier.

THE COMPANY'S CASE ON DUTY AND CAUSATION

STAGE 1 – THE PARTICULARS OF CLAIM

71. The proceedings were preceded by extensive correspondence between the Company's solicitors ("Fieldfisher") and Crowe's solicitors ("Clyde"). Among many other things, the issue of causation was raised. For example, in [48] of a long letter dated 22 February 2023, Clyde wrote "Your clients' case on causation and loss is likewise inadequately particularised". The Claim Form is dated 24 August 2023. The Particulars of Claim ("PoC") are dated 20 December 2023 and were amended on 10 September 2025. The amendments made on that occasion were minor, and are not identified separately below.
72. The PoC rely on the following express terms contained in Crowe's letter of engagement:
- (1) "We have a statutory responsibility to report to the members whether in our opinion the financial statements gave a true and fair view, they have been properly prepared in accordance with the Companies Act ... and the relevant financial reporting framework and whether the directors' report is consistent with the financial statements." ([3.1])
 - (2) "We will carry out our audit in accordance with the International Standards on Auditing (UK and Ireland) issued by the Auditing Practices Board." ([4.1])
 - (3) "We shall obtain an understanding of the accounting and internal control systems to ensure they are adequate as a basis for the preparation of the financial statements and establish whether the Company has kept adequate accounting records." ([4.2])
 - (4) "The nature and extent of our audit will vary according to our assessment of the Company's accounting system ... and may cover any aspect of the business's operations that we consider appropriate ... if it detects weaknesses that we consider you should know about, we will report them to you." ([4.3])
 - (5) "... we may ask you to confirm in writing representations you have made to us during the audit. In particular, where misstatements in the financial statements that we bring to your attention are not adjusted, you must state your reasons in writing." ([4.4])
 - (6) "... we will ask to see all documents or statements that are due to be issued with the financial statements." ([4.5])
 - (7) "We will plan our audit so that we can reasonably expect to detect significant misstatements in the financial statements or accounting records (including those resulting from fraud, error or non-compliance with law or regulations)." ([4.6])

- (8) “We will perform the foregoing services with reasonable skill and care and acknowledge that we will be liable to you for losses, damages, cost or expenses ... caused by our negligence, breach of contract, fraud or wilful default.” ([7.1])
- (9) “...this letter will remain effective from the date of signature until it is replaced.” ([14.1])
73. The letter of engagement also included the following express provisions, not cited in the PoC, but relied upon by Crowe in these proceedings (emphasis added):
- “As noted above, we will report solely to the company’s members, as a body, in line with Sections 495 to 496 of the Companies Act 2006. Our audit work will be undertaken for the sole purpose of stating to the company’s members the information required in an auditor’s report and for no other purpose. In those circumstances, as permitted by law, we will not accept or assume responsibility to anyone other than the company and the company’s members as a body, for our audit work, for the audit report, or for the opinions we form.” ([3.6])
74. The PoC also allege at [11] and [12] respectively:
- “11. Further or alternatively, it was an express alternatively implied term (and/or Crowe owed a concurrent duty of care in tort to a like extent) that in each of the auditors’ reports prepared and submitted by Crowe for TWEISL (for the years ending 2012 to 2018), Crowe would take reasonable steps to ensure that the financial statements would:
- (i) give a true and fair view of the state of TWEISL’s affairs for the relevant period and of its profit or loss for that period;
 - (ii) be properly prepared in accordance with the International Financial Reporting Standards (“IFRS”) as adopted by the European Union;
 - (iii) be prepared in accordance with the requirements of the Companies Act 2006.”
- “12. Further or alternatively, it was an implied term of the Engagement Letters and/or engagements (and each of them) and/or Crowe owed a concurrent duty of care to TWEISL which was that:
- (1) Crowe would act with the standard of skill and care reasonably to be expected from a firm of auditors experienced in the auditing process and the provision of audit reports.
 - (2) Crowe’s work incorporated by reference the ISAs for the relevant audits.

- (3) Crowe was obliged to obtain reasonable assurance about whether the financial statements as a whole were free from material misstatement, whether due to fraud or error, thereby enabling it to express an opinion on whether the financial statements were prepared, in all material respects, in accordance with the applicable financial reporting framework.
- (4) Crowe was obliged to exercise professional scepticism in the carrying out of the audits and audit reports.”
75. The reference to “ISAs” is to the International Standards on Auditing (UK) issued by the Auditing Practices Board. I was referred to ISA 200 (overall objectives of the independent auditor), ISA 240 (the auditor’s responsibilities relating to fraud), ISA 260 (communication with those charged with governance), ISA 315 (identifying and assessing the risks of material misstatement), ISA 500 (audit evidence), ISA 550 (related parties), and ISA 705 (modifications to the audit opinion). However, the meaning and effect of many of these provisions was not in issue between the auditing experts. Nor, in the result, are many of the provisions to which I was referred material to the outcome in the present case. I consider below such of those provisions as I regard as material.
76. Under the heading “Audit Report for Benefit of TWEISL as a Company”, [13] pleads:
- “For the avoidance of doubt each report (and linked duties of care) was prepared for the benefit and/or use of TWEISL as a company and/or its members as a body and not or not primarily or solely the Directors of TWEISL.”
77. Pausing there, I consider that the PoC (correctly) draw a distinction between (i) TWEISL, (ii) the members of TWEISL as a body, and (iii) the directors of TWEISL.
78. Accordingly, the PoC can be read as asserting that Crowe owed duties of care, and possibly also contractual obligations, to both (i) TWEISL and (ii) the members of TWEISL as a body. This is in keeping with the [3.6] of the letter of engagement, that is cited by Crowe. However, even if it is permissible to read the PoC as contemplating that Crowe could report to the members of TWEISL as a body by making a report to TWEISL, or *vice versa*, they cannot be read as suggesting that a report to TWEISL could be made by reporting to the members of TWEISL individually. Indeed, the PoC make no mention of individual members, let alone of reporting to individual members.
79. These points are significant to the issue of whether it would constitute a departure from the PoC for the Company to advance the case that it sought to advance at trial that Crowe’s duties, as pleaded, to report relevant matters to TWEISL required Crowe to report “directly to the members of TWEISL in circumstances where all the directors were involved or were suspected of being involved in the dishonest activity in

question”. In my judgment, it is clear beyond argument that this is a departure from the PoC. _

80. The PoC at [40] plead that Crowe acted in breach of duty in that, in sum, Crowe:
- (1) Failed to exercise due professional scepticism over the operation of the business of TWEISL.
 - (2) Failed to obtain an adequate understanding (as required by ISA 315, [11]) of the nature of TWEISL as the audited entity including of (i) its operations (ii) the manner in which it was structured and financed (iii) its objectives and strategies and/or (iv) the measurement and review of the entity’s financial performance.
 - (3) Failed to investigate monies coming in and out of TWEISL to connected third parties and (having investigated) to flag the serious problem.
 - (4) Failed to assess adequately the risks arising from the presence of various related parties and related party transactions including failures by the Directors, and/or failed to obtain sufficient appropriate audit evidence that related party transactions were accounted for and disclosed appropriately.
 - (5) Failed to ensure that TWEISL complied with the requirements of IAS 24 and disclose the nature of its related party relationship as well as information about its transactions and balances with TWEISL necessary for users to understand the potential effect of the relationship, transactions and balances on the financial statements.
 - (6) Failed to demonstrate adequate professional scepticism as to the nature of that relationship as is required by ISA 550 and ISA 200.
 - (7) Failed to reflect its awareness of the related party connection in insisting that TWEISL’s financial statements disclose the existence of that related party connection, together with the amounts involved and the other disclosures required by IAS 24.
 - (8) Failed to perform adequate assessments of the risks from fraud, including the obvious risk that the directors were undertaking the business in their own interests and/or extracting funds through transactions with related parties which they controlled.
 - (9) Failed to consider properly the DTCs for the relevant audit period (and/or all previous such DTCs from year ended December 2013 onwards) recording “Rolling Term Deposits” of TWEISL funds held with Lilliput.
 - (10) Failed to disclose the connections between third parties and/or the Directors with Lilliput.

- (11) Failed to record the connections with Lilliput until its audit for the year ended 31 December 2016 (and even then inadequately).
- (12) In particular, Crowe failed to:
-) Assess adequately or at all the risks that balances recorded as being held by Lilliput were misstated or misrepresented.
 -) On the mistaken assessment that Lilliput was or must have been a bank, perform any of the procedures required by Practice Note 16, Bank Reports for audit purposes (“PN16”) including (i) failing to consider the risks in relation to disclosures of bank related information (ii) failing to obtain a bank report in circumstances where paragraph 8 of the PN16 states that “Given the importance of cash to an entity’s business and its susceptibility to fraudulent misuse the auditor will usually conclude that, in the absence of a bank report regarding account balances, facilities and securities, it will not normally be practical to obtain sufficient appropriate audit evidence from other sources”.
 -) For all years in which TWEISL recorded an asset held by Lilliput, seek or obtain any evidence that cash had indeed been deposited by TWEISL with Lilliput.
 -) Seek or obtain any evidence that Lilliput had the financial capacity to repay the funds purportedly deposited with it.
 -) Identify the risk that the purported transactions between TWEISL and Lilliput were not at arms’ length or perform any audit procedure designed to obtain audit evidence on this risk.
 -) Investigate the reasons for which TWEISL monies were purportedly deposited with Lilliput in circumstances where TWEISL’s principal activity was described as that of “trading in fine wines”.
 -) Obtain audit evidence that the purported TWEISL balance was recoverable and assess the TWEISL business as a going concern in that context.
 -) Give any or any adequate consideration to the notification to Crowe under a draft investment memorandum provide to Crowe by ADC on or about 23rd November 2011 indicating that Lilliput was a related party.
- (13) Failed to notify the above matters and/or assess the failure by the directors to disclose the connections with Lilliput as a “red flag”.
- (14) Failed to inform TWEISL that immediate steps were required (particularly to recover the monies paid away and/or prevent further fraud or other irregularities)

as soon as possible after becoming aware of the situation and not awaiting the finalisation of the audit.

- (15) Failed to take reasonable steps and/or proper investigations which would or might have revealed that Lilliput had no bank account and the monies had been paid to other companies also linked with the directors and/or despite the words “rolling term deposit” and the evident inference of a loan and actual payment from TWEISL to Lilliput, there was no such payment.
 - (16) Failed to report that the payments which were made were not genuine and/or were made in the interests of the directors rather than TWEISL and/or were or may have been an indication of, or a risk of, fraud on TWEISL.
 - (17) Negligently failed to obtain any accounts (audited or unaudited) for Lilliput in the years prior to the year ended December 2018 (and even then, inadequately).
81. Ms Evans drew particular attention to the formulation of the allegation in [40u] (see sub-paragraph (14) above) that Crowe “Failed to inform TWEISL that immediate steps were required (particularly to recover the monies paid away and/or prevent further fraud or other irregularities) as soon as possible after becoming aware of the situation and not awaiting the finalisation of the audit”. The point made on behalf of Crowe is that there is no complaint that Crowe failed to inform all or some of the individual shareholders.
82. The PoC at [41] plead further breaches of duty by Crowe by reference to specific audit years. For example, in relation to the audit for Y/E December 2012, it is alleged that Crowe failed to investigate adequately or at all:
- (i) “the balance with a current account held by TWEISL at C Hoare & Co in the sum of £52,198.79 and a balance of £137,000 held on deposit with an unspecified third party and/or accepted an explanation from ADC recorded in the notes from the audit clearance meeting that the monies from various investment vehicles (including TWEISL) were pooled and placed together on deposit”;
 - (ii) “£357,000 placed on deposit with Investec of which £137,000 was stated to be TWEISL’s funds where: (i) no bank confirmation letter was sought or obtained as required by paragraphs 9, 20 and 21 of PN16; (ii) ADC was on his own admission mingling the funds of TWEISL with other funds; (iii) no reason was given for the “investment” by ADC; and (iv) the confirmation of trade letter was addressed to a company called the Wine Investment Fund Limited rather than TWEISL”.
83. The PoC contain above [42] the heading “Causation – Crowe Acting Competently”.
84. It is then pleaded at [42] that:

“Crowe acting competently would have declined to submit auditors’ reports for TWEISL (for each of the years ending 2012 to 2018) which stated that financial statements:

- () gave a true and fair view of the state of TWEISL’s affairs for the relevant period and of its loss for that period;
- () were properly prepared in accordance with the IFRS as adopted by the European Union;
- () were prepared in accordance with the requirements of the Companies Act 2006.”

85. At [43], the PoC (as amended) allege:

“Further or alternatively, Crowe acting competently would have reported promptly and without any delay to TWEISL the matters set out below:

- () The relevant matters referred to at paragraphs 40 and 41 above.
- () The business of TWEISL was (as carried out by its management) fraught with risk, unsustainable and likely to lead to financial collapse if it continued to trade.
- () For each audit for the year ending December 2012 onwards, that TWEISL monies were being used and/or mixed with the monies of other companies.
- () For each audit for the year ending December 2013 onwards, that although documents had been generated by the management which appeared to record deposits or loans or payments to Lilliput, no monies were in fact paid to Lilliput.
- () Lilliput was not a bank/an entity capable of holding funds “on deposit” in order to “generate a greater return on investment”.
- () The actual destination of the funds was from the TWEISL bank account to other third parties and/or used for their purposes or the purposes of the Directors but not the benefit of TWEISL or that there were grounds for serious concern that this was the case.
- () The above factors (and each of them) were clear evidence of and/or indicative of and/or raised suspicions of, a significant fraud being committed against TWEISL by its management or Directors (or some of them).”

86. At [44], the PoC allege: “Crowe should (in each relevant year) have taken the steps set out above at paragraph 43 promptly and/or without limitation no later than the signing date of each set of accounts as set out in paragraph 7 above”.
87. The PoC contain above [45] the heading “Causation – Actions by TWEISL”.
88. At [45], it is then pleaded that:
- “On relevant notification TWEISL (through its members) would have taken prompt and significant action including:
- (a) the securing, preservation and valuation of its assets (including wine stock, money in accounts etc);
- (b) insisting upon the repayment of the “loans”;
- (c) ensuring that no more deposits be made or (if made) would be with a well-known commercial bank;
- (d) the immediate dismissal of the Directors;
- (e) the appointment of new management;
- (f) (if necessary) the winding up of the business of TWEISL and the distribution of its assets (including the sale of wine held in stock).”
89. At [46], it is pleaded:
- “If winding up were to have taken place, the liquidators would have taken or continued the steps set out at paragraphs 45 a) – f) above and sought to:
- (a) recover the sums from Anpero and/or the Directors and/or such other third parties to which TWEISL monies had been improperly paid; and
- (b) establish the value of TWEISL in liquidation.”
90. Pausing there, it is plain that the PoC is alleging in [43] that Crowe should have reported various matters to TWEISL. Read both in isolation and in the context of the earlier pleas in the PoC, that means TWEISL, and not even the members of TWEISL as a body. After that, [45] of the PoC alleges that “on relevant notification” TWEISL would have taken action, and would have done so “through its members”. This reflects the fact that TWEISL could only act through the medium of human agency, and asserts that, here, the agency would be that of the members. It also assumes that the members would have received “notification”. However, it alleges no duty on the part of Crowe to notify them.

91. By letter dated 16 February 2024, Clyde wrote asserting deficiencies in the PoC, and complaining that the PoC were “hopelessly vague” as to what it is that Crowe ought to have done differently in the circumstances and what in turn would have been the outcome. Clyde served with that letter Crowe’s first Request for Further Information (“Crowe’s First RFI”) relating to the PoC, which included the following:

Request 10(b): in respect of [40(u)] (the alleged need to inform TWEISL that steps were required to prevent fraud/money being paid away), it was asked what precise steps it is said that TWEISL should have been informed were required and when.

Request 13: in respect of [42], [43] and [45] (including the allegation that “Crowe would have reported”) it was asked:

“(a) What it is said Crowe would have done if it had declined to submit auditors’ reports, and what would TWEISL have done in response.

(b) When, to whom and how would reports have been made and TWEISL (through its members) have been notified.

(c) What it is that ought to have been reported to TWEISL regarding the matters referred to at [40] and [41]?”

92. These requests met with the response that the Company’s case was “adequately pleaded” and that Crowe was “not entitled” to more information. In particular, in respect of Requests 10(b), 13(a) and 13(b) the responses were:

“10(b): Not entitled. The relevant steps are those needed to recover monies paid away and/or prevent further fraud or other irregularities (as set out at paragraph 40 (u)) which would include (without limitation) those set out in paragraphs 42-44 and 45 of the Particulars of Claim.”

“13(a): Not entitled. Adequately pleaded. Paragraphs 42 and 43 of the Particulars of Claim set out what Crowe would have done if it had declined to submit audit reports. Paragraphs 45 and 46 sets out what TWEISL would have done in response.”

“13(b): Not entitled. Adequately pleaded. Paragraphs 1, 4, 7 and 44 of the Particulars of Claim set out the steps which should have been taken and the relevant notification timing.”

93. Further to this last response: (i) of the four paragraphs of the PoC referred to in this response, [44] of the PoC is set out above, and (ii) at [1], [4] and [7] the PoC plead:

“The Claimant (“TWEISL”) is a company now in liquidation (it entered liquidation on 10 January 2020) which was incorporated on 4 November 2011

(registered no. 7835642) with an address at 15 Clifford Street London W1S 4JY.”

“On 10 January 2020, following a special resolution placing TWEISL in members’ voluntary liquidation, Paul Higley and Paul Pittman of Price Bailey LLP were appointed joint liquidators of TWEISL. On 27 October 2020, Messrs Higley and Pittman were removed and Finbarr O’Connell and Colin Hardman of Evelyn Partners LLP (then called Smith & Williamson LLP) were appointed creditors’ voluntary liquidators of TWEISL.”

“At the end of each financial year, Crowe audited TWEISL’s accounts and, at the conclusion of that process, the accounts for each particular year were signed and filed at Companies House together with Crowe’s independent auditor’s report to the members of TWEISL as set out below.”

This last plea is followed by a helpful table:

Auditing Period (Year Ended)	Date of Crowe Sign Off	Date filed at Companies House
December 2012	6 August 2013	9 August 2013
December 2013	30 September 2014	7 October 2014
December 2014	18 March 2015	10 April 2015
December 2015	29 June 2017	5 July 2017
December 2016	29 September 2017	4 October 2017
December 2017	5 March 2019	12 March 2019
December 2018	30 September 2019	11 October 2019

94. Pausing there, the PoC do not mention resignation. It is clear that, at this stage, it formed no part of the Company’s pleaded case that Crowe, acting competently, should have resigned, or considered resigning, or sought legal advice about whether it should resign and, if so, what it should state, and to whom, in respect of its reasons for resigning.
95. As set out above, it is also clear that, at this stage, it formed no part of the Company’s pleaded case that Crowe, acting competently, should have communicated directly with shareholders, let alone that Crowe should have communicated with shareholders (i) instead of the Company, or (ii) before it communicated with the Company. In

particular, the allegation in [43] of the PoC was that “Crowe should have reported to TWEISL”.

96. Further, the answer to Request 13(b) contained no suggestion that Crowe should have reported to the shareholders, whether (i) directly or (ii) by resigning, and producing a statement of reasons for resignation which would be provided to the registrar of companies, and be available for shareholders to access by searching the Company’s records at Companies House. Instead, that answer asserted that the Company’s case was sufficiently pleaded in the PoC, which, in my view, related to “reporting to TWEISL”.

STAGE 2 – FURTHER PLEADINGS AND PROCEDURAL STEPS

97. On 15 March 2024, Crowe served its Defence. On 9 April 2024, Clyde wrote stating that “substantially all of the requests in [Crowe’s First RFI] have been denied, on the basis that they are for various reasons either premature and/or your client’s pleading is adequate”. Clyde stated that it did not agree with that approach, which it considered was calculated only to increase costs and delay resolution by obscuring the real nature of the Company’s case and “multiplying litigation possibilities that have no real-world practical utility”. On 7 May 2024, the Company served its Reply to Crowe’s Defence.
98. At [37.6.5] of the Defence, Crowe pleaded that “the only way of communicating to shareholders was through the auditors’ report on the financial statements. Whatever the alleged concerns were there is no basis (pleaded or otherwise) on which they should have been included in the auditors’ report”. At [11] of the Reply, [37.6] of the Defence was denied. However, nothing else was pleaded in response to [37.6.5] of the Defence.
99. If the Company’s position was (i) that, in the PoC, it was already advancing a case that Crowe could or should have communicated with shareholders directly, or otherwise than through inclusion of information in auditors’ reports, or (ii) that it now wanted to put forward such a case, it had an opportunity to explain this when responding to [37.6.5] of the Defence. It did not. Instead, it responded as set out in [11] of the Reply.
100. At the same time as it served its Reply, the Company made a Request for Further Information (“the Company’s RFI”). By Request 20, Crowe was asked to confirm whether it accepted that the directors of the Company and the Company itself were separate entities. In its response dated 25 June 2025, Crowe replied:

“As to Request 20, Crowe accepts that the directors of TWEISL were entities (in the form of individual natural persons) distinct from TWEISL as an entity (in the form of a company). However, Crowe denies the purported distinction drawn by TWEISL (at para 9 of TWEISL’s Part 18 Response) between TWEISL and TWEISL’s directors for present purposes. Specifically, TWEISL,

as a corporate entity, necessarily acted through its directors. The knowledge and conduct of TWEISL's directors are to be attributed to TWEISL."

101. Crowe made a further Request for Further Information on 25 June 2024 ("Crowe's Second RFI"). This addressed two discrete issues, namely (i) the acts of dishonesty alleged against the directors and (ii) who read the financial statements/audit reports. There was no response to this request, and Crowe issued an application in respect of parts of Crowe's First and Second RFIs on 1 July 2024. This focussed on seeking answers as to limitation (from Crowe's First RFI) and as to who read the Company's accounts (from Crowe's Second RFI). On 9 July 2024, Fieldfisher responded to Crowe's Second RFI by way of a letter. This confirmed that it was not alleged all of the members of the Company read the accounts and/or audit reports, but that at least some of them did so. After that, Crowe decided not to pursue the application dated 1 July 2024.
102. The Costs and Case Management Conference took place on 17 July 2024. At that time, an agreed Case Summary was prepared, and a List of Issues for Disclosure ("LOID").
103. The Case Summary stated at [3]:

"The Company alleges that:

 - a) Had Crowe acted competently, it would have declined to submit auditors' reports with the certification identified above, and/or would instead have reported promptly and without any delay to the Company various matters (pleaded at paragraph 43 of the Particulars of Claim), including that there was clear evidence of a fraud being committed against the Company by its management or Directors (or some of them).
 - b) On relevant notification, the Company (through its members) would have taken significant action (pleaded at paragraph 45 of the Particulars of Claim) including inter alia the dismissal of the Directors, the appointment of new management and (if necessary) the winding up of its business and distribution of its assets. In the latter case, the liquidators would have taken steps (pleaded at paragraph 46 of the Particulars of Claim) including to recover sums from those third parties (including the Company's directors) to which Company monies had been improperly paid."
104. In essence, and unsurprisingly, this Case Summary reflects the contents of the PoC, in asserting (i) that Crowe should have declined to submit "unqualified" auditor's reports and/or that Crowe should have reported various matters of concern to the Company, and (ii) that the Company, through its members, would then have taken "significant action".
105. It should be noted in passing that when, in the fullness of time, the CVL liquidators were appointed they did not, in fact, take steps to recover monies from AdC, or even

send a letter before claim, or attempt a full tracing exercise relating to the Company's monies. Mr Hardman explained that there were insufficient funds available to enable proceedings to be commenced, or to seek protective measures such as an injunction: "freezing orders, Norwich Pharmacal orders, they were not possible because we had no funds ... we were on a very tight budget in terms of what we could and could not do".

106. Nor, in the events which happened, did the members of the Company take any such steps before the CVL liquidators were appointed. The prospects of preservation or recovery of assets may have seemed less promising by the time the MVL liquidators were appointed than they might have seemed if matters had come to a head in one of the earlier years of the Company's existence. Nevertheless, well over £4m had been extracted from the Company, and, on the face of it, the prospect that AdC/RB and others had retained some of the missing monies or their traceable proceeds and/or had other assets to meet a claim against them could not be ruled out. The fact that no steps were taken against them at this time does not help the case that is set out in [46] of the PoC.
107. Issue 8 in the LOID was framed as follows:

"Had Crowe reported (a) the matters pleaded at PoC paras 42 and/or 43 to TWEISL; or (b) any other matters in accordance with its obligations, then what steps would have been taken by:

(a) Its directors; and

(b) Its members."
108. Crowe makes the point that there was no agreed issue for disclosure surrounding whether or not (a) Crowe would have taken legal advice concerning its findings or concerns; (b) what the contents of that legal advice would have been; or (c) whether Crowe had a duty to report any matters directly to individual members of the Company.
109. Although this looks ahead to what happened following the service of the first round of witness statements, it is convenient to mention at this stage that, on 21 February 2025, Clyde wrote complaining about the "diffuse and opaque" nature of the Company's case on causation and loss, and saying that Clyde did not understand the Company's primary case on causation and therefore required further information ("Crowe's Third RFI"). The Third RFI included questions about the "years" point, but also sought further information in respect of the Company's case on causation in [45(a) to (f)] of the PoC, including the steps that the Company was alleging the shareholders would have taken.
110. The Company's response to Crowe's Third RFI stated (among other things) that:

“The detailed witness statements of the witnesses served by the Claimant on 7 February 2025 deal adequately in respect of the steps which would have been taken. The Defendant is referred to those witness statements.

In any event the Claimant reserves the right to serve a further witness statement dealing with details of these matters rather than address them in this Response”.

STAGE 3 – THE FIRST ROUND OF WITNESS STATEMENTS

111. The parties exchanged witness evidence on 7 February 2025.

112. The evidence of the only three shareholders who were called on behalf of the Company is as follows. I set it out at length because I consider that the detail is important.

(a) Mr Clark

113. In his first witness statement dated 30 January 2025, Mr Clark states:

“15. During my investment, I received various documents including ‘Quarterly Reports’ from Mr della Casa by email. These were essentially updates on the performance of the fine wine market and TWEISL’s holdings. As the name suggests, I had expected to receive these documents every financial quarter, but in practice their provision was more erratic. There were a number of occasions where I had to chase for documents to be provided to me, as illustrated by my emails to Mr della Casa dated 13 June 2014 (in which I complained about the fact that the NAVs were increasingly being released late) and 17 October 2018 (chasing the missing Quarterly Reports).

16. Throughout the course of my investment, I also obtained and reviewed copies of TWEISL’s financial statements for each financial year, shortly following their publication. As a practising solicitor and General Counsel, I am familiar with the statutory filing deadlines for company accounts (which is usually 9 months after a company’s financial year-end). I had an expectation from having read the Financial Promotion that copies of TWEISL’s financial accounts would be sent to shareholders given TWEISL’s confirmation that: “The Company’s first financial statements will be prepared to 31 December 2012 and annually thereafter by the Company’s accountants and annual accounts will normally be published and sent to Shareholders as soon as is practical to the email address given by prospective investors on the subscription application form” (see page 10). From TWEISL’s record on the Companies House website I was able to see the statutory deadline for the filing of TWEISL’s financial statements, which provided a longstop date by which time copies of the same should have been sent to me.

17. Notwithstanding the confirmation set out above, I do not recall ever being sent copies of the financial statements. However, I was easily able to obtain these directly from Companies House' website. During my investment, I noticed that TWEISL missed the relevant statutory deadline for filing its financial statements for the year ended 31 December 2017 (which expired in September 2018). I took the following action:
- (a) On 17 October 2018, I sent an email to Mr della Casa (copied to Rodney Birrell) noting that the statutory accounts were overdue and asking, "When are you expecting these to be filed?" Mr della Casa replied later that day confirming that the accounts would be filed "within the next fortnight".
 - (b) Noting that the accounts continued to remain overdue, on 8 March 2019 I sent a further email to Mr della Casa (copied to Rodney Birrell) stating that the accounts "are still showing as outstanding at Companies House" and asking "are the auditors still in place?".
114. Mr Clark continues by stating that during his annual reviews of the Company's financial statements, he recalls noting (amongst other things), the following:
- (i) "For the years ended December 2012 to December 2015, the reporting of various losses. I was not overly concerned by these at the time on the basis that TWEISL's performance was broadly in line with my expectations; as set out above, I expected there to be some fluctuations in the value of my investment depending on the condition of the wine market. This was substantiated by the information and updates set out in the Quarterly Reports. I considered these fluctuations an expected feature of investing in the wine market. They were also reflective of the relatively sophisticated nature of this particular investment and the fact that this was not a retail product aimed at novice investors. I expected that investors in TWEISL would hold their investments alongside others as part of a wider investment portfolio and that it would therefore attract reasonably sophisticated investors who would be comfortable with a certain degree of fluctuation in the value of their investment."
 - (i) "From the year ended December 2016, reference to a Bermuda- based entity called Lilliput Holdings Limited (Lilliput). I was aware that Rodney Birrell had various connections with Bermuda (as confirmed in the Financial Promotion at page 4), as did Anpero and TWEISL: another fund managed by Anpero (namely, TWIF) was domiciled in Bermuda, as was TWEISL's administrator (Tromino Financial Services Ltd.)."
 - (i) "I observed that the notes to the financial statements for the year ended 2016 recorded a "deposit" with Lilliput of £1,714,450. This amount was

material in the context of TWEISL and it was something that I monitored. However, I assumed that this was part of efficient cash management operations for TWEISL, and that Lilliput was an authorised deposit taking entity. In my experience, it is normal for investment funds to put surplus cash into short term deposits with authorised credit institutions and/or money market funds to earn a return pending application. I took some comfort from the fact that the notes in the 2016 accounts stated that the deposit with Lilliput had decreased from the amount recorded for 2015 (£2,259,500) - although the financial statements for the year ended December 2015 had not made any reference to any such deposit. The deposit with Lilliput was recorded in the 2017 financial statements as having decreased further (to £384,025) but was recorded as having grown to £2,995,150 in the 2018 financial statements. I attributed this increase to the portfolio being turned into cash in readiness for the fund being liquidated and distributions made to investors. I do not recall any of the financial statements for TWEISL making reference to Mr della Casa or his affiliates having an ownership interest in Lilliput, a family member of Mr della Casa being the only other director of Lilliput, or that Lilliput was not authorised to accept deposits in Bermuda. Had such facts been disclosed in the accounts, I would have been very concerned that Lilliput was not an appropriate counterparty and that TWEISL was being exposed to an unacceptable level of risk.”

115. Mr Clark continues:

“Ultimately, I took great comfort from the fact that the financial statements had been subject to independent review and sign-off by Crowe. I was confident that any issues or problems (or potential problems) with TWEISL’s accounts would have been brought to my attention, for example by Crowe refusing to sign-off the accounts or highlighting any concerns in the financial statements themselves. It was greatly reassuring to me that for each financial year, Crowe signed off the accounts without qualification. As far as Lilliput was concerned, I took this as confirmation that Crowe had investigated the position as to Lilliput to its satisfaction, including that it was confident that the deposits had been made in the manner set out in the financial statements.”

116. Mr Clark later states that he has read the PoC and Crowe’s Defence, and noted that these documents deal with a number of points regarding the various actions which the shareholders would have adopted (i) had Crowe declined to submit auditors’ reports; and (ii) if Crowe had issued a notification on various matters which would have suggested that a fraud or a potential fraud was being committed against the Company. Mr Clark says that he understands that the Company alleges at [42] of the PoC that for the years ending December 2012 to December 2018, Crowe acting competently would have declined to submit auditor’s reports for the Company stating that its financial

statements (a) gave a true and fair view of the state of the Company's affairs for the relevant period and of its loss for that period; (b) were properly prepared in accordance with the IFRS accounting standards; and (c) were prepared in accordance with the Companies Act 2006 ("CA 2006").

117. Mr Clark then addresses what he would have done if Crowe had declined to submit auditor's reports. He states:

"As I explain above, I read TWEISL's financial statements shortly following their publication each year and was very reassured by the fact that they had been signed-off by Crowe. It would have been immediately apparent to me had Crowe declined to submit auditors' reports. I would have also been deeply concerned on the basis that (as I explain above), I placed a great deal of weight on the fact that TWEISL's accounts were audited and therefore gave a true and fair view of the state of the company's affairs at the relevant time. My first thought would have been that there must be a (relatively substantial) issue which meant that the auditors were not comfortable with signing-off the financial statements. I have previously come across situations where auditors have been fired and newly appointed auditors have undertaken a fresh review of the company's accounts and have identified problems which have prompted them to refuse to sign-off auditors' reports or where there has been a delay in finalising financial statements because portfolio assets have been unusually difficult to value (for example, as a result of litigation). I would therefore have been on high alert at this point and my suspicions would have continued to build the longer the absence of auditors' reports persisted."

118. Mr Clark then states his understanding that the Company alleges at [43] of the PoC that, "in summary, Crowe should have also immediately reported various matters to TWEISL", including:

- (i) The relevant matters set out at [40] and [41] of the PoC (which set out the various breaches which are said to have been committed by Crowe in relation to the relevant audit years).
- (i) The business of the Company was fraught with risk and that it was likely to collapse if it carried on trading.
- (i) For each audit starting with the year ending December 2012, that the Company's monies were being used and/or mixed with the monies of other companies.
- (i) For each audit starting with the year ending December 2013, that although documents had been generated by management which appeared to record deposits or loans or payments to Lilliput, no monies were in fact paid to Lilliput.

- (i) Lilliput was not a bank or an entity capable of holding funds “on deposit”.
- (j) That the funds in fact went from the Company’s bank account to other third parties including Anpero and were not used for the benefit of the Company.
- (k) That the above factors were clear evidence or raised suspicions of a significant fraud being committed against the Company by its management or directors.

119. Mr Clark continues:

“I would have been very alarmed had I received a notification in respect of the above matters individually or as a whole. I had made a very considered investment in TWEISL on the basis of my due diligence and my risk appetite at the time. In doing so, I considered the various risks associated with the investment, including those set out in the Financial Promotion and TWEISL’s financial statements. Those risks did not extend to the risks set out above including the risk of fraud by TWEISL’s directors. The notification would have alerted me to risks that I simply did not think I was taking, and it would have prompted me to take immediate action to protect my investment (which I discuss further below).”

- 120. Up to this point, it seems to me that Mr Clark’s evidence is in line with the Company’s pleaded case as set out in the PoC, in particular in rehearsing that the PoC are complaining about the content of Crowe’s “unqualified” audit reports and that [43] of the PoC relates to an obligation to report “various matters to TWEISL”. Mr Clark’s evidence then deals with what he would have done if he had seen that no financial statements had been submitted and/or if he had received notification of such matters.
- 121. At the same time, he does not assert that notification should have been provided to him directly by Crowe, nor seek to explain how Crowe could or should have done that.
- 122. I consider that Mr Clark’s evidence must be read as contemplating that he would have “received notification” through the medium of a report from Crowe to the Company.
- 123. Mr Clark then states his understanding that Crowe “declining to issue auditor’s reports” includes Crowe reporting (1) the risk that the balances recorded as being held by Lilliput were misstated or misrepresented; and (2) that for all years in which the Company recorded an asset being held by Lilliput, that Crowe failed to seek or obtain any evidence that cash had indeed been deposited by the Company with Lilliput. He continues:

“Had I received a notification from Crowe in the terms set out above, I would have considered it to be a significant red flag. I explain above that in respect of

the financial statements for the year ended 2016 onwards, I was aware of the reference to Lilliput but took great comfort from the fact that Crowe had signed off auditors' reports for the relevant years and had not raised any warnings regarding the sums purportedly deposited with Lilliput. On this basis, I had assumed that Crowe had undertaken all proper investigations and had satisfied itself as to [the] position regarding Lilliput. Had I been made aware that in fact the opposite was the case and that a proper assessment had not been undertaken – to include a failure to obtain any evidence of deposits – I would have lost confidence in TWEISL and the security of my investment.”

124. Mr Clark states that had Crowe declined to submit an auditor's report and/or had he “received notification in the above terms”, then:

“I would have taken (or considered taking) a range of action, including the steps set out below:

(a) I would have contacted Mr della Casa to discuss the situation and ask questions. I also would have requested that he take immediate steps to organise a shareholders' meeting to provide opportunity to discuss these significant issues and decide on a course of action going forward. Given the terms of the notification, I would have treated with extreme caution anything said to me by Mr della Casa and would have anticipated a degree of prevarication on his part in terms of liaising with the shareholders and/or setting up a meeting. I would therefore have taken steps (in conjunction with my discussions with Mr della Casa) to contact Crowe to discuss the notification issued by them and to see whether any further information could be obtained/whether they could verify any information which may have been provided to me by Mr della Casa.

(b) Depending on Mr della Casa's response to my request for a shareholders' meeting, I would have taken independent steps to contact the shareholder group. I would have first contacted Crowe to request that they put me in touch with the other shareholders or provide me with their contact details. Had Crowe declined to do so, I would have searched Companies House to establish the shareholders' names and their approximate shareholdings (which are recorded in TWEISL's annual returns) so I could form a view about which investors held significant interests. I would then have contacted these individuals to discuss the notification further. I would also have considered placing a notice in the press inviting any shareholders to contact me. I am confident that these efforts to established contact with other shareholders would have been successful. As noted above, I had been in contact with another investor (Anthony Edwards) around the time of discussions amongst the shareholder group to remove Price Bailey as TWEISL's liquidators. Anthony had in turn informed me of the steps being proposed by other shareholder groups regarding Price Bailey's removal. Given

this degree of contact amongst the shareholder group, I am certain that contact would also have been established in circumstances where the shareholders had been notified of a fraud (or potential fraud) against TWEISL.

(c) I would have considered and supported obtaining legal advice in relation to the notification and the options/remedies available.

(d) I would have considered and supported the immediate dismissal and replacement of the directors, especially in circumstances where there was a significant concern that they had been committed the fraud.

(e) I would have considered and supported an investigation of the reasons for the matters of concern set out above which would have revealed all the matters which we now know about, including the use of TWEISL monies for ulterior purposes.

(f) I would have fully supported the liquidation of TWEISL regardless of any tax relief which was or may have been available to me. The whole hypothesis behind my investment (being to make a reasonable return on a risk adjusted basis and involve experienced professionals in my wine investment) would no longer have stood up at that point (because the risks would have increased significantly in a manner that could not be accurately quantified) and so a liquidation would have appeared a logical and sensible option in the circumstances. It would also have been very advantageous at that point given that a liquidator would have had access to the assets of TWEISL and would have had statutory powers to investigate matters and take immediate steps to preserve and secure TWEISL's assets. I would have supported the taking of any such steps and would have made every effort to protect what I could in terms of my investment and the assets of the company.

(g) I would have considered and supported reporting the matter to Action Fraud (the national reporting centre for fraud and cyber-crime)."

125. In my opinion, this part of Mr Clark's evidence is addressing "notification" by two different means: (i) by Crowe failing to submit auditor's reports (which he would have learned about as a result of his searches for the Company's financial statements) and (ii) in some other way. As to the second means, this evidence is an expansion of Mr Clark's earlier evidence, and accordingly must also be read as contemplating that he would have "received notification" through the medium of a report from Crowe to the Company.
126. Mr Clark does not spell out how he considers that a report from Crowe to the Company would reach him, but the implication of his evidence is that it would do so through the medium of the Company's financial statements. This is consistent with Mr Clark's understanding that Crowe "declining to issue auditor's reports" includes

Crowe reporting (1) the risk that the balances recorded as being held by Lilliput were misstated or misrepresented; and (2) that for all years in which the Company recorded an asset being held by Lilliput, that Crowe failed to seek or obtain any evidence that cash had indeed been deposited by the Company with Lilliput – because that understanding links Crowe’s reporting of these matters to the production of auditor’s reports. Further, these matters could have been “reported” by a disclaimer or qualification in the reports.

127. Next, Mr Clark states that he has read the Company’s case at [45] of the PoC which sets out the actions which the members would have taken upon receiving notification.
128. Mr Clark confirms that “I would have supported these actions being taken in principle and subject to matters including any legal advice which may have been received as to options and immediate next steps at the time”. This is a highly qualified statement.
129. Mr Clark says that he understands that [40.5] of Crowe’s Defence contends that if the Company’s members did not read and/or consider in any detail the financial statements or Crowe’s audit reports, then further disclosures within those documents would have made no difference. He states:

“I entirely disagree with this for the reasons set out above; I did in fact read and consider in detail each of TWEISL’s financial statements and Crowe’s auditors’ reports shortly following their publication each year. I would have immediately seen any notifications contained in those documents, to include in relation to the matters set out above. Furthermore, as I explain above, I would have immediately contacted other investors to discuss any such notification.”

(b) Mr Streather

130. In his first witness statement dated 31 January 2025, Mr Streather explains that:

“During the course of my investment, I read the Company’s financial statements (as filed at Companies House) on an annual basis and as part of a wider review of my investments. I obtained copies of the financial statements directly from Companies House website (which is a very easy process). I read the Company’s financial statements primarily with a view to obtaining an understanding of (1) whether the Company had made a profit in that financial year; (2) whether the management fees and other expenses appeared reasonable in amount; and (3) whether the value of the Company’s assets had increased or decreased. I am not an accountant and very much reviewed the Company’s financial statements from an investor perspective and to get some comfort that my investment was on track to make a return”.

131. Later in his witness statement, Mr Streather says that having read [42] of the PoC, he understands that is the Company’s case that Crowe should have declined to submit auditor’s reports for the Company for the years 2012 to 2018 confirming that (i) its

financial statements gave a true and fair view of the state of the Company's affairs and its losses for the relevant periods; and (ii) the financial statements were properly prepared in accordance with the relevant rules (being the IFRS accounting standard and the provisions of the Companies Act 2006). Mr Streather continues as follows:

“If a reputable professional auditor such as Crowe had taken the above action, I would have been highly concerned. Given that I reviewed the Company’s financial statements on an annual basis, any declination in the manner set out above would have been immediately obvious to me following that review and would have led me to suspect that there were major issues with the Company’s financial position. I certainly would not have invested any further money with the Company in these circumstances and would have been nervous about the security of my existing investment. My first action would have been to contact Crowe to establish why they had declined to submit an auditors’ report. Crowe may have been unwilling to engage in discussions or provide me with any further information. In this case, I would have contacted the directors of the Company to seek further information. Again, there is no certainty that I would have received satisfactory answers from them (particularly in circumstances where there was a suspicion that the directors had committed a fraud or potential fraud). In this instance, I would have contacted the other shareholders to discuss the position and seek their views, to include in respect of the next steps. This may have included seeking to replace the directors with an independent board.”

132. Next, Mr Streather deals with his response “had Crowe issued a notification to shareholders”. He states that, having read [43] of the PoC, he understands the Company’s case to be that “Crowe should have immediately reported the following matters to the Company”:

- (i) Those referred to in [41] and [42] of the PoC.
- (i) The business of the Company was fraught with risk, unsustainable and likely to lead to a financial collapse if it continued to trade.
- (i) For each audit for the year ending December 2012 onwards, that Company monies were being used and/or mixed with the monies of other companies.
- (i) For each audit for the year ending December 2013 onwards, that although documents had been generated by management which appeared to record deposits or loans or payments to Lilliput, no monies were in fact paid to Lilliput.
- (i) Lilliput was not a bank/an entity capable of holding funds “on deposit” in order to “generate a greater return on investment”.

- () The actual destination of the funds was from the Company's bank account to Anpero and/or other third parties and/or used for their purposes or the purposes of the directors but not for the Company's benefit.
- () The above factors were clear evidence of and/or indicative of and/or raised suspicions of a significant fraud being committed against the Company by its management or directors.

133. Mr Streather states:

“I would have read any such notification at the time of my annual review of the Company's financial statements and would have considered it to be extremely alarming. Again, it would have made me very nervous about the security of my investment and question how such a situation could have possibly occurred given Crowe's involvement in the annual audit process. With specific reference to the notification concerning Lilliput, as I have explained above, I was very comforted by the fact that Crowe had audited the financial statements every year and assumed that this process had been conducted competently and in line with the standards I would have expected from such a reputable firm. If I had found out that Crowe had in fact failed to undertake proper investigations, including in respect of Lilliput, I would have lost confidence in both Crowe and the Company. I would have started interrogating Crowe and the Company's directors as to the exact position regarding Lilliput and the true destination of the monies which had purportedly been lent to it.”

134. This evidence makes clear that Mr Streather is not contemplating “receiving notification” other than by reading information included in the Company's financial statements. As set out above, I consider this is also the meaning of Mr Clark's evidence.

135. Mr Streather continues:

“If I had received a notification in the above terms, I would have taken immediate action including the following:

- () I would have started by asking questions of Crowe and the directors of the Company to try and establish whether any further information or explanation could be obtained in respect of the issues identified in the notification. Given the very serious nature of the notification, I suspect that I would not have received sufficient explanations from either of these parties. I would obviously have treated any information received from the directors with a large amount of caution and scepticism (as indeed I did when receiving information from Mr Della Casa in July and

October 2020) given the warning that they had been (or may have been) involved in a fraud.

- () I would have supported a full investigation into each of the matters referred to above (being Crowe's failure to submit auditors' reports and/or each of the matters contained in Crowe's notification). I consider that such an investigation would have uncovered all the matters of which we are now aware concerning the true state of the Company's affairs and operations, including the dissipation of monies from the Company to third parties for their benefit (or the benefit of the directors).
- () I would have contacted the other shareholders to discuss the notification, their views about the notification and the possible courses of action open to us as shareholders. I explain above the various steps I took to contact the other Company shareholders in the context of replacing the Price Bailey liquidators with new liquidators. The notification of a fraud (or potential fraud) is clearly a significantly graver matter and one which warrants immediate action to ensure that the fraud and any losses are stopped or minimised to the greatest extent possible. There is absolutely no doubt in my mind that I would have embarked upon exactly the same course of action as I did in the context of Price Bailey's replacement in contacting the other shareholders so that an immediate discussion could be facilitated. This would have comprised the following steps: (1) I would first have contacted Crowe and/or the directors to seek the names and contact details of the other shareholders; (2) if these details had not been forthcoming, I would have conducted searches of Companies House and/or the internet to seek the relevant information. Given the success I achieved in contacting the investors in the context of the Price Bailey replacement, I am very confident that I would have been equally successful in establishing contact and organising a shareholder meeting in this instance. Based on my previous discussions with the shareholders and their enthusiasm for taking action in the context of the replacement of Mr Pittman and Mr Higley, I am convinced that there would have been the same – if not significantly greater - enthusiasm for discussing and agreeing next steps following a notification which indicated that a significant fraud had been committed against the Company.
- () As I did in connection with the replacement of Mr Pittman and Mr Higley as joint liquidators, I would have taken (or supported the taking of) legal advice as to the notification and the various options

available to the shareholders. I would have sought to instruct specialist lawyers with experience of fraud to provide this advice.

- (i) In circumstances where there was evidence or a suspicion that the directors may have committed a fraud, I would have supported immediately replacing the directors with new directors/management.
- (i) I would have taken (or supported the taking of) any reasonable action which would have stopped further monies from being transferred out of the Company and preserved the assets of the Company. This may have included placing the Company into liquidation (and I would have been fully supportive of such a step). I would also have been fully supportive of any recovery action in respect of the missing monies. This may have included seeking a freezing order or presenting a winding up petition. I have a reasonable familiarity with these options from my knowledge as a general practitioner. I can say categorically that I would certainly not have prioritised the maintaining of any EIS relief over a possible liquidation of the Company (which I note is suggested by Crowe at paragraph 40.3 of its Defence). This would have been a ludicrous course of action to take in circumstances where a possible fraud was being committed against the Company which placed at risk my investment. As I explain above, my main priority in terms of my investment was making a profit and so I would have taken (or supported the taking of) any action which would have safeguarded my investment funds.”

136. Mr Streather further states:

“Thinking realistically and practically about the situation, and especially given the considerable steps which I have already taken, I confirm that I would have been prepared to take such further action as would have been necessary in the circumstances to investigate and address any fraud, minimise the losses to the Company and protect my investment. On this issue, I have read paragraph 45 of the Particulars of Claim and understand that it sets out the Company's case on what action would have been taken by the shareholders following a notification by Crowe. I confirm that I would have been supportive of the action set out in that paragraph.”

(c) Mr Hillson

137. In his first witness statement dated 20 January 2025, Mr Hillson states:

- (1) Having reviewed the PoC, he understands that it sets out what the Company says (1) Crowe should have done in declining to submit auditors' reports for the years ending 2012 to 2018 confirming that the Company's financial statements gave a true and fair view of the state of the Company's affairs and were properly prepared in accordance with the relevant rules (at [42]); and (2) what should have been reported to the Company by Crowe in respect of its financial situation (at [43]).
- (2) If he had been aware during the course of his investment that Crowe had declined to submit auditors' reports, then his response would have been one of significant concern. As an auditor's job is to ensure that a company's accounts are accurate, he would therefore have suspected that there was an issue or concern which prevented Crowe from doing so. This would have made him very nervous. He would not have made any further investments with the Company, and he would have sought to protect the monies which he had already invested by trying to recover the same from the Company.
- (3) The PoC set out the various other steps which Crowe should have taken (at [43]). They include reporting the matters set out in [40] and [41]. With specific reference to Lilliput, it is stated that the balances said to have been held by Lilliput (an entity based in Bermuda) were misstated or misrepresented and that Crowe failed to obtain any evidence that cash had indeed been deposited with Lilliput. Crowe has admitted in its Defence (at [37.10.2]) that it failed to adequately assess the risk.
- (4) Mr Hillson further understands that the Company's position is that Crowe should have notified the shareholders of the risks regarding the purported sums sent to Lilliput. Had he received a notification in these terms, he would have been deeply concerned. Had Crowe raised concerns (as he believes they should have) that monies were in fact purportedly deposited in a Bermuda entity which was connected to AdC, and which could not in fact have received the relevant monies because it did not have a bank account, that would have rung alarm bells with him immediately, and he would have been extremely nervous about the security of his investment and his ability to liquidate his investment at relatively short notice.
- (5) Furthermore, having reviewed the PoC, he understands that it sets out at [43] that Crowe should have reported that the matters set out at [43(b)]- [43(f)].
- (6) Those matters would have been greatly concerning to him. If they had been reported, then he would have taken immediate action.
- (7) Furthermore, if he had been told that those matters were clear evidence of, and/or indicative of and/or raised suspicions of, a significant fraud being

committed against the Company by its management or directors (or some of them) then he would have felt no confidence in the Company anymore.

- (8) Had there been a fraud or a risk of fraud on the Company, he would have expected Crowe to immediately signal that in very clear terms to the investors, especially in circumstances where there had been any suspicion on the part of Crowe that the fraud had been committed by the directors of the Company. Therefore, had he received notification from the auditors that there was a suspicion of a fraud against the Company by its directors, he would obviously have been extremely concerned and would have acted with urgency in order to protect his investment (to the extent achievable).
- (9) He would have taken steps including: (a) Discussing the position with the other investors. He got to know various of the other investors during the course of the Company's liquidation and he was aware that several of them are very experienced and knowledgeable investors. As part of the discussions with the investors group, he is confident that we would have sought their views when deciding upon a course of action. (b) Contacting AdC to demand answers. In circumstances where he had been alerted to a fraud or potential fraud committed by the directors themselves, he would have treated anything that AdC said during these post-notification discussions with a high degree of scepticism. (c) Obtaining legal advice as to the actions and remedies available. (d) Exploring how to recover the losses and prevent any more from occurring and even whether to place the Company into liquidation. (e) Considering what should be done with the directors of the Company and any legal recourse which might be taken against them in view of the above matters and the suspicion that the directors had been behind a fraud.
- (10) He understands that the Company sets out at [45] of the PoC the various actions which the members would have taken following receipt of a notification from Crowe. To the extent that his views are not already clear, he confirms that he would have supported steps being taken including those set out in [45].
- (11) Crowe states (at [40.5] of the Defence) that if the investors had not read the financial statements, then any disclosures within those statements made by Crowe would not have made any difference. He does not agree with this because "it ignores the reality of what I consider would have happened in this situation". He continues: "Although I do not myself recall having reviewed the Company's accounts each year, I am sure that I would have read accounts which came with notification that the auditors had declined to sign off on them and/or had given the warnings which I have referred to above".
- (12) He is certain that other investors would have done so and would have raised alarm bells within the shareholder base if anything untoward had been reported by the auditors or the auditors had refused to sign off. He considers it highly

likely that news of any disclosure in the Company accounts alerting the investors to a fraud (or the other matters referred to above) would have been immediately flagged and discussed with great urgency, and that enquiries would have been made with Crowe to establish whether it was able to provide any further information relating to the notification. He would certainly have contacted Crowe to discuss the notification. He would also have sought information from Crowe relating to the other investors (unless he had already been contacted by another investor to discuss the situation first).

138. Mr Hillson's first witness statement is more open-ended than the first witness statements of Mr Clark and Mr Streather because, unlike them, when Mr Hillson talks about the Company's pleaded case concerning Crowe's failure to report he does not repeat the pleaded formulation "report to the Company". Nevertheless, it is clear that Mr Hillson's evidence in his first witness statement is designed to track what is pleaded in the PoC, and (as set out above) that the Company's pleaded case (in particular, at [43] of the PoC) is that Crowe should have reported, but failed to report, various matters to the Company.
139. Also, it gives rise to inconsistency, and makes no sense, to read these witness statements as addressing different cases as to the means by which shareholders would "receive notification" of Crowe's findings or concerns - such that Mr Hillson's evidence should be read as contemplating direct communication from Crowe to him, whereas the evidence of Mr Clark and Mr Streather should be read differently. There is no suggestion that Crowe should have adopted a different approach to Mr Hillson than it did to them.
140. The like points therefore apply to the evidence of Mr Hillson as apply to the evidence of Mr Clark and Mr Streather. He is not contemplating direct reporting to members.

STAGE 4 – THE EVIDENCE OF THE AUDITING EXPERTS

141. Mr Ashley produced a report dated 2 April 2025.
142. Mr Ashley deals with the 2012 audit at section 6.2 of that report. At [6.2.1] onwards, he sets out a number of enquiries that, in his view, a reasonably competent auditor ought to have made, and explains his reasons for thinking that if Crowe had made those enquiries the responses (i) would not have enabled it to obtain sufficient appropriate audit evidence to sign an unqualified audit report on the 2012 financial statements, and (ii) would have caused it conclude that there was a significant risk of fraud and a realistic possibility that the Company's assets were being misappropriated by the directors.
143. At [6.2.25], Mr Ashley states that in his opinion, taking into account these matters, a reasonably competent auditor would have regard to the provisions of ISA 200 ("Overall Objectives of the Independent Auditor and the Conduct of an Audit in

Accordance with International standards on Auditing (UK)”) and ISA 705 (“Modifications to the Opinion in the Independent Auditor’s Report”), and in particular following provisions:

“In all cases when reasonable assurance cannot be obtained and a qualified opinion in the auditor’s report is insufficient in the circumstances for purposes of reporting to the intended users of the financial statements, the ISAs (UK) require that the auditor disclaim an opinion or withdraw (or resign) from the engagement, where withdrawal is possible under applicable law or regulation.”

“The auditor shall disclaim an opinion when the auditor is unable to obtain sufficient appropriate audit evidence on which to base the opinion, and the auditor concludes that the possible effects on the financial statements of undetected misstatements, if any, could be both material and pervasive.”

144. At [6.2.26], Mr Ashley states:

“In view of these requirements and given the significance of the amounts involved and the pervasive nature of the concerns surrounding cash paid to TWIFL via TWIF, in my opinion a reasonably competent auditor would have concluded that in order to properly report to the shareholders they should either disclaim an opinion or more likely consider resigning.”

145. At [6.2.27], he states:

“If a reasonably competent auditor proposed issuing a disclaimer, then it is possible that the directors would have asked them to stand down as auditors in any event. Whilst the directors could not have insisted on such a step (the removal of auditors before the end of their term of office is reserved to the members by section 510(4) [CA 2006]) a reasonably competent auditor would likely in my opinion either in response to such a request or otherwise have decided that they should consider resigning without issuing a report.”

146. Mr Ashley states at [6.2.29]:

“In my opinion a reasonably competent auditor is likely to have determined, even without taking legal advice, that in the circumstances outlined above it was appropriate for them to consider resigning. I believe however that they would have taken legal advice on the exact steps to be taken as a consequence of that conclusion. In this context, and given the serious legal issues to be considered, the reasonably competent auditor would work closely with either in-house counsel and/or external lawyers in respect of the bullet points set out below, taking legal advice until the conclusion of this matter:

- the obligations set out under sections 519, 521 and 522 CA2006. These provisions would have required them to report any circumstances connected with their resignation that they believed needed to be brought to the attention of members/creditors to the directors, the registrar of companies and the appropriate audit authority. They would also have been able under section 518 CA 2006 to require the directors to convene a general meeting of the members to consider any explanation they wished to present of the circumstances connected with their resignation.
- any duty that they had to inform the Company (or its shareholders in the circumstances of this case) of the auditor becoming aware of or suspecting fraud or any other third party as articulated in the case of *Sasea Finance Limited*.
- the obligation under the Prevention of Crime Act 2002 to file a Suspicious Activity Report and also not to commit a “tipping-off” offence.”

147. At [6.2.30]-[6.2.36], Mr Ashley deals with the likely timing of the steps and actions that he considers Crowe ought to have taken, concluding at [6.2.36]:

“I believe therefore it is reasonable to assume therefore that shareholders would have been made aware that the auditors were not able to provide an audit opinion either through the issue of financial statements with an opinion disclaimed or more likely through a letter explaining their resignation or some other communication sometime in February or early March 2014”.

148. At [6.2.37], Mr Ashley lists the following “key considerations” that, in his view, when seeking legal advice, a reasonably competent auditor would have identified as leading the auditor to take the view that the auditor should resign:

- “- They knew that the funds of TWEISL had been comingled with a related party also advised/managed by the Scheme Manager in that purported bank deposits as well as some purchases and sales of wine had been routed through TWIF.
- An amount represented to them in the draft financial statements as a cash and cash equivalent as at 31st December 2012 was seemingly due from TWIFL. This purported deposit had also seemingly increased significantly since the year end and (assuming this was now after 31st December 2013) was now over £700,000.
- Whether the balance was still represented as being with TWIFL or (more likely) with Lilliput they did not have sufficient appropriate audit evidence as to its existence (given the payments that had been routed through TWIF) or its recoverability. In relation to Lilliput they had also received no satisfactory explanation as to why the payments

had been routed through TWIF. They also had no evidence that the purported deposit met the definition of cash and cash equivalents under IFRS.

- TWIFL, TWIF and Fine Wines had not been identified by the directors as related parties. This might also apply to Lilliput given that when the existence of Lilliput first came to light in the 2013 audit it was not seemingly identified by the directors as a related party.
- There did not seem to be any controls operated by either the directors or Scheme Manager to prevent future comingling of TWEISL's funds with those of other funds managed/advised by the Scheme Manager. Indeed the arrangements with TWIF were seemingly designed explicitly to facilitate this.
- The Scheme Manager's own accounts showed that it had a significant net liability position and was supported certainly by loans from the directors (RB and AdC) and also at least in the past by borrowings from one of the wine funds that it advised/managed.
- The Company was continuing to raise funds from investors.
- As a consequence of the above they had grounds for serious concern about the integrity of the directors and that TWEISL's cash funds may have been and may in future be diverted for the benefit of the directors and/or Anpero in a manner that may constitute fraud."

149. Mr Ashley repeats the like exercise with regard to each later audit. See, in particular, [6.3.13] with regard to the 2013 audit, [6.4.11] with regard to the 2014 audit, [6.5.12] with regard to the 2015 audit, [6.6.10] with regard to the 2016 audit, [6.7.10] with regard to the 2017 audit, and [6.8.10] with regard to the 2018 audit, all of which repeat the same words: "As noted above a reasonably competent auditor would have taken legal advice on the contents of any communication with the shareholders of TWEISL and/or such resignation letter, having regard to the considerations set out in (i) the provisions of ss519, 521 and 522 of the CA 2006, and the fact that, pursuant to s518, Crowe could require the directors to convene a general meeting of the members to consider any explanation it wished to present of the circumstances connected with its resignation above."

150. For example, in relation to the 2013 audit, Mr Ashley lists at [6.3.13], the following "key considerations" that, in his view, when seeking legal advice, a reasonably competent auditor would have indicated had led to the auditor to take the view that the auditor should resign:

- "- They knew that the funds of TWEISL had been comingled with a related party also advised/managed by the Scheme Manager in that

purported bank deposits as well as some purchases and sales of wine had been routed through TWIF.

- An amount represented to them in the draft financial statements as a cash and cash equivalent as at 31st December 2013 was in fact an amount purportedly due from Lilliput which had seemingly increased significantly since the year end and (assuming this was now after 31st December 2014) was nearly £1.2 million.”

151. Mr Ashley addresses what he regards as the comparable “key considerations” in respect of later audit years in similar terms at [6.4.11], [6.5.12], [6.6.10], [6.7.10], and [6.8.10].
152. Pausing there, it is clear that Mr Ashley was not putting forward any view as to what legal advice Crowe would have obtained. In particular, Mr Ashley expresses no view as to the contents of any statement of reasons for resignation that would be made in accordance with that advice. Nor does Mr Ashley express any view on whether the advice would have been that Crowe ought to report directly to the shareholders. His expert evidence goes no further than to say that, in his view, Crowe would have taken legal advice, and to identify the matters that he considers the legal advisers would have needed to take into account. This is plain from the wording of Mr Ashley’s report. It was confirmed by an answer that he gave in cross-examination (emphasis added):

“It is clear, I think, from what I am aware of, particularly I had my attention drawn to the case of *Sasea*, but I would have always accepted, I think, that there may be common law duties that an auditor owes to shareholders, again probably as a body, outwith the statutory requirements. *Sasea* makes it clear that there are circumstances, particularly in cases involving suspected fraud, where, as I indicated earlier, an accountant, not just an auditor, acting in the public interest might be expected to try and draw a halt to that fraud. So I was merely allowing for the possibility that the legal advice might say, I do not know that it would, that I should be communicating directly to the shareholders in order to be able to draw a halt to what I thought might be a potential fraud.”

153. In this regard, [6.2.30]-[6.2.36] of the report are concerned with timing. In particular, [6.2.36] addresses matters on the contingent basis that, if it had considered resigning and had sought legal advice, Crowe would have been advised to report to the members.
154. Those paragraphs cannot be read as if Mr Ashley is saying that, in his view, Crowe would have sent a letter or some other communication directly to shareholders explaining its reasons for resigning. To read these paragraphs of his report in that way would run counter to other sections, where he refrains from expressing any such view.

155. In my judgment, therefore, the contents of Mr Ashley's expert report, even taken entirely at face value and without any qualification, were insufficient to provide the Company with a basis for claiming that Crowe should have reported directly to shareholders, whether as a matter of factual analysis (i.e. that if Crowe had acted as it ought to have done, and had sought the legal advice that it ought to have sought, that is what Crowe would have ended up doing) or as a matter of legal obligation (i.e. that Crowe owed a duty to report directly to shareholders in the circumstances of this case).
156. In order to make good the first of those bases of claim, it was necessary for the Company to go further than Mr Ashley does in his report, and to advance a positive case that the legal advice that, in Mr Ashley's view, Crowe ought to have obtained, would have been that Crowe should report directly to shareholders. Without that element, any case based on Mr Ashley's evidence was inchoate. Put another way, if the contents of Mr Ashley's report were transposed into a pleaded case, that pleading would not provide the Company with a cause of action, because a pleaded case that "Crowe should have taken legal advice, but the Company advances no case that such advice would have been that Crowe should report directly to shareholders" would not disclose a properly arguable claim that "Crowe should have reported directly to shareholders". It makes no difference that the issue of what Crowe's legal adviser(s) should have advised Crowe to do is a matter for the determination of the Court. That is true of most pleaded issues. The Company would still have needed to plead how it claims that issue should be resolved.
157. In order to make good the second of those bases of claim, as a matter of law Crowe either had, or did not have, a duty to report directly to shareholders (and in particular terms) on the facts of the present case. The existence of that duty would not be affected by whether Crowe did or did not seek legal advice, or indeed by the contents of any advice that Crowe may have decided to seek. Accordingly, Mr Ashley's evidence about the likelihood of Crowe needing to seek legal advice, and the factors that would influence the advice that Crowe would have received, are beside the point. However, if and to the extent that the Company wished to advance a case that Crowe owed a duty to report directly to shareholders, not by asserting that duty straightforwardly, but instead by asserting it through the indirect or elliptical route that this is what Crowe would have been advised if Crowe's lawyer(s) had correctly analysed the law, it was necessary for the Company to go further than Mr Ashley does, and to say that. Without that element, the Company's case on this second basis is as inchoate as its case on the first basis.
158. I do not consider that these conclusions are affected by [5.5.1] of Mr Ashley's report, where Mr Ashley states (emphasis added):
- "Paragraphs 43 and 44 of the Particulars of Claim sets out various matters which it is alleged should have been reported by Crowe to TWEISL and that such reporting should have been made no later than the signing date of each

set of accounts. I understand that in this context reporting to TWEISL encompasses reporting to its members in circumstances where all the directors were or were reasonably likely to be involved in the dishonest activity in question.”

159. As will be seen below, at the trial of this claim it formed part of the Company’s case that these words made clear that the plea in [43] the PoC that “Crowe acting competently would have reported promptly and without any delay to TWEISL the matters set out below” and in [44] of the PoC that “Crowe should (in each relevant year) have taken the steps set out above at paragraph 43 promptly and/or without limitation no later than the signing date of each set of accounts as set out in paragraph 7 above” should be understood as advancing a case that “Crowe acting competently would have reported ... to the members of TWEISL”. I do not consider that this argument is well-founded.
160. First, on the face of it, the “understanding” that Mr Ashley says that he has appears to have been provided to him by someone else, but he does not say when, by whom, or on what basis. The fact that Mr Ashley may have been given an “understanding” by unidentified means on an unidentified basis cannot change the meaning of the PoC.
161. Second, if, contrary to the above, this is Mr Ashley’s own view, it does not fall within the proper remit of his evidence as an auditing expert to express a view on whether a pleaded case that there was an obligation to report to the Company should be understood as including a pleaded case that there was an obligation to report to the members.
162. Third, the understanding expressed by Mr Ashley does not accord with the contents of the PoC. In particular, the PoC plainly distinguish between (i) TWEISL and (ii) the members of TWEISL, and it would be contrary to this to read [43] and [44] as suggested.
163. Fourth, this “understanding” is contrary to Mr Ashley’s own evidence, because, as set out above, that evidence does not provide a basis for putting forward a case on behalf of the Company that Crowe should have reported directly to shareholders. The lack of any averment in Mr Ashley’s report, either (i) that Crowe would have been advised to report directly to shareholders or (ii) that Crowe owed a duty to report directly to shareholders, is inconsistent with saying that the PoC should be read as alleging that “Crowe acting competently would have reported ... to the members of TWEISL” – as, in the absence of any such averment, there is simply no basis for that allegation. The Company offered no basis for any “direct reporting to members” case outside this report.
164. Mr Ashley and Mr Main produced a joint statement dated 22 May 2025.

165. At section 7, under the heading “Auditor’s duties to report to the shareholders, those charged with governance and management including duties relating to resignation - Areas of agreement”, the joint statement records:

“The Experts agree that the auditor has the following duties to report matters arising from their audit of a limited company in the United Kingdom when that company is not a regulated company under the Financial Services and Markets Act 2000 (and the Experts agree that TWEISL was not a regulated entity):

There is a requirement in ISA 260 for auditors to report to those charged with governance (which in the case of TWEISL comprised only Mr della Casa and Mr Birrell), timely observations arising from their audit that are significant and relevant to their responsibility to oversee the financial reporting process.

There is a requirement in ISA 260 for auditors to evaluate whether the two-way communication between the auditor and those charged with governance has been adequate for the purpose of the audit. If it has not, then the auditor is required to evaluate the effect, if any, on the auditor’s assessment of the risks of material misstatement and ability to obtain sufficient appropriate audit evidence and take appropriate action. ISA 260 notes that such action may include communicating with “a higher authority in the governance structure outside the entity, such as the owners of the business”. The Experts agree that in such circumstances auditors would take legal advice before seeking to communicate directly with shareholders, especially if the circumstances were considered sufficient to lead to them considering their resignation as auditors.

There is a requirement in ISA 265 for an auditor to report significant deficiencies in internal controls to those charged with governance of an entity.

Auditors have a duty to provide an opinion on the truth and fairness of the financial statements of a limited company in the United Kingdom to the shareholders in accordance with Section 495 of the Companies Act 2006 ... The audit report should be made in accordance with the requirements specified in ISA 700, ISA 705 and ISA 706.

If the results of Crowe’s audit procedures indicated that there had been material and pervasive fraud or if the absence of audit evidence is such that an auditor is unable to form an opinion on the truth and fairness of the financial statements, and/or if an auditor has significant concern about the integrity of management these would constitute examples of the exceptional circumstances described in paragraph 38 of ISA 240 that would have required them to consider resignation. The Experts also agree that such circumstances could have arisen had Crowe considered it necessary to issue an audit report that stated that they disclaimed

an opinion on the financial statements or gave an adverse opinion on the financial statements.

If an auditor considers there are circumstances connected with their ceasing to hold office that need to be brought to the attention of the members or creditors of the Company, they are required by Section 519 of the Companies Act 2006 to send a statement of those circumstances to the Company. The Experts agree that paragraphs 4.3.11 to 4.3.13 of Mr Main's report fairly describes the required process and that additionally an auditor has a right (but not a duty) in accordance with Section 518(2) of the Companies Act 2006 to require that the directors convene a general meeting of the company for the purposes of receiving and considering the auditor's explanation for their resignation.

An auditor is likely to take legal advice before resigning and issuing any statement under Section 519 of the Companies Act 2006 and on the contents of that statement having set out the relevant circumstances to their legal advisers.

If there is a suspicion of fraud, there is likely to be an obligation under the Proceeds of Crime Act 2002 to file a Suspicious Activity Report. If such a situation arises the auditor is also like to take legal advice to avoid a tipping off offence under that Act, before making any of the reports referred to above."

166. Section 7 of the joint statement records the following areas of disagreement:

"Mr Ashley notes that in the event that the auditor sought legal advice in contemplation of resigning, then such legal advice would as a matter of course cover not only the auditor's statutory duties, but also any other common law obligations that the lawyer felt the auditor may have in the specific circumstances. Where, as in this case, the auditor had concerns that fraud may be being committed, Mr Ashley understands that such legal advice would in particular consider the implications arising from the decisions in the *Sasea Finance* cases."

"Mr Main is not aware of any other reporting responsibilities of the auditors apart from through the channels described in the areas of agreement above."

167. Again, pausing there, this evidence does not, any more than Mr Ashley's report, provide the Company with a basis for claiming that Crowe should have reported directly to shareholders, whether as a matter of factual analysis (i.e. that if Crowe had acted as it ought to have done, and had sought the legal advice that it ought to have sought, that is what Crowe would have ended up doing) or as a matter of legal obligation (i.e. that Crowe owed a duty to report directly to shareholders in the circumstance of this case).

168. It provides the basis for a claim that Crowe would take legal advice before seeking to communicate directly with shareholders, and puts forward a case as to the ambit of that advice. But it does not advance any case as to what this advice would be, or any case that this advice would correctly reflect the nature of Crowe’s legal duty, and that such duty would be to report directly to shareholders in the circumstances of the present case. Even if it is implicit that the advice would be accurate, it is not said what it would be.

169. The relevant provision of ISA 260 is [A44] of the section entitled “Application and other explanatory material”:

“If the two-way communication between the auditor and those charged with governance is not adequate and the situation cannot be resolved, the auditor may take such actions as:

- Modifying the auditor’s opinion on the basis of a scope limitation.
- Obtaining legal advice about the consequences of different courses of action.
- Communicating with third parties (for example, a regulator), or a higher authority in the governance structure that is outside the entity, such as the owners of a business (for example, shareholders in a general meeting), or the responsible government minister or parliament in the public sector.
- Withdrawing from the engagement, where withdrawal is possible under applicable law or regulation.”

170. The relevant provision of ISA 240 is [A54] of the section entitled “Application and other explanatory material”:

“Examples of exceptional circumstances that may arise and that may bring into question the auditor’s ability to continue performing the audit include:

- The entity does not take the appropriate action regarding fraud that the auditor considers necessary in the circumstances, even where the fraud is not material to the financial statements;
- The auditor’s consideration of the risks of material misstatement due to fraud and the results of audit tests indicate a significant risk of material and pervasive fraud; or
- The auditor has significant concern about the competence or integrity of management or those charged with governance.”

171. The CA 2006 at s519 provides (so far as material) that an auditor of a non-public interest company who is ceasing to hold office must send to the company a statement of the reasons for doing so, and:

“(3A) Where there are matters connected with an auditor’s ceasing to hold office that the auditor considers need to be brought to the attention of members or creditors of the company, the statement under this section must include details of those matters.

(4) A statement under this section must be sent

(a) in the case of resignation, along with the notice of resignation ...”

172. The CA 2006 at s518 provides (so far as material) that where an auditor’s notice of resignation is accompanied by a statement under s519:

“(2) He may send with the notice an authenticated requisition calling on the directors of the company forthwith duly to convene a general meeting of the company for the purpose of receiving and considering such explanation of the reasons for, and matters connected with, his resignation as he may wish to place before the meeting.

(3) He may request the company to circulate to its members

(a) before the meeting convened on his requisition, or

(b) before any general meeting at which his term of office would otherwise have expired or at which it is proposed to fill the vacancy caused by his resignation, a statement in writing (not exceeding a reasonable length) of the reasons for, and matters connected with, his resignation.

(4) The company must (unless the statement is received too late for it to comply)

(a) in any notice of the meeting given to members of the company, state the fact of the statement having been made, and

(b) send a copy of the statement to every member of the company to whom notice of the meeting is or has been sent.

(5) The directors must within 21 days from the date on which the company receives a requisition under this section proceed duly to convene a meeting for a day not more than 28 days after the date on which the notice convening the meeting is given.”

173. I return to these provisions below.

174. At this stage, I have set them out for completeness, to dispel any notion that reading them together with the evidence of the auditing experts might lead to a different result.

STAGE 5 – THE SECOND ROUND OF WITNESS STATEMENTS

(a) Mr Clark

175. In his second witness statement dated 9 July 2025, Mr Clark begins by noting the contents of Mr Ashley’s report, “the key issues which would have led a reasonably competent auditor to consider resigning as TWEISL’s auditor”, and Mr Ashley’s views “that a reasonably competent auditor would have brought these issues to the attention of their legal advisor in the context of seeking advice as to the content of a letter of resignation or other communication with the shareholders of TWEISL”. Mr Clark then notes that “the key issues for each relevant financial year from December 2012 to December 2018 are broadly of the same or similar nature and reflect the specific information which would or should have been known to a reasonably competent auditor at that time”. Mr Clark then sets out a summary of the relevant paragraphs of Mr Ashley’s report “with reference to each relevant financial year”. Mr Clark also notes that “Mr Ashley identifies the various dates for each financial year when a letter of resignation or other communication should have been issued by an auditor making the shareholders aware that the auditor was not in a position to provide their audit opinion”.
176. Mr Clark later turns to his “response and actions in the event that Crowe had issued a letter of resignation or other communication to the shareholders of TWEISL referring to the key issues identified by Mr Ashley”. He states that he has considered in detail each of the key issues identified by Mr Ashley in his report and his reaction “had I received a letter of resignation or other communication from an auditor identifying these issues, either individually or collectively”. Mr Clark states that he considers that the issues fall into two categories: (i) “first-tier concerns” that “would have been immediately indicative of very serious problems with TWEISL’s affairs and would have warranted the taking of immediate action, and (ii) “second-tier concerns” that “would have required further investigation”.
177. Mr Clark explains that he would have treated as “first tier concerns” warnings from an auditor that:
- (i) Monies and other assets belonging to the Company had been comingled with a related party also advised/managed by the Scheme Manager in that purported bank deposits as well as some purchases and sales of wine had been routed through TWIF without appropriate segregation.
 - (i) There did not seem to be any controls operated by either the directors or Scheme Manager to prevent future comingling of the Company’s monies and other assets with those of other funds managed/advised by the Scheme

Manager. Indeed, the arrangements with TWIF were seemingly designed explicitly to facilitate this.

- (j) In the context of Lilliput, that (a) the amount represented in the Company's draft financial statements as a cash and cash equivalent was in fact an amount purportedly due from Lilliput; (b) the absence of sufficient appropriate audit evidence as to the recoverability of this amount or whether Lilliput in fact owed the money given that all payments had been routed through TWIF and they had received no satisfactory explanation as to why that had been the case. They also had no evidence that the purported deposit met the definition of cash and cash equivalents under IFRS; and (c) Lilliput had not been identified by the directors as a related party.
- (k) Questioned the integrity of the directors and/or that TWEISL's cash may have been and may in the future be diverted for the benefit of the directors and/or Anpero in a manner that may constitute fraud.

178. Mr Clark states:

“Had I received a letter of resignation or other communication from an auditor identifying either individually or collectively any of the first-tier concerns, I would have considered these to be very significant red flags requiring immediate action. It is important to remember that TWEISL's trading strategy was relatively simple and straightforward: its aim was to purchase good quality wine and sell it at a profit. It should therefore have been easy to audit. It is against this backdrop that I would have viewed any of the first-tier concerns as extremely out of character for any fund but especially one of this type and consequently very alarming.”

179. Mr Clark identifies the following as “second-tier” concerns, namely that:

- (l) TWIF and TWIFL had not been identified by the directors as related parties (subject to the comments contained in the auditing experts' Joint Statement).
- (m) In the context of the Scheme Manager, that its own accounts showed that it had a significant net liability position and was supported certainly by loans from the directors, and also at least in the past by borrowings from one of the wine funds that it advised/managed. Specifically, the Scheme Manager's accounts showed that it made losses whilst at the same time further reducing the amounts owed effectively to the directors and increasing other funding from undisclosed sources.

180. Mr Clark states:

“Had I received a letter of resignation or other communication from an auditor identifying only the second-tier concerns (either individually or collectively), then I would have considered that, whilst they would not have raised immediate red flags in the manner that the first-tier concerns would have done, they would have been issues that required further investigation. I would have supported any such investigation, and I believe that this would have uncovered the true state of TWEISL’s affairs which existed at the time that the letter of resignation or other communication was issued by the auditor. Had such a letter of resignation or other communication identified any of the first-tier concerns in combination with the second-tier concerns, then this would have resulted in an even bigger red flag, and I would have viewed any such notification with a very high degree of alarm.”

181. The passages quoted above reflect the fact that, by the time Mr Clark’s second witness statement was prepared and served, the evidence of the parties’ auditing experts was available. Mr Ashley’s report, and his contribution to the joint statement that he produced with Mr Main, contained a discussion of whether Crowe should have considered resigning, and should have taken legal advice as to (i) the action that it should take and (ii) the content of any letter explaining its resignation or “some other communication with shareholders”. Mr Clark’s second witness statement takes the form of saying he has had those matters drawn to his attention and been asked to say what he would have done if he had learned of the “key issues identified by Mr Ashley” by means of “a letter of resignation or other communication” from Crowe identifying those issues.
182. Questions about (i) resignation, and (ii) direct communication with shareholders were raised for the first time in Mr Ashley’s report. Mr Clark had not addressed them before.
183. Further, the hypothesis discussed in Mr Clark’s second witness statement is an extrapolation from the contents of Mr Ashley’s expert report and the joint statement of the auditing experts. As is apparent from his report, Mr Ashley does not say whether or not Crowe should have resigned; nor what should have been contained in any statement of reasons for resignation that Crowe might have produced; and nor that any such statement should have been sent to shareholders. What Mr Ashley states, in sum, is that Crowe should have considered resigning; that Crowe should have sought legal advice about whether to resign; that if Crowe was advised that it should resign, it should also have sought legal advice both as to the content of any statement of reasons for resignation, and as to whether that statement should be communicated directly to shareholders; and that, in Mr Ashley’s view, any legal advice provided to Crowe would take into account not only Crowe’s statutory duties but also any duties that Crowe might have at common law. Mr Main agrees with parts of this analysis (e.g. that if Crowe had reached a stage where it thought it might be appropriate to resign, then Crowe should have sought legal advice), and questions other parts (e.g. he is

unaware of any common law duty requiring an auditor to report directly to shareholders). Mr Ashley does not state that the course of action that he contemplates Crowe following would result in the circumstances discussed by Mr Clark (although it is, of course, possible that it might).

(b) Mr Streather

184. In his second witness statement dated 9 July 2025, Mr Streather summarises his understanding of Mr Ashley's report in very similar terms to Mr Clark.

185. Mr Streather then states:

“Having considered each of the issues identified by Mr Ashley in his report, there are a couple that I would have treated with perhaps the most alarm. This would have included any warning relating to Lilliput. I explain in my first statement what my reaction would have been had I received notification that Crowe had not undertaken proper investigations in respect of that company. Had I received a letter of resignation or other communication from Crowe which identified that the Company's draft financial statements recorded an amount which was in fact an amount purportedly due from Lilliput; that Crowe did not have sufficient appropriate audit evidence in respect of that amount or whether it was actually owed; and/or that the Company's directors had failed to identify Lilliput as a related party, I would have immediately suspected that a fraud was being committed and that would have prompted me to take immediate action (which I address below). I also would have regarded with considerable consternation any concern from an auditor as to the integrity of the directors and/or that the Company's monies may have been and may in the future be diverted for the benefit of the directors and/or Anpero in a manner that may constitute fraud. I would thus have been extremely worried about the safety of my investment.”

186. Mr Streather continues:

“My concerns would have been further compounded had any letter of resignation or other form of communication from Crowe extended to any of the other matters detailed in Mr Ashley's report, such as (1) the losses suffered by Anpero and that it was seemingly being supported by the Company's directors and another wine fund it advised/managed as well as by monies from unidentified sources; and/or (2) the co-mingling of the Company's monies with a related party also advised by Anpero and the lack of controls to prevent this happening; and/or (3) that the Company was continuing to raise monies from investors. I should make clear that had Crowe's communication been limited to its concerns in respect of the matters addressed in this paragraph and been silent on the concerns identified in paragraph 16 above, I would still have

been alarmed to have received that notification and would have taken immediate action to investigate the position further.”

187. Mr Streather further states with regard to specific action that he would have taken “following receipt a letter of resignation or other communication from Crowe alerting me to any or all of the considerations set out above, I have revisited the comments in my first statement ... and confirm that I would have embarked on a similar course of action”. He makes the following additional comments:

- (i) “I would have started by asking questions of Crowe to establish whether they could provide me with any additional information relating to the contents of their letter of resignation/other communication. I would also have contacted the Company’s directors to discuss the matters identified by Crowe and reiterate the comments at paragraph 19 (a) of my first statement regarding my treating with a high degree of caution and scepticism any information received from them, especially in circumstances where Crowe’s communication had identified “grounds for serious concern about the integrity of the directors and that TWEISL’s cash funds may have been and may in future be diverted for the benefit of the directors and/or Anpero in a manner that may constitute fraud””.
- (i) “I would have supported a full investigation of each of the matters identified in Crowe’s communication. Depending on the date that the letter of resignation or other communication was issued by Crowe, I consider that any such investigation would have uncovered all of the matters concerning the true state of the Company’s affairs that existed at that time.”
- (i) “I repeat the comments made in my first statement at paragraphs 19 (c) regarding the steps I would have taken to contact the Company’s other shareholders; 19 (d) regarding the steps I would have taken or supported taking in respect of obtaining legal advice regarding the letter of resignation or other communication; and 19 (e) regarding the replacement of the Company’s directors with new directors/management.”
- (i) “I also repeat the comments made in my first witness statement at paragraph 19 (f) regarding the reasonable action I would have taken (or supporting the taking of) to prevent further monies from being transferred out of the Company and preserve the assets of the Company. On this issue, I note that Mr Ashley identifies various date ranges for each audit year at which point it would have been reasonable to assume that the Company’s shareholders would have been made aware that the auditors were not able to provide an audit opinion. In respect of the audit for the financial year ended December 2014, Mr Ashley expresses the view that it would have been reasonable for shareholders to have received a letter of resignation or

other communication “sometime in August or September 2015”. Had I received such a communication from Crowe at around that time, I certainly would not have made any further investment, including my second investment of £10,000 on 28 January 2016. I also would have taken steps to try and recover or otherwise preserve my first investment of £10,000 which would have been made by me only a matter of weeks prior to receiving a communication from Crowe in the above terms.”

- (i) “On the above issue, had I been made aware of the issues identified in Mr Ashley’s report above (either individually or collectively), then I would have considered that I had a claim against the Company for misrepresentation. I explain in my first statement that I invested in the Company on the basis that it traded in fine claret wine (with which I was familiar) and that it stood every chance of making a profit (see paragraph 5). Had I discovered that the Company had not in fact used its funds in the manner set out above and instead diverted funds (or may in the future divert funds) for the benefit of the directors and/or Anpero in a manner that may constitute fraud, then I would have considered at that stage that I had a claim against the Company on the grounds of misrepresentation. As I explain in my first statement, I would have been reasonably familiar with the available legal remedies as a general legal practitioner and would have taken (or supported the taking of) legal advice to explore these options further.”
- (i) “Furthermore, I understand that it is Mr Ashley’s view that, in respect of the audit for the year ended December 2012, it would have been reasonable for shareholders to have received a letter of resignation or other communication ‘sometime in February or early March 2014’ (paragraph 6.2.36) and in respect of the audit for the year ended December 2013, ‘sometime in January or February 2015. In addition, the Information Memorandum would not have been issued in January 2015’ (paragraph 6.3.12). I had not yet made any of my investments during the time periods identified above. However, had a letter of resignation or other communication been issued by Crowe at either of these points, then I certainly would not have proceeded to make any investment at all. As I explain in my first statement, the aim of my investment was to make a profit, and I was extremely comforted and reassured by the appointment of Crowe (a leading firm of auditors) as the Company’s auditors. I would not have invested money in a company whose auditors had expressed serious concerns about the integrity of the directors and/or a potential fraud. More practically, I do not see how it would even have been possible for me to make an investment in the Company had a warning been issued in 2014 or early 2015, or how the directors could have been in a position to market and promote the investment, such as at the presentation hosted by Mr della

Casa and Rodney Birrell in 2015 (which I attended prior to making my first investment and which I describe in my first statement).”

188. Mr Streather concludes by saying that he has re-read [45] of the PoC, and:

“To the extent not already covered in this second statement, I confirm that had I received a letter of resignation or other communication identifying any or all of the matters set out above, I would have supported the actions set out at paragraph 45 of the Particulars of Claim, including the securing and preservation of the Company’s assets, insisting on payment of losses, taking steps to ensure that no more deposits be made, the immediate dismissal of the directors and the appointment of new management and, if necessary, the winding up of the Company and the distribution of its assets.”

189. In my judgment, it is clear from these passages that, in his second witness statement, Mr Streather is addressing, and appreciates that he is addressing, a different set of circumstances than those addressed in his first witness statement. That is why he discusses whether or not he “would have embarked on a similar course of action” to that described in his first witness statement “following receipt a letter of resignation or other communication from Crowe”. If this scenario had been covered by Mr Streather’s first witness statement, there would be no need to go over the same ground again.

190. Further, as is true of the evidence of Mr Clark, the evidence of Mr Streather is based on extrapolation from the evidence of Mr Ashley. Specifically, Mr Ashley does not say that Crowe would or should have communicated directly with the members of the Company.

(c) Mr Hillson

191. In his second witness statement dated 9 July 2025, Mr Hillson begins by noting the contents of Mr Ashley’s report and his view that “as a consequence of the various concerns identified for each financial year a reasonably competent auditor would have had grounds for serious concern about the integrity of the Company’s directors and that the Company’s cash funds may have been and may in future be diverted for the benefit of the Company’s directors and/or Anpero in a manner that may constitute fraud”.

192. Mr Hillson then notes that “this seems to me largely consistent with what was said by Mr Main in his expert report on audit standards”.

193. Mr Hillson then states that he has considered Mr Ashley’s views that it is reasonable to assume that the shareholders would have been made aware that the auditors were not able to provide an audit opinion sometime in January or February 2015 for the 2013 audit, and sometime in August or September 2015 for the 2014 audit. He then

continues as follows, addressing matter on the assumption that Mr Ashley's view is borne out:

"Had I been made aware of such a notification from the Company's auditors in the terms set out above, then I would have considered that there were huge problems with the Company and would not have made any investment whatsoever (had I received such a notification before my first investment on 15 July 2015). Alternatively, I would not have made any further investment (had I received such notification before my second and third investments on 21 October 2015 and 28 January 2016). In this scenario, I note that I would have made my second investment of just under £24,000 only a matter of weeks prior to the date on which I should have received notification from the Company's auditors in August or September 2015. Had this have happened, then I would have demanded the immediate return of my investments made up to that point."

194. In his second witness statement, Mr Hillson further states:

- "9. Mr Ashley identifies several key concerns during each relevant financial year, which collectively build a very serious and worrying picture of the state of the Company's affairs. However, even if a letter of resignation or other communication from the Company's auditors had identified only a selection of those concerns, then I would have still considered that there were grounds for serious alarm about the Company and the need to take immediate action.
10. I would have considered that a warning on terms which identified that monies were in fact due from Lilliput, the complete lack of appropriate audit evidence in respect of the recoverability of this sum and Lilliput's connections with Mr della Casa would have been by itself extremely concerning. I reiterate the comments in my first statement that any such notification would have run alarm bells immediately and would have made me extremely nervous about the security of my investment and whether this sum could be liquidated at short notice (see paragraph 19). In addition, I would have viewed any notification regarding the comingling of the Company's funds with a related party and the lack of controls to prevent this from happening as another great cause for concern.
11. The same would be true for any notification which expressed concern about the integrity of the directors and/or that the Company's cash funds may have been and may in future be diverted for the benefit of the directors and/or Anpero in a manner that may constitute fraud. Indeed, I would have been likely to have concluded even without such a notification that there was doubt about their integrity and that the

Company's cash funds may have been diverted in such a way and that it might constitute fraud.

12. Had I received a communication from Crowe which was limited to the above issues (either individually or collectively), then it would have reinforced the gravity of the situation and raised worrying questions about the safety of my investment. This would have prompted me to take immediate action (which I explore further below). Had the communication been limited to issues other than those identified above, then this would still have prompted me to take immediate action to investigate the position further and discuss it with Crowe and the other shareholders, especially if the auditor considered that they could not sign an auditor's report and/or had to resign as a consequence of those concerns.
13. In preparing my first statement, I considered at length the actions that I would have taken had the Company's auditors declined to submit auditors' report and/or issued notifications on matters including that a significant fraud was being (or might have been) committed against the Company. I have re-read these statements in view of the specific concerns identified in Mr Ashley's Report and make the following comments.
 - 13.1 Had I received a letter of resignation or other communication from Crowe in the terms set out in that report, then my first action would have been to contact Crowe. I suspect that this would have been a very straightforward step to take as no doubt Crowe's contact details would have appeared on any communication issued to the shareholders or alternatively would be available on Crowe's website and/or on documents filed at Companies House. I would have sought further information from Crowe as to the content of their communication and the safety of my investment. If the letter of resignation/other communication from Crowe had identified concerns regarding the integrity of the directors and/or that the Company's cash funds may have been and may in the future be diverted for the benefit of the directors, then I would have taken the view that there would be little if any benefit in contacting Mr della Casa or Mr Birrell to discuss the position further on the basis that I could not have treated with confidence anything that may have been said by them.
 - 13.2 I confirm that I would have also taken the steps outlined in my first witness statement at paragraph 23 regarding:

- () Discussing the position with the other investors. If I did not already have contact details for the other investors at the date on which the letter of resignation or other communication from Crowe was issued, then I would have requested that Crowe put me in touch with the other investors or alternatively, I would have searched Companies House for their details. I think it is also very likely that other investors would have taken action to contact one another, and I may very well have been contacted by other individuals to discuss the position.
- () Exploring how to recover the losses and prevent any further losses from occurring and whether to place the Company into liquidation.
- () Considering what should be done with the directors and any legal recourse available against them. This would have been a logical step in view of receiving any notification that called into question the integrity of the directors and their involvement in a fraud.
- () I also reiterate my comments about seeking legal advice as to the actions and remedies which may have been available to me and/or the other shareholders at the relevant time. On this issue, I set out in my first statement that I invested in the Company on the basis that my money would be used to invest in wine with a view to generating what would hopefully be a good return for me (see paragraph 19). Had I received a communication in terms that this had not in fact happened and that my investment (and other funds) had been used for the benefit of the directors and/or Anpero in a manner that may constitute fraud, then I am certain that legal redress would be available at that point and I would have wanted to take steps to explore this further.

13.3 To the extent that this is not addressed above, I confirm that I would have supported the steps set out at paragraph 45 of the Company's Particulars of Claim had I received a communication from the auditors alerting me to the various concerns addressed in Mr Ashley's report, including the securing and preservation of its assets, insisting on payment of losses, ensuring that no more deposits be made, the immediate dismissal of the directors and the appointment of new management and, if necessary, the winding up of the business of the Company and the distribution of its assets.

- 14. For the avoidance of doubt the reporting in the circumstances outlined by Mr Main in his report at paragraph 6.5.3 (see my paragraph 7 above) would have led to the same or similar reaction by me, and in particular the reporting of (a) a qualified audit opinion or (b) enquiries indicating

that the directors might have behaved fraudulently leading to resignation by the auditors because of the exceptional circumstances and a statement of the circumstances connected with their resignation.

15. In this context and because it is relevant to my knowledge and that of the Company, I have explained in my first witness statement that I first became aware of the serious problems with the Company as a result of the investigations of Paul Pittman and Paul Higley of Price Bailey (the members voluntary liquidators) following the Company entering members' voluntary liquidation on 10 January 2020 (the date on which Price Bailey were appointed). I attach to this statement a copy of the email I received from Price Bailey's offices on 7 February 2020 which confirmed for the first time that the Company's cash at bank of £4.5 million was in fact held "on a higher interest deposit with Lilliput Holdings Limited" and that the funds could not be paid in a single transaction.
16. I have been shown a copy of the Defence and Counterclaim of Mr Pittman and Mr Higley in case number CR-2020-004240 (the proceedings issued against them by Colin Hardman and Finbarr O'Connell, the Company's present liquidators) which confirms (at paragraphs 15 and 16) their belief that Ms Clough of their office was told on 28 or 29 January 2020 that the Company's balance in its bank account was £6.50 and that Mr della Casa had himself told them that cash was held with Lilliput on 29 January 2020.
17. I cannot now recall the precise timescales, but the above documents accord with my recollection that I only became aware of the issues with the Company after January 2020. I went on to lodge a proof of debt for the total value of my investment around 5 October 2020 which referred to my misrepresentation claim on the basis set out above."

SUMMARY OF THE COMPANY'S WITNESS EVIDENCE

195. In sum, in their first witness statements all three men discuss receiving "notification" of the findings and concerns that Crowe should have made or had as a result of either (i) Crowe failing to submit auditor's reports or (ii) Crowe reporting to the Company. In their second witness statements, they mention for the first time the possibility of Crowe resigning, and go on to address the implications of a resignation in the event that this resulted in the receipt by them of a statement detailing the reasons for that resignation.
196. However, they do not, and nor could they be expected to, give evidence that they would, in fact, have been in receipt of such a statement from Crowe. Their evidence is

based upon a hypothetical state of affairs. It does not profess to establish that state of affairs.

EVIDENCE ABOUT OTHER SHAREHOLDERS

197. When issues arose about the Company's pleaded case, evidence was placed before me in a witness statement of Mr Jarvis a partner at Fieldfisher, dated 18 November 2025, (which I discuss further below) about two other investors in the Company.
198. One, Mr Gordon, is a member of the Company's Creditors' Committee, who was between July 2014 and June 2017 the Global & UK Forensic Services Leader at PwC, and between January 2018 and June 2024 the Global Head of Forensic and Integrity Services at EY, and who invested just under £54,000 in the Company. The other, Mr Thanki KC, is a member of Fountain Court Chambers, who invested £25,000 in March 2012 and a further £50,000 in April 2013. Mr Jarvis stated with regard to Mr Gordon that "It is implausible that he would not have had ready access to suitable lawyers or have known precisely what to do in these circumstances and that he would have simply permitted his investment of £54,000 to be dissipated without taking action". Mr Jarvis stated with regard to Mr Thanki that he has great expertise in civil fraud cases.
199. I do not doubt that these two individuals would have had, or been able to access, knowledge about the legal remedies that were potentially available to the shareholders.
200. However, the Company chose not to call them to give evidence. I can only assume that this was because it was considered that their evidence would not add, or add materially, to the evidence of the three shareholders who the Company chose to call. Put another way, it would be unfair to Crowe to accept that the evidence of these individuals would have been more favourable to the Company than the evidence that was actually given.
201. The accessibility of "suitable lawyers" or legal expertise is only one of many issues that are relevant to causation, and assertions such as "known precisely what to do" and "would [not] have permitted his investment ... to be dissipated without taking action" beg numerous questions. As discussed in greater detail below, it is implausible that the shareholders would have taken steps without a measure of consensus, and some of the steps that it is suggested they would have taken would have required a majority vote. Therefore, even if, for example, Mr Gordon personally would have "known precisely what to do", it does not follow that sufficient others would have agreed with him.
202. It is apparent from the events which happened after the MVL liquidators were appointed that, even at that stage, when Mr Streather and others were very concerned, the members were not unanimous in thinking the worse of AdC, and that AdC's capacity for denying wrongdoing was undiminished. On 17 August 2020, Ms Elizabeth Peyton-Jones, the CEO and Founder of the "Responsible Trust for Models",

sent an email to AdC saying “I thought you should see this email ...there have been emails going backwards and forwards all day ... I thought it would be helpful ... Are you getting this from someone else??? Or should I continue to send them?”. AdC replied on 18 August 2020:

“Thank you so much, Elizabeth, for sending these on to me. Yes, please continue to send them all as they are very useful as we explain that there’s categorically no skulduggery involved in what we’re doing. It’s not been an easy start to the week. Thanks again.”

203. It was suggested during the course of the trial that a number of shareholders may have been accorded preferential treatment by AdC, and were paid out while others were not. This was not explored in detail, but it is obviously possible that some individuals may have considered that the best prospect of recovering their investments lay in keeping in with AdC, and this, also, might lead to a disparity of views as to “precisely what to do”.
204. Moreover, even stripping out subjective considerations, and approaching the issue entirely objectively, what it would have been sensible to do would depend on a host of variables: for example, how much information the shareholders had or could obtain, and what responses were received from the directors. If the shareholders would have been told chapter and verse by Crowe, that might point to one course of action; whereas, if they would not, that would have presented obvious difficulties for them. The directors might have admitted wrongdoing, or denied it on implausible grounds, or put up a defence that seemed plausible to at least some shareholders. It should be noted in this regard that when, in November 2020, AdC gave an explanation to the CVL liquidators about difficulties in repaying monies represented as going to Lilliput, and suggested that repayment could be made if some shipping transactions worked out, the liquidators may have been sceptical but they did not immediately say or suggest this was patently untrue.
205. Even if the shareholders had strong grounds for concern, and, for example, sufficient evidence to seek a freezing injunction, it does not follow that they would “take action” to “prevent dissipation”. An application for a freezing injunction would need to be funded, and would only be worthwhile if it was thought that sufficient assets were or might be available to be preserved to make the cost of the exercise (and possible exposure on the cross-undertaking in damages) worthwhile. If, as seems likely, no application could be made until some considerable time after the directors had received notice of the shareholders’ concerns, that would reduce the prospect that an injunction would be effective, and also, perhaps, the prospect that, if sought, the Court would be willing to grant it. Those points in turn would militate against the wisdom of seeking it.

206. For these reasons, assertions as to what persons not called as witnesses would have known and done are not of any real assistance, and I am unable to attach weight to them.

STAGE 6 – THE EXPOSITION AT TRIAL

207. The Company’s opening Skeleton Argument for trial addressed at [49] the issue of “What would have brought the fraud/impropriety to an end?”. Three points were made, each by reference to section 7 of the joint statement of the auditing experts.
208. As to the first point, it was submitted that the “possibility” of a need to communicate with “a higher authority in the governance structure outside the entity, such as the owners of the business” was recognised by the auditing experts.
209. In this regard, as set out above, in their joint statement the auditing experts wrote:
- “There is a requirement in ISA 260 for auditors to evaluate whether the two-way communication between the auditor and those charged with governance has been adequate for the purpose of the audit. If it has not, then the auditor is required to evaluate the effect, if any, on the auditor’s assessment of the risks of material misstatement and ability to obtain sufficient appropriate audit evidence and take appropriate action. ISA 260 notes that such action may include communicating with “a higher authority in the governance structure outside the entity, such as the owners of the business.” The Experts agree that in such circumstances auditors would take legal advice before seeking to communicate directly with shareholders, especially if the circumstances were considered sufficient to lead to them considering their resignation as auditors.”
210. As to the second point, reference was made to [A54] of the section entitled “Application and other explanatory material” in ISA 240, which I have already set out above.
211. Third, reference was made to s519 of the CA 2006 (which is also quoted above).
212. In [50] of the Company’s opening Skeleton Argument for trial, it was submitted that these matters “and others, no doubt, which will be developed while examining the evidence of the relevant witnesses” compel the conclusion that the shareholders in the Company “would have learned of the relevant matters”.
213. Further, also in [50], it was stated that the Company would argue that “Crowe owed a duty to report to the shareholders (as the only other organ of TWEISL available) as soon as it became apparent that there was a real risk of fraud in TWEISL, particularly in a case ... where fraud is being practised by the very directors to whom reporting would ordinarily be made: [*Sasea*].”

214. In his oral opening of the case on Day 1 of the trial, Mr Lawrence stated that the CA 2006 places obligations on the auditor in relation to the making of a report, which is intended to reach the members of the company and that “The auditor has to take steps to cause that report to be distributed to the members”. Neither the auditing experts’ discussion of ISA 260 nor the provisions of ISA 240 “compel the conclusion” that the shareholders in the Company would have learned from Crowe of the material fraud/impropriety. On the contrary, they go no further than to discuss the actions that an auditor “may take” in certain circumstances, subject to legal advice. Accordingly, this understanding of s519 may explain the statement in [50] of the Company’s Skeleton Argument that the matters listed in [49] “compel the conclusion” that the shareholders in the Company would have learned from Crowe of the material fraud/impropriety.

215. However, this understanding is incorrect. In this regard, s520 places the relevant obligation on the company. So far as material, s520 provides that where a company receives from an auditor who is ceasing to hold office a statement under s519:

“(2) ... the company must within 14 days of the receipt of the statement either

(a) send a copy of it to every person who under section 423 is entitled to be sent copies of the accounts, or

(b) apply to the court.

(3) If it applies to the court, the company must notify the auditor of the application.

(4) If the court is satisfied that the auditor is using the provisions of section 519 to secure needless publicity for defamatory matter

(a) it shall direct that copies of the statement need not be sent out, and

(b) it may further order the company’s costs (in Scotland, expenses) on the application to be paid in whole or in part by the auditor, even if he is not a party to the application.

The company must within 14 days of the court’s decision send to the persons mentioned in subsection (2)(a) a statement setting out the effect of the order.

(5) If no such direction is made the company must send copies of the statement to the persons mentioned in subsection (2)(a) within 14 days of the court’s decision or, as the case may be, of the discontinuance of the proceedings.”

216. A little later in his oral opening, Mr Lawrence said “there is not that much case law which deals directly with this type of situation. There is a remark in a Court of Appeal

case called *Sasea*, which certainly indicates that the information must, one way or another, reach the members who are affected by the director fraud.” (emphasis added)

217. By late on Day 4 of the trial, Mr Clark, Mr Streather and Mr Hillson had given oral evidence. At that stage, I sought clarification from Mr Lawrence about the Company’s case as to the steps that Crowe ought to have taken upon discovering fraud/impropriety.
218. In the course of that discussion, Mr Lawrence explained that “The resignation of an auditor, subject to certain exceptions which do not arise here, requires certain steps to be taken as a matter of statute. The auditors can, and here would, if they had discovered everything we say they should have discovered, require the company to call a general meeting, at which appropriate disclosures will be made.”
219. This was a reference to s518 of the CA 2006, which I have set out above.
220. Mr Lawrence said: “Ultimately, if it appears to a reasonable auditor, in the hypothetical position that we are putting Crowe in, that there is information that, as a matter of urgency, needs to reach the members about director fraud, and the directors are acting in a way which means that the members are not going learn about director fraud, then the auditors are going to have to take appropriate action in one way or another.”
221. I asked Mr Lawrence about the argument concerning the calling of a general meeting, and suggested that it seemed likely that the shareholders would conclude that there was a big problem, that they would decide to do something about it, and that removing the directors might be one obvious first step. Mr Lawrence replied: “Yes, and ultimately our case is that those events would have led to the appointment of liquidators”.
222. Later, I expressed concerns about the timing of the measures that the shareholders would have taken and what the directors might have been doing in the meantime. I said this: “The procedure that has been suggested is effectively ... convening a meeting, deciding what to do, taking appropriate steps, and putting the company into liquidation. ... That is a relatively protracted process and does not have the effect of securing anything, certainly not in the first instance. That is the concern.”.
223. During the course of the discussion, Mr Lawrence submitted that once Crowe had realised that they had been very seriously misled by the directors for a number of years that “would have led, by one route or another, to the members learning of the problem”, and that the remedies that were open to the members, on proper legal advice, included that the wine stock “would have been there and could have been frozen”. I then expressed the view that the evidence did not suggest that a freezing order would have been obtained. When I said: “The procedure that has been suggested is effectively ... convening a meeting, deciding what to do, taking appropriate steps,

and putting the company into liquidation”, Mr Lawrence agreed with that. But he then alluded to the “obvious” inference that on the discovery of fraud or a very strong suspicion of fraud “legal advice will be taken”. The discussion continued with Mr Lawrence referring to “investors of many different stripes putting their heads together once they found out who they were”, to the fact that “[d]ifferent investors would have reacted in different ways, but they would have been compositely very concerned”, and to the fact that this would lead on to “an analysis of the various possible permutations that open up then”.

224. When I raised with Mr Lawrence the points that [A44] in ISA 260 relied upon by the Company (i) is not in the body of the ISA but is in the explanatory materials, and (ii) is expressed in permissive rather than mandatory terms (i.e. “the auditors may take ... actions”), Mr Lawrence replied “I do not want to discharge all my ammunition at this point”. He went on to say that while he was not keeping very much powder dry he might have “powder” to raise with Mr Main, and that whether or not it was in his opening “There will be ... a fully developed submission that in the exceptional circumstances presented by this case ... an auditor has to make sure the members know”.
225. At that stage, while it is right to say (from Mr Lawrence’s reference to “one route or another”) that the Company’s case as to how shareholders would have learned of Crowe’s concerns was not confined to the convening of a general meeting, the contention that Crowe “would have” made the choice to require the directors to convene a general meeting in accordance with s518 appeared to be at the forefront of that case.
226. There was certainly no clear articulation of a case that Crowe should have communicated with the shareholders directly, or without at the same time also communicating with the directors; and the s518 procedure runs counter to these points.
227. In order to put my observations in context, it is right to note that the following evidence emerged from the cross-examination of the Company’s three witnesses of fact:
- (i) Mr Clark read the financial statements in full in each year. He would have wanted to do so for the purpose of preparing a spreadsheet of the assets held by him and his wife, which he tends to prepare in November or December in each year.
 - (i) Mr Streather also accessed the financial statements each year, but looked only at the balance sheet and the profit and loss account.

- () Mr Hillson has no recollection of receiving the accounts or of going looking for them or reading them on the Company's records at Companies House.
 - () Both Mr Clark and Mr Hillson said that contacting the directors of the Company would have been one of the steps that they would have taken or considered taking upon receipt of a notification by Crowe.
 - () When Mr Clark was asked about the costs of legal advice and investigation, and the need to obtain support from other people, he replied that he would have got his own legal advice to start with "which obviously would have been more limited in scope, given, you know, I would have been paying for it out of my own pocket". His evidence went no further than that.
 - () Mr Hillson said that he would have taken legal advice, and: "my brother is a lawyer and I know some of his ex-partners who are in litigation. I would have probably spoken to them". Again, his evidence went no further.
 - () Each of the shareholders accepted that they did not know other shareholders (or many other shareholders) and that it would have been necessary to take steps to contact other shareholders in order for action to be taken.
 - () Mr Streather accepted that, when trying to muster support from other shareholders for the removal of the MVL liquidators, it took him two months to gain support from 23% of the shareholders in the Company.
228. In the course of discussions at the beginning of Day 5 of the trial, I asked for confirmation that it was the Company's case that the shareholders should have been told earlier than in fact they were about the problems in the Company, and that they would then have put the company into liquidation at an earlier date than they actually did.
229. Mr Lawrence replied "They would have taken appropriate action, to be discussed, and ultimately put the company into liquidation". He later explained "What would have happened then is a matter of inference, but ... after getting their heads together, the shareholders would have ended up taking legal advice, and legal advice from a competent lawyer in this context would have involved urgent action to restrain the directors from behaving dishonestly and misappropriating the corporate assets".
230. These proceedings began in August 2023, and were preceded by lengthy pre-action correspondence. By Day 5 of the trial, all the Company's witnesses of fact had given evidence. The Company had no further evidence to call as to what, on its case, the shareholders would have done on learning about the problems in the Company. I accept that the actions that the shareholders would have taken would or might depend

on precisely what they learned, and that until the end of the trial there remained scope for argument about what they would have learned. However, when asking Mr Lawrence for his assistance on this topic I invited him to assume the most favourable outcome for the Company in this context – i.e. in a nutshell, that the shareholders were told about fraud.

231. In these circumstances, it was a little disappointing to be informed that the actions that, on the Company's case, the shareholders would have taken were still "to be discussed".
232. During discussions on Day 7 of the trial, Mr Lawrence submitted that Crowe "would have taken advice, and the conclusion they would have come to is that because the only people who could be contacted within the company were the two directors who appeared to be complicit in the fraud, they would communicate directly with the members".
233. The first part of this response is in line with the agreement of the auditing experts recorded in section 7 of their joint statement that "in such circumstances auditors would take legal advice before seeking to communicate directly with shareholders". The second part is an extrapolation from that agreement, namely that the legal advice would have been that Crowe ought to communicate directly with the members. (In fact, I consider that the most natural reading of the experts' agreed position is that, in their view, the auditors would not seek to communicate directly with shareholders unless they had first taken legal advice – in other words, that the auditors would only communicate directly with members if the auditors were advised that this is what they ought to do.)
234. This was, I believe, the first time that the argument that the "possibility" of a need to communicate with shareholders - that had been mentioned in [49] of the Company's opening Skeleton Argument - was extended to the proposition that Crowe would have been advised that it ought to communicate directly with shareholders. In any event, this case was different from the case that Crowe would have told shareholders of Crowe's concerns by requiring the directors to convene a general meeting pursuant to s518.
235. Mr Lawrence further clarified that the evidence from the shareholders does not, and could not, say what would then have happened "because that is wholly hypothetical and depends upon the court's assessment of the advice that they would have received and the steps that they would, in all probability, have taken in light of the advice".
236. On Day 9 of the trial, I raised with Mr Lawrence the fact that the auditing experts agreed that Crowe would or should have obtained legal advice, but that they do not opine as to what that advice would be. Further, it was nowhere pleaded or articulated, even in the Company's opening Skeleton Argument for trial, that the advice would have been that Crowe owed a duty to send a letter to shareholders. Mr Lawrence

replied (i) that this was the Company's primary case and (ii) that the Company's secondary case was that "the bad news would have reached them anyway via the entry on Companies House".

237. This was a reference to the requirement in s521 of the CA 2006 that:

"Unless within 21 days beginning with the day on which he sent the statement under s519 the auditor receives notice of an application to the court under s520 [i.e. an application made to the Court within 14 days of receipt of the notice complaining that the auditor is using the provisions of s519 to secure needless publicity for defamatory matter], he must within a further seven days send a copy of the statement to the registrar".

238. The Company's submissions, written and oral, are not to be construed like a statute. Nevertheless, it was important for the Court to understand the case it was being expected to determine, and for Crowe to understand the case that it was expected to meet.

239. In the Company's opening Skeleton Argument for trial the Company appeared to be suggesting two answers to the question: "What would have brought the fraud/impropriety to an end?". The first, based on a factual analysis, suggested by [49], was that (i) Crowe would have had to resign or consider resigning, (ii) Crowe would have sought legal advice concerning its resignation and, if it resigned, what it should do about reporting its findings or concerns, and (iii) the Court should reason that this legal advice would have included advice to report directly to the shareholders. The second, articulated in [50], was that Crowe had a duty to report directly to the shareholders on the particular facts of this case, where both directors were implicated in the wrongdoing.

240. The first point made orally at trial – that Crowe was required to take steps to cause the statement of reasons for its resignation to be distributed to members in accordance with s519 of the CA 2006 – did not fit into either formulation, and in any event was wrong.

241. The next point made was that Crowe would have required the Company to call a general meeting in accordance with s518, at which the reasons for Crowe's resignation would have been disclosed to the members. It is not clear whether this was suggested as falling within the factual analysis (i.e. this is what, on the balance of probabilities, would have occurred in fact if Crowe had decided to resign) or as falling within the legal analysis (i.e. Crowe was under a duty to do this). In any event, if this was the means by which, on the Company's case, Crowe should have communicated with the members, it is one that would require the Company to take action, and that would also take time, such that it might be thought of doubtful utility to save the Company's assets from the directors.

242. The third argument advanced was that Crowe (i) would have taken legal advice and (ii) would have concluded that it would communicate directly with the members. Point (i) is based on the evidence of the auditing experts. Point (ii) is a finding that the Court was asked to make following from point (i). That all falls firmly within the factual analysis.
243. The fourth exposition had two limbs. First, that Crowe would have sought legal advice and been advised that it had a duty to report directly to shareholders. This was an elaboration or fortification of the third argument, and introduced the issue of legal duty for the first time during the course of the dialogue at trial. However, it did not introduce that issue by way of direct application, but instead introduced it only elliptically by way of an argument as to what Crowe would be told by legal advisers. The second, and alternative, limb was that Crowe's statement of reasons for resignation would have reached the shareholders in any event pursuant to s521. This was a submission based on facts, but not those referred to in [49] of the Company's opening Skeleton Argument.
244. A freestanding submission that, as a matter of law, Crowe owed a duty to the Company to report directly to the shareholders was not made in the course of oral argument.

STAGE 7 – THE COMPANY'S CLOSING ARGUMENTS

245. Day 9 of the trial was 24 October 2025. At the conclusion of that day, the trial was adjourned until 10 and 11 November 2025 for the purpose of closing submissions.
246. The Company's written Closing Submissions were served on 7 November 2025. They contain, at [46]-[54], a section entitled "Breach of duty: having taken legal advice, what would Crowe have been obliged to do (in terms of informing others of the fact of, or strong suspicion of, director fraud ...)?". When the Company later applied for permission to re-amend the PoC ("RAPoC"), it sought to include [46]-[54] by reference.
247. At [47], the Closing Submissions addressed the "hypothetical situation in which ... legal advice would have been taken by Crowe". This was summarised as follows:
- "a. Proper audit enquiry and procedure has exposed the fraud. Crowe has concluded that the Lilliput deposit is or is very probably a dishonest fiction concocted by Mr della Casa for illegitimate purposes.
 - . It follows that any previous years' accounts which have been audited by Crowe, and have been the subject of an unqualified audit opinion, have or probably have been fundamentally misleading because they have represented that TWEISL holds a lot of money in a deposit account with Lilliput when that is a lie.

- . Crowe's audit opinion supporting those accounts has been addressed to the shareholders as a body.
- . Crowe would be, and would know that it was, in a very delicate position. Crowe and its partners and employees are chartered accountants who are obliged (both as a matter of professional ethics and pursuant to contract) to act in accordance with the ICAEW's Code of Ethics. That, as Mr Main confirmed, attaches weight to integrity. Accountants must not knowingly be associated with reports or other information where it contains a materially false or misleading statement, being subject to broad principles to act in the public interest. Where an accountant becomes aware of having been associated with such information, he must take steps to be disassociated from it.
- . Crowe would go to its lawyers and explain the situation and say, in effect: "What are we required to do, in circumstances in which a report to the directors may well be wholly ineffectual, and the company's and the shareholders' interests may be seriously prejudiced if we do not make a report to them as a matter of urgency".

248. At [50], it was submitted that the notional legal adviser would have regard to the following matters:

- (i) The fact that as a matter of law the auditor, in reporting to the shareholders as a body, is acting in one sense in a way that is potentially adversarial to the interests of the directors whose management of the company's affairs is the subject of its report: see *Caparo v Dickman* [1990] 2 AC 605 at 630C-G and *In re London & General Bank* [1895] 2 Ch 166.
- (ii) See also consideration of notification of shareholders in *Dairy Containers v Auditor-General* [1995] 2 NZLR 30; Salzedo & Singla, 7.71 discussing *Pacific Acceptance Corporation Ltd v Forsyth* (1970) 92 WN (NSW) 29.
- (iii) The references to the making of a report directly to the shareholders in ISA 240 A54-56 and ISA 260 A44 which treats the shareholders as a higher authority in the governance structure. Mr Main accepted that shareholders were a higher authority for the purposes of ISA 260.
- (iv) The role of auditors, performing the functions laid down by statute, in promoting and preserving confidence in the reliability of audited financial statements.
- (v) The ability of the shareholders to protect the interests of the company in the absence of honest management or directors ([*Sasea*] on protection of company by notification to third parties).

249. At [51]-[52] of those Closing Submissions, it was submitted as follows:

- “51. The legal adviser would ask: what does the law require an auditor, acting with integrity and in the public interest, to do in this situation in which the auditor is associated with fundamentally misleading financial statements; where the auditor has supported those statements with an unqualified audit opinion; and where the auditor has addressed that opinion to the shareholders who are likely to be prejudiced by the misleading information?”
52. It is submitted that there can only be one answer to this question: correct the record by explaining what has been discovered and what is now known or strongly suspected to be the case, as soon as possible, by reporting directly to the shareholders.”
250. At this stage, therefore, the Company’s case was based on the proposition that Crowe should have obtained legal advice as to what to do, and that this legal advice (i) would have been based (among other things) on case law from New Zealand and Australia, and considerations of integrity and public interest, and (ii) would have been that Crowe should report directly to the shareholders. The following points arise from the foregoing.
251. First, the question and answer, as framed, do not directly assert the content of Crowe’s legal duty. Instead, they build into the analysis, as a first step, the fact that Crowe would have taken legal advice. They then submit what that legal advice would have been.
252. Second, the premise underlying the question “if Crowe had sought legal advice, what would Crowe have been obliged to do in light of that advice?” is that the legal advice that Crowe would have received would have correctly identified Crowe’s duty in law. Accordingly, this way of presenting the case is really a roundabout way of saying that, on the facts of the present case, Crowe had a legal duty to report directly to shareholders. If it is sought to rely on Crowe’s legal duty, argument about the legal advice that Crowe would have received is convoluted and distracts from the real issue. To advance a case of legal duty, there is no need to debate the terms or basis of hypothetical legal advice.
253. Third, none of this is mentioned in the PoC. Mr Lawrence submitted that some of it (e.g. the basis of the legal advice) did not need to be pleaded, and that other aspects were pleaded (e.g. it was said in [31] of the Closing Submissions that the plea in [45] of the PoC - that “On relevant notification TWEISL (through its members) would have taken ... action” – is one that “necessarily indicates that TWEISL’s case is that the information would have reached the members”). I did not find these points persuasive.

254. In my judgment, if and to the extent that the Company was seeking to rely upon the contention that Crowe had a duty to report directly to the shareholders, it was material to plead this in the PoC, especially as such a case involved a novel proposition of law.
255. In addition, the opening words of [45] of the PoC cannot be read in isolation. The plea in [43] of the PoC is that “Crowe acting competently would have reported ... to TWEISL”. On this basis, “relevant notification” in [45] of the PoC means notification to the Company. I accept that it is implicit in [45] of the PoC that it is the Company’s case that the information would have reached the members. But this falls short of asserting that it is the Company’s case that, as a matter of fact, it would have done so as a result of direct reporting by Crowe, let alone that Crowe had a duty to report directly.
256. Mr Lawrence further pointed out that the plea in [37.12.2] of the Defence that “... there was no duty for the auditors to advise TWEISL that they must seek to recover the money, and/or it would have made no difference if they had done. The persons they would notify of any concerns would be the directors (those charged with governance). On TWEISL’s own case, the directors had acted dishonestly and had misappropriated the money themselves” had been met by a plea in [27] of the Reply that “The relevant persons to notify when it was the Directors who were or ought to have been suspected of this dishonesty was TWEISL as a company in the context of the audit”. Mr Lawrence accepted that this did not say that the relevant persons to notify were the members, but argued that “it obviously does convey that it would obviously not have been sufficient for notification of fraud or something pertaining to fraud to be made to the fraudsters”.
257. I did not find this point persuasive either. Leaving aside altogether that the Reply did not have the effect of amending the PoC, it seems to me that the language used in the Reply is unhelpful to the Company. Instead of asserting that “the relevant persons to notify” were the members, the Reply pleads that the relevant persons were “TWEISL as a company”. This suggests other individuals within the Company, or perhaps viewed kindly the members as a body, but it is clearly not a reference to individual members.
258. Fourth, while it supposes that Crowe owed a duty to report directly to shareholders and that the legal advice that Crowe would have received would have told Crowe so, this way of presenting the argument nevertheless meant that the questions of what advice Crowe would have received and what Crowe would have done in response were each matters of fact for the Court to decide. This is why, on the basis that this line of argument was being maintained by the Company, Crowe was subsequently in a position to argue that a case based on it should not be allowed in by amendment to the PoC because (according to it) Crowe had not had the opportunity to adduce evidence that, in fact, Crowe would not have been advised that it should report directly to the shareholders. The Company accepts that a duty to report directly to members is novel, or, at the very least, involves entering waters that are far from clearly charted. As

appears below, I consider that the Company's case on this is unfounded, and that therefore advice that accurately reflected the law would not have produced the result for which the Company contends. However, to approach matters by asking what legal advice Crowe would have received adds a layer of complexity, because where the law is unclear, different lawyers, each exercising reasonable skill and care, may reasonably take different views about it.

259. Fifth, the argument about the legal advice that Crowe would have received as to what it was obliged to do not only relied on propositions based on new cases, but also focussed on points about integrity and public interest which formed no part of the way the Company's case had previously been presented, and which are not mentioned in the PoC. This last feature of the Closing Submissions was of particular concern to Crowe.
260. I raised the second of the above points with Mr Lawrence, and he made no comment on it at the time. However, when, subsequently, a draft RAPoC was produced (i) that draft made no overt mention of the legal advice that Crowe should have obtained but instead relied on breach of duty, and (ii) it was argued on behalf of the Company that what Crowe was obliged to do on the facts of the present case was a pure point of law. I say "no overt mention" as the incorporation by reference in the draft RAPoC of passages from the Company's written and oral submissions involves allusion to legal advice.
261. During the course of Day 10 of the trial, I also raised a number of other concerns about the Company's case. Among other things, I expressed the view that it was not sufficient for the Company to say "the shareholders would have taken steps in response" to being notified of problems or concerns, and that it was necessary to set out a case as to what they would have done. As the pleaded case was that "TWEISL (through its members) would have taken ... action", that involved explaining whether steps would be taken in the name of the Company, and if so how and in accordance with what procedures.
262. These exchanges resulted in the production overnight by Mr Lawrence and Mr Stacey of a Note dated 11 November 2025. This was handed up on the following day, Day 11 of the trial. The third section dealt with "timing of shareholder reaction", and addressed, in particular, issues about dissipation of wine and the proceeds of sale of wine. I consider those topics below. The first section, entitled "Content of report", dealt with the contents of the report to shareholders that the Company contended that Crowe ought to have made. The second section, entitled "Shareholder reaction", dealt with the steps that the Company contended the shareholders would have taken. Those sections read as follows:

"Content of report"

2. The precise content of the report to shareholders (and, in due course, the content of the statement of the reasons for resignation made pursuant to s.519 of the Companies Act 2006) would have depended on the response of the directors to proper audit enquiries and procedures directed at the issues relating to the Lilliput deposit. For the reasons set out in the written closing submissions, it is to be inferred that the following matters would have become known to the auditors and would have been reported:
 - (a) That there was no sufficient audit evidence to support the directors' representation that monies had been deposited with Lilliput.
 - (b) That there was no sufficient audit evidence that such monies as had been deposited with Lilliput (if any) were recoverable.
 - (c) That Lilliput was a related party as a result of its connection with Mr della Casa.
 - (d) That the connection between Lilliput on the one hand and Mr della Casa and Tweisl on the other hand had not been disclosed.
 - (e) That in the light of the said matters there were grounds for serious concerns about the integrity of the directors of Tweisl and there was a risk of fraud in relation to the purported Lilliput balance.
3. The report might have gone into further detail, but the gist of the matters set about would have been sufficient to convey to any reader thereof the gravity of the problem that had arisen.
4. The auditors' obligation to make a properly comprehensive and frank disclosure would not have been affected by:
 - (a) Any concern about defamation...
 - (b) GDPR obligations...
 - (c) Any provisions about tipping off, etc (if Crowe wishes to argue the contrary, then it will do so – it has not do so, to date)."

Shareholder reaction

5. It is to be inferred that the shareholders, having taken legal advice, would have reacted to the said disclosure by:
 - (a) Taking control of the management of the company: this could be achieved by using their power to require a general meeting

pursuant to s. 305 of the Companies Act 2006 (members representing 5% of paid-up capital may do so).

- (b) In so far as it appeared necessary to do so in order to secure and preserve assets, issuing a petition to wind up the company on just and equitable grounds pursuant to s. 122(1)(g) of the Insolvency Act 1986; applying for interim injunctive relief to preserve the assets of the company; and applying for the appointment of a provisional liquidator pursuant to s. 135 of the Insolvency Act 1986.”

- 263. There had been no prior reference to any of these statutory provisions, save that the Company had added the provisions of s303 of the CA 2006 to the trial papers on the previous day, 10 November 2025, and Crowe had added s305 in response.
- 264. So far as material, s303 of the CA 2006 provides that the members of a company may require the directors to call a general meeting of the company once the company has received requests to do so from members representing at least 5% of such of the paid-up capital of the company as carries the right of voting at general meetings of the company; that the request (a) must state the general nature of the business to be dealt with at the meeting, and (b) may include the text of a resolution that may properly be moved and is intended to be moved at the meeting; and that a resolution may properly be moved at a meeting unless (among other things) it is defamatory of any person.
- 265. So far as material, s304 of the CA 2006 provides that directors required under s303 to call a general meeting of the company must call a meeting (a) within 21 days from the date on which they become subject to the requirement, and (b) to be held on a date not more than 28 days after the date of the notice convening the meeting.
- 266. So far as material, s305 of the CA 2006 provides that if the directors (a) are required under s303 to call a meeting, and (b) do not do so in accordance with s304, the members who requested the meeting, or any of them representing more than one half of the total voting rights of all of them, may themselves call a general meeting.
- 267. It can be seen that (realistically, on the Company’s case as to the dishonesty of the directors) the Note pre-supposes that the directors of the Company would not comply with a request under s303, and that the members would need to call a meeting under s305. It therefore follows that the time that would elapse between the date when the members invoked s303 and the date of the meeting would be 21 days (the time allowed to the directors by s304) plus whatever notice period the members gave under s305.
- 268. In accordance with s122(1)(g) of the Insolvency Act 1996, a company may be wound up by the court if the court is of the opinion that it is just and equitable that the company should be wound up. In accordance with s135, so far as material, the court

may, at any time after the presentation of a winding-up petition, appoint a liquidator provisionally; and the appointment of a provisional liquidator may be made at any time before the making of a winding-up order; and either the official receiver or any other fit person may be appointed. I was not addressed on the timings involved in invoking these jurisdictions, and I assume that these might depend on the urgency of the matter.

269. During the course of Day 11, I expressed the view that the case pleaded in the PoC related to notification being given by Crowe to the Company, and that a case about direct notification to members was not pleaded and if the Company want to advance such a case an amendment was required. I also said that if an application for permission to amend was to be made, it would be necessary to formulate the pleaded case that the Company wished to rely on, including the contents of the notice to members that Crowe should have given, which at that time I assumed would be as set out in the Note.
270. In addition to [46]-[54] of the Company's written Closing Submissions, Mr Lawrence's oral submissions on Day 11 were later sought to be incorporated into the Company's pleaded case in the draft RAPoC by reference to pp51-82 of the transcript for that day. In sum, those oral submissions proceeded as follows:
- (i) Reference was made to [50] of the Company's written Closing Submissions.
 - (i) Reference was made to [48] of that document, which posits circumstances where the "Lilliput fraud" has been discovered, Crowe realises that the previous years' accounts which have been audited by Crowe are or are probably "fundamentally misleading", and Crowe knows that it must act in accordance with the ICAEW's Code of Ethics, and would need (in the public interest) to take steps to be disassociated from reports or other statements which contain any materially false or misleading public statement.
 - (i) The proposition that "the conscientious auditor, seeking to act with integrity, must act to dissociate himself from misleading statements, where he becomes aware that they are misleading" was relied on as part of the context in which the Court should "consider the question whether there was any duty on the auditor here to make a report to shareholders".
 - (i) Mr Lawrence submitted "...the analysis now becomes one as to what is the duty. We are not talking about a factual issue as to what legal advice in fact would have been given by general counsel or by some external lawyer; that is not the question. The question is much more hard-edged than that, and it is a question that demands legal analysis: what is the duty?"

- (j) Reference was made to *Caparo v Dickman* [1990] 2 AC 605 and *In re London & General Bank* [1895] 2 Ch 166.
- (k) Reference was made to *Salzedo & Singla* at [7.69]-[7.71], including:
 - (i) “The requirement to report to ‘those charged with governance’ reflects the rather unusual position of the auditor as being appointed by the company as a check on behalf of one of the company’s own organs (the shareholders in general meeting) upon another (the management).”
 - (ii) “The guidelines also acknowledge that there may be occasions when it is necessary for an auditor to report directly to a third party without the knowledge or consent of the management. Such would be the case if the auditor suspects that management may be involved in, or is condoning, fraud or other irregularities and such would be occasions when the duty to report overrides the duty of confidentiality.”
 - (iii) “If appropriate action is not possible or does not result from the warning, then the auditor might have to consider whether to resign as auditor, bringing with it the right and obligation to make certain statutory reports.”
- (l) Reference was made to *Pacific Acceptance Corporation Ltd v Forsyth* (1970) 92 WN (NSW) 29 and *Dairy Containers v Auditor-General* [1995] 2 NZLR 30, including Thomas J at p55: “If the circumstances are such as to give rise to a reasonable suspicion of fraud, [the auditors] must necessarily proceed further and either determine that no fraud exists or report their suspicion to the general manager, or the board, or even the shareholders of the company, as may be appropriate in the circumstances of the case.”
- (m) Reference was made to the *Sasea* cases and it was submitted:
 - (i) “However, at the same time as resigning or contemplating resigning, they would have had to consider their reporting obligation, an obligation which exists, according to *Sasea*, in order to address the risk of further losses flowing from the misconduct that has been identified. So I say resignation and report to shareholders, broadly speaking, [are] contemporaneous in this case.”
 - (ii) “So there may be occasions when it is necessary for an auditor to report directly to a third party - that is somebody outside the internal management of the company - without the knowledge or consent of the management.”
- (n) Reference was made to ISA 240 at [A54].

- (i) Reference was made to ISA 260 at [A44].
 - (j) Reference was made to [51] and [52] of the Company's written Closing Submissions as "posing the question that has to be answered as a matter of law".
 - (k) When asked whether it was the Company's case that the document that Crowe was required to serve in accordance with the CA 2006 should also have been circulated to shareholders, or whether a different document should have been circulated, Mr Lawrence answered: "It would be a separate report, in that it would go directly to the shareholders, and would not follow the statutory path which would involve going via the directors. The gist of what would be reported, what needed to be reported, would be substantially the same in both documents, because the matters of concern, which we have summarised in this morning's Note, represented the reasons for resignation."
271. It can be seen that Mr Lawrence recognised the difference between (i) "a factual issue as to what legal advice in fact would have been given [to Crowe]" and (ii) the legal question of "What is [Crowe's] duty?". However, he nevertheless adhered to the argument that the question of "What is Crowe's duty?" should be answered on the basis set out in [51]-[52] of the Closing Submissions, namely by asking what a notional legal adviser would have advised. On this formulation, arguments about what a legal adviser would have advised still formed part of the Company's case, but it was now being said that there was only one answer that the notional legal adviser could properly have given.
272. In any event, at this stage the foundation for the Company's case that Crowe owed a duty to report directly to shareholders, and/or that this was the advice that Crowe would necessarily have received from a legal adviser, was firmly based on Crowe's obligation to act "with integrity and in the public interest" in circumstances where Crowe "is associated with fundamentally misleading financial statements ... [and] has supported those statements with an unqualified audit opinion ... and [has] addressed that opinion to the shareholders who are likely to be prejudiced by the misleading information".
273. I do not consider that this case had been foreshadowed in the PoC or, for that matter, either Mr Ashley's report or the joint statement of the auditing experts. Among other things, the "key considerations" which Mr Ashley considers a reasonably competent auditor would have identified, when seeking legal advice, as prompting the auditor's decision to resign (and which therefore, it is to be inferred, would have informed the tenor of the legal advice that would have been given), are quite different. Those "key considerations" focus on troubling features of the way in which the Company was being run, not matters of ethics, public interest and the need to correct previous documents.

274. Further, this way of putting the Company's case does not make sense in relation to the 2012 audit year, as in that year there was no prior "misleading information" to correct.
275. This may explain why, when permission to re-amend the PoC was sought, a claim in respect of the 2012 audit year was omitted from the proposed new [44A] of the RAPoC.

STAGE 8 – AMENDMENT OF THE COMPANY'S PLEADED CASE

276. By an application notice dated 18 November 2025, the Company sought permission to re-amend the PoC in accordance with a draft settled by Mr Lawrence and Mr Stacey.
277. The application was supported by the witness statement of Mr Jarvis to which I have already referred. This was accepted to contain argument and submissions. The witness statement dealt not only with re-amendment of the PoC but also with various points that Crowe wished to argue concerning the value of the Company's stock of wine and the risk of dissipation of that stock. So far as concerns the PoC, at [8.1.1] of the witness statement, the Company's case was summarised as follows:

"Both parties approached and conducted the trial on the basis that the question whether a direct report should be made to shareholders was in issue; the possibility of a 'pleading point' in this respect was not raised by Crowe until it was alluded to by the court on Day 9 of the trial; in the circumstances, the point is in issue and no amendment is required; alternatively, the court should permit an amendment. The issue is one of law, and there is no evidential prejudice."

278. First, it was sought to re-amend [43] of the PoC by adding the words underlined below:

"Further or alternatively Crowe acting competently would have (for the avoidance of doubt because it would have been under a duty to TWEISL to do so):

A. reported promptly and without any delay to TWEISL (which would for the avoidance of doubt have involved reporting directly to the members of TWEISL in circumstances where all the directors were involved or were suspected of being involved in the dishonest activity in question) the matters set out below; and

B. resigned and included the same or substantially the same matters as set out below in their resignation statement to be sent to TWEISL and the registrar of Companies House pursuant to ss. 519-521 of the Companies Act 2006.

The gist of TWEISL's case that Crowe was under a duty to so report and/or include such matters in their resignation statement is a matter for legal

submissions and is not required to be stated in this statement of case; it is for the avoidance of doubt set out at paragraphs 46-54 of its written Closing Submissions and oral submissions on Day 11 in the transcript [I/21/51-82].”

279. Second, also at [43], it was sought to add a heading “Matters to be reported and/or contained in the resignation statement”, and the words that are underlined below:

-) the relevant matters referred to at paragraphs 40 and 41 above.
-) the business of TWEISL was (as carried out by its management) fraught with risk, unsustainable and likely to lead to financial collapse if it continued to trade.
-) For each audit for the year ending December 2012 onwards, that TWEISL monies were being used and/or mixed with the monies of other companies.
-) For each audit for the year ending December 2013 onwards, that although documents had been generated by the management which appeared to record deposits or loans or payments to Lilliput, no monies were in fact paid to Lilliput alternatively there was no or no sufficient audit evidence to support the directors’ representations that monies were in fact paid to Lilliput.
-) Lilliput was not a bank/an entity capable of holding funds 'on deposit' in order to 'generate a greater return on investment'.

e)A There was no sufficient audit evidence that such monies as had been deposited with Lilliput (if any) were recoverable.

e)B Lilliput was a related party as a result of its connection with Mr della Casa.

e)C The connection between Lilliput on the one hand and Mr della Casa and TWEISL on the other hand had not been disclosed by the directors.

-) the actual destination of the funds was from the TWEISL bank account to ~~Anpero~~/other third parties and/or used for their purposes or the purposes of the Directors but not the benefit of TWEISL or that there were grounds for serious concern that this was the case.
-) the above factors (and each of them) were clear evidence of and/or indicative of and/or raised suspicions of, a significant fraud being committed against TWEISL by its management or Directors (or some of them).
-) In support of the above TWEISL relies upon the admissions made at paragraph 37.7 of the Amended Defence for each audit year from y/e 2013 to y/e 2018 that (a) Crowe did not carry out adequate enquiries to obtain an understanding of Lilliput (b) had further investigations been carried out once Lilliput had been identified as holding the funds in 2013 Lilliput would have been identified as a related party (c) Crowe would as a consequence have had to act with scepticism, consider the business rationale for

the arrangement and the risk of fraud and other undisclosed transactions, and assess the ability of Lilliput to repay the amounts owed.”

280. The incorporation by reference of [40] and [41] of the PoC brings in a long list of matters. Even if that is disregarded, it is clear that the formulation in [43] of the proposed RAPoC is quite deliberately far wider than that suggested in the Note prepared by Mr Lawrence and Mr Stacey dated 11 November 2025. This is apparent not least from the fact that some of the text of the Note has been transposed into the draft re-amendment (i.e. the proposed new sub-paragraphs [e)A], [e)B], and [e)C] of the RAPoC) but this transposed text has been added to, and not substituted for, a large amount of other text.

281. No amendment was sought in respect of [44] of the PoC, which reads as follows:

“Crowe should (in each relevant year) have taken the steps set out above at paragraph 43 promptly and/or without limitation no later than the signing date of each set of accounts as set out in paragraph 7 above.”

282. Third, it was sought to add an entirely new [44A] and [44B] to the PoC, as follows:

“44A) In particular with reference to each audit year such reporting should have occurred (as set out in the expert report of Mr Ashley dated 2nd April 2025):

- a) for audit y/e 2013 on or around January/February 2015.
- b) for audit y/e 2014 on or around August/September 2015.
- c) for audit y/e 2015 on or around September/October 2016.
- d) for audit y/e 2016 on or around November/December 2017.
- e) for audit y/e 2017 on or around August/September 2018.
- f) for audit y/e 2018 on or around August/September 2019.

44B) Further or alternatively the members of TWEISL would have had notice of the resignation notice and/or statement either:

- . as sent to them pursuant to the company’s obligations under s 520 of the Companies Act 2006.
- . alternatively within 21 days beginning with the day on which Crowe should have sent the s. 519 statement to the company it should have sent a copy of the statement to the registrar within 7 days. That statement would have been placed on the website at Companies House within a further 7 days and been accessed by the members within 14 days thereafter.”

283. Fourth, it was sought to amend [45] of the PoC by adding the words underlined below:

“On relevant notification pursuant to 43A and/or 43B above TWEISL (through its members) would have taken prompt and significant action including:

- . the securing, preservation and valuation of its assets (including wine stock, money in accounts etc) and without prejudice to the generality of the foregoing by (i) issuing a petition to wind up the company on just and equitable grounds pursuant to s. 122(1)(g) of the Insolvency Act 1986 (ii) applying for interim injunctive relief to preserve the assets of the company (“the injunction steps”) and/or (iii) applying for the appointment of a provisional liquidator pursuant to s. 135 of the Insolvency Act 1986.
- . insisting upon the repayment of the “loans”.
- . ensuring that no more deposits be made or (if made) would be with a well-known commercial bank.
- . the immediate dismissal of the Directors.
- . the appointment of new management.
- . (if necessary) the winding up of the business of TWEISL and the distribution of its assets (including the sale of wine held in stock).”

284. Finally, it was sought to add an entirely new [45A] and [45B] to the PoC, as follows:

“45A) As to the particulars of such prompt and significant actions:

- a) the notified members of TWEISL or sufficient of them would have taken urgent legal advice promptly. It is to be inferred that they would have sought and obtained such legal advice within 4 days or such period as the court may find after notification as set out above which advice would have notified them of:
-) their rights in relation to the injunction steps and/or to apply for the appointment of a provisional liquidator pursuant to s. 135 of the Insolvency Act 1986.
-) their rights to take control of the management of the company by using their power to require a general meeting pursuant to s. 305 of the Companies Act 2006 (members representing 5% of paid-up capital may do so) and/or if impracticable to call a meeting in the usual way (because for example of the unwillingness of the directors to call such a meeting) request the court to order such a meeting on the application of a member who would be entitled to vote at such a meeting pursuant to s. 306(2).
-) The said members would have taken the injunction steps promptly and within 3 days of the legal advice or such period as the court may find.

45B) In the premises the relevant actions would have led to the preservation and securing of the assets promptly and in any event within 7 days of notification as set out at 44A and 44B above and/or the general meeting within 8 weeks of the notification or such date as the court may find.”

285. These amendments were resisted by Crowe. Further, Mr Lawrence confirmed that the omission of any reference to the audit Y/E 2012 in the proposed new [44A] was deliberate, and that the claim in respect of that year was abandoned. It was not clear to me, however, whether that claim was being abandoned unreservedly, or only on the contingent basis that the proposed re-amendments of the PoC were otherwise allowed. In any event, Crowe applied to strike out that claim on the basis of the draft pleading.

THE COMPANY’S AMENDMENT APPLICATION

(a) Applicable law

286. I gratefully adopt the following summary contained in [3]-[10] of the annex to the judgment of Henshaw J in *Toucan Energy Holdings Ltd v Wirsol Energy Ltd* [2021] EWHC 895 (Comm).

287. The Court has a discretion to permit amendments to a statement of case under CPR rules 17.1(2)(b) and 17.3. The Court’s discretion should be exercised in accordance with the overriding objective under CPR r. 1.1(1) to deal with cases “justly and at proportionate cost”. CPR rule 1.1(2) indicates that:

“(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable—

- (a) ensuring that the parties are on an equal footing;
- (b) saving expense;
- (c) dealing with the case in ways which are proportionate—
 - (i) to the amount of money involved;
 - (ii) to the importance of the case;
 - (iii) to the complexity of the issues; and
 - (iv) to the financial position of each party;
- (d) ensuring that it is dealt with expeditiously and fairly;
- (e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases; and
- (f) enforcing compliance with rules, practice directions and orders.”

288. Further, as was held in *Scott v Singh* [2020] EWHC 1714 (Comm) (HHJ Eyre QC):

- (i) the proposed amendment must be properly formulated (§18);
- (ii) if the proposed amendment raises a new claim or defence, it must have a real prospect of success (§19); and

- (i) if the proposed amendment is “very late” in that it would require the vacation of an existing trial date, there is a heavy burden on the applicant to show that justice requires that they be permitted to advance their amended case (§20).

289. In *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm), where the claimant applied two weeks before trial to amend the particulars of claim, it was conceded that the unamended claim was unsustainable and that the proposed amendments “wholly change the nature of the case” (§32). The lateness of the application led to the trial date being vacated. Carr J summarised the relevant principles as follows:

“Drawing these authorities together, the relevant principles can be stated simply as follows:

(a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;

(b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;

(c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;

(d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;

(e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;

(f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;

(g) a much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so.” (§38)

290. In *CIP Properties (AIPT) v Galliford Try Infrastructure Limited* [2015] EWHC 1345 (TCC) permission was sought for extensive amendments to the claimant’s case that would necessitate the adjournment of a trial date that Coulson J concluded it was imperative to maintain (see §§11 and 13). Coulson J gave the following further summary of the relevant principles:

“In summary, therefore, I consider that the right approach to amendments is as follows:

(a) The lateness by which an amendment is produced is a relative concept (*Hague Plant*). An amendment is late if it could have been advanced earlier, or involves the duplication of cost and effort, or if it requires the resisting party to revisit any of the significant steps in the litigation (such as disclosure or the provision of witness statements and expert's reports) which have been completed by the time of the amendment.

(b) An amendment can be regarded as ‘very late’ if permission to amend threatens the trial date (*Swain-Mason*), even if the application is made some months before the trial is due to start. Parties have a legitimate expectation that trial dates will be met and not adjourned without good reason (*Brown*).

(c) The history of the amendment, together with an explanation for its lateness, is a matter for the amending party and is an important factor in the necessary balancing exercise (*Brown*; *Wani*). In essence, there must be a good reason for the delay (*Brown*).

(d) The particularity and/or clarity of the proposed amendment then has to be considered, because different considerations may well apply to amendments which are not tightly-drawn or focused (*Swain Mason*; *Hague Plant*; *Wani*).

(e) The prejudice to the resisting parties if the amendments are allowed will incorporate, at one end of the spectrum, the simple fact of being ‘mucked around’ (*Worldwide*), to the disruption of and additional pressure on their lawyers in the run-up to trial (*Bourke*), and the duplication of cost and effort (*Hague Plant*) at the other. If allowing the amendments would necessitate the

adjournment of the trial, that may be an overwhelming reason to refuse the amendments (*Swain Mason*).

(f) Prejudice to the amending party if the amendments are not allowed will, obviously, include its inability to advance its amended case, but that is just one factor to be considered (*Swain-Mason*). Moreover, if that prejudice has come about by the amending party's own conduct, then it is a much less important element of the balancing exercise (*Archlane*). (§19)

291. Coulson J also indicated that the starting point for amendments under CPR 17 is no longer to the effect that amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon, provided that any prejudice to the other party caused by the amendments can be compensated for in costs (§15).
292. As to prospects of success, if there are no real prospects then that is determinative. Apparent lack of prospects, even when not so low as to meet the CPR Part 24 threshold, is also a factor against the granting of permission. The court is not expected to conduct a mini-trial, but that does not mean that the court must take at face value and without analysis anything that a party says in its statements before the court. It may, for example, be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents (see *ADVA Optical Networking Ltd v Optron Holding Ltd* [2018] EWHC 852 (TCC) §§ 30-35 (Joanna Smith QC)).
293. It is relevant to have regard to the degree to which the case sought to be advanced by the amendment is one that the parties have in fact already been addressing. In *Hawksworth v Chief Constable of Staffordshire* [2012] EWCA Civ 293 (CA), the Court of Appeal stated, *obiter*, that it might appropriate to permit an amendment at trial in respect of a matter which, although not raised in the pleadings, had nevertheless been raised in some of the witness statements and experts' reports served before trial. In *Ahmed v Ahmed* [2016] EWCA Civ 686, the claimants applied to have letters of administration revoked on the basis that the will annexed to them had not been duly executed or witnessed. At the start of the trial the claimants obtained permission to amend their particulars of claim so as to allege that the will had been forged. The Court of Appeal dismissed an appeal against that grant of permission: the amendment was no more than a formality bringing the claimants' case into line with what had been argued for at least six months; the appellants had not been taken by surprise by the amendment and, indeed, had themselves sought at the pre-trial review permission to call a handwriting expert.
294. On the other hand, the mere fact that an issue has received *some* attention in the preparation of the case and the experts' reports is not necessarily sufficient to make permission to amend appropriate. In *Willmott Dixon Construction Ltd v Robert West Consulting Ltd* [2016] EWHC 3291, Coulson J refused to grant permission for

amendments by a defendant to its technical case. He did not consider the proposed new case to be arguable, but added *obiter*:

“25. Now let us assume that I am wrong on both points above, so that the issue of law is at least arguable as a matter of contributory negligence. Even if that were the case, I would still refuse to allow the amendments to Response 14. There are two reasons for that.

26. The first is because the amendments were made late, only a few weeks before trial (and with a holiday period intervening). The lateness is neither explained nor the subject of any explanation.

27. The second is because of all the uncertainties that the amendments introduce, and the inevitable adjournment of the trial if they were allowed. On the basis of the case as it presently exists, the claimant has devoted little time, and little of its expert’s report, to a consideration of the allegations of contributory negligence arising out of the underpinning works. That is because the claim has hitherto been put on the narrow basis indicated in *D&F Estates* (i.e. actual knowledge and condoning of the wrong) and the claimant has decided - whether rightly or wrongly - that it has a good case in defence of that very specific allegation.

28. I accept Mr Sullivan’s proposition that, if these amendments were allowed, they would require the claimant to reconsider this whole aspect of the case and, more than likely, to focus upon matters which it had previously thought were unnecessary. It would give the case on workmanship and inspection a completely different emphasis. Out of caution, the claimant would have to put itself into the shoes of Toureen and look at all the factual and expert issues (not just the narrow *D&F Estates* point), to gather evidence in response and weigh its potential liability for contributory negligence on this new basis.

29. It would not stop there. No matter what my views are as to the inherent dangerousness exception as a matter of law, and the difficulty of arguing the point in this case (paragraph 14 above), the claimant would need carefully to consider that aspect of the amendments, for the first time, and in very short order. It may be a matter on which expert, as well as factual, evidence is thought to be required. I acknowledge at once that Ms McCafferty properly indicated that this would not be how the case would be presented at trial, but the discussion of the law set out above demonstrates that considerations of inherent danger may easily become part of the defendant's case, even by default.

30. Thus, if I allowed these amendments, they would not only comprise an unwelcome and unnecessary distraction to the claimant as it prepares for a trial

that is a month away, but it would probably also give rise to the need for further evidence, perhaps including expert evidence. That would fatally jeopardise the trial date. On an application of the relevant principles summarised by Carr J in *Su-Ling*, I am bound to conclude that it would not be appropriate to allow the amendments in those circumstances.”

295. To this synopsis of Henshaw J, I would add that in *Wani LLP v Royal Bank of Scotland plc* [2015] EWHC 1181 (Ch), Henderson J (as he then was) said at [50]:

“... Unless and until an application to amend was made, so as to bring the claimant’s pleaded case into alignment with the evidence of its witnesses, the Bank was entitled to proceed on the footing that the issues remained those defined by the statements of case in their existing form. It puts matters the wrong way round, in my judgment, for the claimant to say that the Bank was now on notice of the “real” case that the claimant wished to advance. It is the function of the pleadings to define the issues, and evidence which does not go to the pleaded issues is, strictly speaking, irrelevant and liable to be struck out or disregarded accordingly...”

296. To similar effect is a case cited by Ms Evans, *UK Learning Academy v Secretary of State for Education* [2020] EWCA Civ 370, Richards LJ at [47]:

“I endorse the view expressed by the judge to the parties at the trial and repeated in his judgment at [11] that the statements of case ought, at the very least, to identify the issues to be determined. In that way, the parties know the issues to which they should direct their evidence and their challenges to the evidence of the other party or parties and the issues to which they should direct their submissions on the law and the evidence. Equally importantly, it enables the judge to keep the trial within manageable bounds, so that public resources as well as the parties’ own resources are not wasted, and so that the judge knows the issues on which the proceedings, and the judgment, must concentrate. If, as he said, there was “a prevailing view that parties should not be held to their pleaded cases”, it is wrong. That is not to say that technical points may be used to prevent the just disposal of a case or that a trial judge may not permit a departure from a pleaded case where it is just to do so (although in such a case it is good practice to amend the pleading, even at trial), but the statements of case play a critical role in civil litigation which should not be diminished.”

297. In the present case, it was not in dispute that the limitation period in respect of all the Company’s causes of action had expired. This brings into play other considerations.

298. First, CPR 17.4 provides as follows:

“(1) This rule applies where –

(a) a party applies to amend their statement of case in one of the ways mentioned in this rule; and

(b) a period of limitation has expired under –

(i) the Limitation Act 1980;

(ii) the Foreign Limitation Periods Act 1984; or

(iii) any other enactment which allows such an amendment, or under which such an amendment is allowed.

(2) The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as are already in issue on a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.”

299. Second, the Limitation Act 1980 (“the 1980 Act”), s35 provides as follows:

“New claims in pending actions: rules of court.

(1)For the purposes of this Act, any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced—

(a)in the case of a new claim made in or by way of third party proceedings, on the date on which those proceedings were commenced; and

(b)in the case of any other new claim, on the same date as the original action.

(2)In this section a new claim means any claim by way of set-off or counterclaim, and any claim involving either—

(a)the addition or substitution of a new cause of action; or

(b)the addition or substitution of a new party;

and “third party proceedings” means any proceedings brought in the course of any action by any party to the action against a person not previously a party to the action, other than proceedings brought by joining any such person as defendant to any claim already made in the original action by the party bringing the proceedings.

(3)Except as provided by section 33 of this Act or by rules of court, neither the High Court nor the county court shall allow a new claim within subsection (1)

(b) above, other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim.

For the purposes of this subsection, a claim is an original set-off or an original counterclaim if it is a claim made by way of set-off or (as the case may be) by way of counterclaim by a party who has not previously made any claim in the action.

(4) Rules of court may provide for allowing a new claim to which subsection (3) above applies to be made as there mentioned, but only if the conditions specified in subsection (5) below are satisfied, and subject to any further restrictions the rules may impose.

(5) The conditions referred to in subsection (4) above are the following—

(a) in the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action; and

(b) in the case of a claim involving a new party, if the addition or substitution of the new party is necessary for the determination of the original action.”

300. Guidance on the application of CPR 17.4 and s35 of the 1980 Act was provided in *HM Commissioners for Revenue & Customs v Begum* [2010] EWHC 1799, Richards J at [29]-[32], including the following (emphasis added):

“29. Section 35 and CPR 17.4 refer to “a new claim” and to a “claim already made”, and s.35 refers also to “a claim involving a new cause of action”. For present purposes, a claim is a new claim only if it involves “the addition or substitution of a new cause of action”: s.35(2)(a). The authorities establish that “cause of action” carries the meaning given by Diplock LJ in *Letang v Cooper* [1965] 1 QB 232 at 242-3: “simply a factual situation the existence of which entitles one party to obtain from the court a remedy against another person ... [as distinct from] a form of action ... used as a convenient and succinct description of a particular category of factual situation”.

... In *Lloyds Bank plc v Rogers* [1999] 3 EGLR 83, Auld LJ noted that what makes a new claim as defined in s.35(2) is “not the newness of the claim according to the type or quantum of remedy sought, but the newness of the cause of action which it involves”.

30. ... A change in the essential features of the factual basis (rather than, say, giving further particulars of existing allegations) will introduce a new cause of action, but it may be permitted under s.35(5)(a) and CPR 17.4(2) if the facts are the same or substantially the same as those already in issue.

32. ... The exercise to be undertaken in deciding whether there is “a new claim” as defined in s.35(2) is therefore to compare the essential factual elements in a cause of action already pleaded with the essential factual

elements in the cause of action as proposed. If they are the same, there is no new cause of action and therefore no new claim.”

35. While therefore it is legitimate to look at the further information for a fuller understanding of the claimant’s pleaded case, it cannot be relied on to supply essential elements of the cause of action. *NEC Semi-Conductors Ltd v IRC* [2006] STC 606 concerned in part the amendment of particulars of claim and the application of s.35 and CPR 17.4. In a passage with which the other members of the court agreed (paras 84 and 89), Mummery LJ said at para 131:

“[131] While it is good sense not to be pernickety about pleadings, the basic requirement that material facts should be pleaded is there for a good reason—so that the other side can respond to the pleaded case by way of admission or denial of facts, thereby defining the issues for decision for the benefit of the parties and the court. Proper pleading of the material facts is essential for the orderly progress of the case and for its sound determination. The definition of the issues has an impact on such important matters as disclosure of relevant documents and the relevant oral evidence to be adduced at trial. In my view, the fact that the nature of the grievance may be obvious to the respondent or that the respondent can ask for further information to be supplied by the claimant are not normally valid excuses for a claimant’s failure to formulate and serve a properly pleaded case setting out the material facts in support of the cause of action. If the pleading has to be amended, it is reasonable that the party, who has not complied with well-known pleading requirements, should suffer the consequences with regard to such matters as limitation.” (emphasis added)

301. Guidance as to whether the factual elements are “the same or substantially the same”, was provided in *Ballinger v Mercer* [2014] 1 WLR 3597, Tomlinson LJ at [34]-[37]:

“34. Helpful guidance as to the proper approach to the resolution of this question was given by Colman J in *BP plc v Aon Ltd* [2006] 1 Lloyd’s Rep 549 where, at page 558, he said this:

“52. At first instance in *Goode v Martin* [2001] 3 All ER 562 I considered the purpose of Section 35(5) in the following passage:

“Whether one factual basis is ‘substantially the same’ as another factual basis obviously involves a value judgment, but the relevant criteria must clearly have regard to the main purpose for which the qualification to the power to give permission to amend is introduced. That purpose is to avoid placing a defendant in the position where if the amendment is allowed he will be obliged after expiration of the limitation

period to investigate facts and obtain evidence of matters which are completely outside the ambit of, and unrelated to those facts which he could reasonably be assumed to have investigated for the purpose of defending the unamended claim.”

53. In *Lloyd’s Bank plc v Rogers* [1997] TLR 154 Hobhouse LJ said of Section 35:

“The policy of the section was that, if factual issues were in any event going to be litigated between the parties, the parties should be able to rely upon any cause of action which substantially arises from those facts.”

54. The substance of the purpose of the exception in subsection (5) is thus based on the assumption that the party against whom the proposed amendment is directed will not be prejudiced because that party will, for the purposes of the pre-existing matters [in] issue, already have had to investigate the same or substantially the same facts.”

35. In the *Welsh Development Agency* case Glidewell LJ said, in an often quoted passage at page 1418, that whether or not a new cause of action arises out of substantially the same facts as those already pleaded is substantially a matter of impression.

36. Less well-known perhaps is the cautionary note added by Millett LJ in *Paragon Finance*, where at page 418 he said, after citing the passage from Glidewell LJ to which I have just referred:

“In borderline cases this may be so. In others it must be a question of analysis.”

37. I would also point out, as did Briggs LJ in the course of the argument, that “the same or substantially the same” is not synonymous with “similar”. The word ‘similar’ is often used in this context, but it should not be regarded as anything more than a convenient shorthand. It may serve to divert attention from the appropriate enquiry.”

(b) The Company’s submissions

302. Mr Lawrence’s primary submission was that the Company did not require permission to amend to introduce the issue of whether Crowe should have reported to the shareholders directly because things had “moved on” since the PoC were formulated and “By the time the [auditing] experts ... came to consider this area of the case, it was appreciated on both sides that TWEISL’s case was that a report would have been made to the shareholders if Crowe had done its job properly” and “The Skeleton Arguments before trial leave no room for doubt about that”. Mr Lawrence relied on:

- () Mr Ashley’s report at paragraph [5.5.1], which I have quoted above.
 - () The discussions between Mr Ashley and Mr Main which followed the exchange of reports, and which led to the production of their joint statement which “clearly reflected consideration of the question whether there was a duty to report to the shareholders”. Mr Lawrence relied on section 7 “which refers to the passage in ISA 260 noting that it may be necessary to communicate with a higher authority in the governance structure, such as the owners of the business”, and to the areas of disagreement quoted above.
 - () The fact that Mr Ashley and Mr Main agreed that legal advice would be taken. Mr Lawrence submitted “The content of such advice is of course a matter for the court, having heard submissions, not for the audit experts”.
 - () The statement in [50] of TWEISL’s opening Skeleton Argument for trial that TWEISL will argue that Crowe owed a duty to report to shareholders as soon as it became apparent that there was a real risk of fraud.
 - () Crowe’s opening Skeleton Argument for trial, which (it was submitted) recognised that this was TWEISL’s case: (i) at [87] (“Service of Audit Expert Reports and the Joint Statement of Audit Experts have caused the issues on breach of duty to narrow and the focus to change ...”) and (ii) at [122] (“The APOC is imprecise about who should have been the recipient of the alleged reports. The shareholders’ witness statements appear to proceed on the basis that the auditors should have reported to them ... But this is a misconception of the auditor’s role ... Crowe disagrees that there was some other form of duty to report to shareholders” (Emphasis added)).
 - () Exchanges in the course of opening. Mr Lawrence submitted that these reflected the “correct perception in all parts of the Court” that TWEISL’s case was that a report should have been made directly to shareholders.
303. In his witness statement, Mr Jarvis added further points arising from Mr Ashley’s report. First, Mr Jarvis referred to [6.2.29] of Mr Ashley’s report. Second, Mr Jarvis referred to [6.2.36] of Mr Ashley’s report. I have quoted both of these paragraphs above.
304. Mr Jarvis also referred to the answer that Mr Ashley gave in cross-examination, that I have also quoted above, ending with the words: “So I was merely allowing for the possibility that the legal advice might say, I do not know that it would, that I should be communicating directly to the shareholders in order to be able to draw a halt to what I thought might be a potential fraud.”
305. Mr Jarvis added that Mr Main had accepted that the reasonably competent and conscientious auditor would want to make disclosure to shareholders, to put them in

the picture, in order to correct any misunderstanding that might have been generated by earlier, perhaps deficient accounts, and, further, that shareholders were a “higher authority in the governance structure” of a company for the purposes of ISA 260.

306. Mr Jarvis made a number of further points relating to the history of the proceedings. To the extent that I consider these relevant, I have addressed them in the narrative above.
307. Mr Lawrence further submitted that the issue of reporting to shareholders was addressed by Ms Evans in cross examination of Mr Ashley, in particular when it was put to him that there was no duty on the part of auditors to report to shareholders and specifically by the question “I am saying that the law does not require you to report to shareholders.”
308. In addition, Mr Lawrence submitted that, if it was required, permission to re-amend should be granted, as “There is no question of any evidential prejudice: the issue that arises is one of law, for the court to determine on the basis of submissions and analysis”.
309. Mr Lawrence relied on *Hawksworth v Chief Constable of Staffordshire* [2012] EWCA Civ 293 (CA) at [40]-[43], the tenor of which is apparent from part of the passage the judgment of Lawton LJ in *Rolled Steel Products Holdings Limited v British Steel Corporation & Others* [1966] 1 (Ch) 246 at pages 309 to 310, which is cited at [40]:

“My recent experience in this court shows that some counsel and judges are not giving pleadings the attention which they should. Pleadings are formal documents which have to be prepared at the beginning of litigation, they are essential for the fair trial of an action and the saving of time at trial. The saving of time keeps down the costs of litigation. A plaintiff is entitled to know what defences he has to meet and the defendant what claims are being made against him. If the parties do not know, unnecessary evidence may be got together and led or, even worse, necessary evidence may not be led.

Pleadings regulate what questions may be asked of witnesses in cross-examination. When counsel raises an objection to a question or a line of questioning, as Mr Morritt did on a number of occasions, the trial judge should rule on it at once. He should not regard the objection as a critical commentary on what the other side is doing. If the judge does not rule, counsel should ask him to do so. If a line of questioning is stopped because it does not relate to an issue on the pleadings, counsel should at once consider whether his pleadings should be amended. If he decides that they should, he should forthwith apply for an amendment and should specify precisely what he wants and the judge should at once give a ruling on the application. The principles upon which

amendments should be allowed are well known and are set out in the current edition of the Supreme Court practice.”

310. Mr Lawrence further relied on *Ahmed v Ahmed* [2016] EWCA Civ 686 at [12]-[19], where Moore-Bick LJ said at [13]:

“It will be apparent from what I have already said that the appeal proceeds on the basis that, by allowing the amendment to the particulars of claim the Recorder allowed the claimants at the beginning of the trial to put forward a new case which raised issues of fact which the defendants had not had a proper opportunity to deal with and so put them at a serious disadvantage. If that had indeed been the case there would have been a strong argument that the defendants had been denied a fair trial, but in my view to describe it in those terms is to ignore the procedural history to which I have referred. The fact is that almost as soon as the will was produced, the claimants through their solicitors made it clear that they disputed its authenticity. In opposition to the defendants’ application for summary judgment, they filed the affidavit of Mr Safdar and the first affidavit of Mr Hossain which together made it clear that the validity of the will was being challenged. Moreover, it is clear that the defendants themselves understood that the authenticity of the testator’s signature was being challenged because they asked Mr Recorder Chapman at the pre-trial review for permission to call a handwriting expert. There can only have been one purpose in doing so: to assist in establishing (if the report were favourable) that the signature of the testator was genuine and the will validly executed.”

311. Finally, Mr Lawrence relied on other points, namely, in sum: (1) the balance of justice favours the grant of an amendment, (2) the amendment is not “very late”, (3) in any event, lateness is a relative concept, and lateness in the present case is explained in substance because “it had always been considered that the issues were properly raised as between the parties and that it was the Court’s involvement which engendered the application to amend”, (4) there is nothing new about TWEISL’s case on the duty to report to shareholders, (5) the witness statement of Crowe’s solicitor, Mr Roberts, made in opposition to TWEISL’s amendment application, accepts that Crowe came to trial knowing of TWEISL’s reliance on ISA 240 and *Sasea Finance* in support of its case that such a duty arose, (6) this is determinative, as there can be no prejudice to Crowe because the matter is a point of law on which no further evidence is relevant; (7) the case has sufficient prospects of success; and (8) there is no limitation problem in allowing the amendment as (i) there is no new claim and (ii) even if there is, it arises out of the same or substantially the same facts as those that are already in issue.
312. So far as concerns the amendments dealing with shareholder responses, Mr Lawrence submitted that (1) the PoC already plead that members would have taken prompt action, including to preserve assets, and (2) the proposed amendments merely

particularise the dates on which notification would have been given and action would have been taken.

(c) Crowe's stance

313. In opposition to the Company's application for permission to re-amend, Crowe relied on a witness statement of Mr Roberts, a partner in Clyde, dated 3 December 2025. Mr Roberts sought to set out the grounds on which Crowe opposed the application (save to the extent that it related to areas where the Company proposed to pare back its case). In doing this, Mr Roberts strayed into legal argument and analysis (as Mr Jarvis had done).
314. The first point made by Mr Roberts is that the Company had made no attempt to satisfy the tests set out at CPR 17.4 and s35 of the Limitation Act 1980, which it needed to do.
315. To the extent that any of the proposed new allegations survive the application of these tests ("the Limitation Filter"), Mr Roberts submitted that the exercise of the Court's discretion whether to allow the draft re-amendments involved considering whether the new allegations have reasonable prospects of success, whether they are satisfactorily pleaded, whether it is in the interests of justice to allow them, whether they would prejudice Crowe, and the explanation for lateness (which involves "a heavy burden").
316. Mr Roberts divided the contentious re-amendments into two main areas. First, alleged duties on the part of auditors to report directly to shareholders or by way of including the same matters in resignation notices ("the Reporting Duties"). Second, what the shareholders would have done ("the Shareholder Responses"). Mr Roberts argued that there should in fact also be a further step in the reasoning - namely why it is said that the Shareholder Responses would or might have been successful in preserving and/or recovering the Company's assets, although the Company had chosen not to plead that.
317. Mr Roberts argued that (i) the contentious re-amendments seek to introduce a new claim or claims and (ii) they are therefore barred by the Limitation Filter unless they arise out of "the same or substantially the same facts". The existing claim in the PoC is that Crowe owed a duty to report to TWEISL, leading to TWEISL taking action via its members. The proposed new claims are that Crowe owed duties to report to the members (perhaps or even probably to the exclusion of the directors), leading to the members taking a variety of different actions. Although the draft re-amendments ("RAPoC") do not contain changes to the "duties" section of the PoC, the rider at the end of [43] makes plain that significant new duties are relied on. This position is made all the more troubling by the attempt at widespread "incorporation by reference" of closing submissions, buried in the wrong part of the RAPoC. It is also plain from [43A] and [43B] that significant new breaches of duty are involved, with new but (as Mr Roberts submitted) inadequately reasoned steps in the chain of causation at [45]-[45B].

318. Crowe was prepared to accept that parts of TWEISL's proposed re-amendments on Reporting Duties (i) are founded in obligations actually imposed on auditors (ii) were matters Crowe was prepared to meet at trial and (iii) potentially satisfy the Limitation Filter, namely those that refer to the statutory procedures to send notice to the company on resignation set out under ss519-522 of the CA 2006. Insofar as the CA 2006 sets out statutory provisions which themselves involve notifying the Company (via the directors) Crowe accepted that this might involve "substantially the same facts" as those originally pleaded in the PoC. However, Crowe disputed that the provision of information to Companies House involved "the same or substantially the same facts".
319. In any event, Mr Roberts submitted that: (i) the draft [43B] and [43a) to h)] of the RAPoC stretched the content of any resignation notice far beyond what was required; (ii) the reporting lines in ss519-522 do not require contacting shareholders direct and indeed give the directors a right of objection before any notice can be sent to Companies House; and (iii) any case seeking to stretch ss519-522 to a duty to report to shareholders would fall foul of the Limitation Filter as well as lacking proper prospects of success.
320. Mr Roberts stated:

"Crowe accepts that going into trial it was aware that TWEISL sought to advance some form of duty to report based on ss519-522 of the CA 2006 and/or arising from the *Sasea Finance* cases and possibly ISA 240 or 260 (but not that these would be some form of "Trojan Horse" for other duties). However, Crowe did not understand there to be any suggestion that the reporting would go against or subvert the mechanism in the CA 2006. Nor did it understand for instance that TWEISL would seek to involve duties of integrity or ethics, the need to dissociate with prior years' accounts, the need to act in the public interest or any suggestion that reporting would be to shareholders at meetings. Had Crowe understood that it might [face] a case of that nature then this would plainly have been dealt in its opening submissions.

Importantly Crowe also understood that it was meeting a case where the shareholders' evidence was that they would themselves have told the directors about the fraud - which is relevant to the issue of whether Crowe should somehow have realised that reporting to shareholders should have been "behind the directors' backs".

... [Mr Jarvis' contention] that Crowe "did understand the case it had to meet" ... is incorrect ... all Crowe realised it might have to meet so far as the Reporting Duties is concerned is a case based on ss519-522 of the CA 2006 and/or *Sasea Finance* and possibly ISA 240 or 260 (although they did not appear to properly support a claim as to reporting to shareholders). So far as Shareholder Responses were concerned, the shareholders' cases were premised

on approaching ADC, only one shareholder (Mr Streather) mentioned freezing injunctions, and nobody mentioned the two new provisions of the IA 1986 until closing”.

321. Save in these very limited respects, and subject to Crowe’s comments about the imprecise pleading of the Company’s case and the Company’s misconception of auditors’ duties that were contained in Crowe’s opening Skeleton Argument for trial, Mr Roberts disputed Mr Jarvis’ contention that “both parties approached and conducted the trial on the basis that the question whether [sic] a direct report should be made to shareholders was in issue”. On the contrary, Mr Roberts contended that “TWEISL’s case was in a state of development and flux throughout trial - to the extent that parts of it were only revealed late in the evidence or even in closing”.
322. Mr Roberts further contended that, as Crowe had flagged up in closing, it was incumbent on the Company to explain the timing of a late application for permission to amend, yet Mr Jarvis advances no explanation as to why “TWEISL found itself going into trial with its case so poorly pleaded”. Given the Company’s track record of “stonewalling” pertinent parts of Crowe’s RFIs, Mr Roberts asked me to conclude that there is no such explanation. Mr Roberts further rejected the suggestion that the case that the Company was seeking to advance in the draft RAPoC was somehow “there all along”. Mr Robert said that this argument “suffers from the serious problem that if TWEISL actually thought it was trying to run a “reporting to shareholders” case, it should have given proper answers to the RFI Requests and amended its pleading much sooner” and “The suggestion that Crowe “waived” pleading defects before trial is misconceived”.
323. Mr Roberts then argued that, in sum, the proposed re-amendments to the PoC (1) lack reasonable prospects of success; (2) lack the necessary qualities of clarity and precision, and are inadequately pleaded - some amendments being too broad, others being too vague, and others being too sparse; (3) are not supported by the evidence (and no application for relief from sanctions has been made, as would be required, to put in new evidence); (4) would give rise to real and substantial prejudice to Crowe (and that it would not be in the interests of justice to permit them), and (5) had been raised too late.
324. With regard to the suggestion that Crowe should have made disclosure to the members at a general meeting, Mr Roberts stated that neither disclosure nor the evidence of the auditing experts had covered auditor engagement with shareholders at meetings. He said “This is a highly controversial issue and has consequently been the subject of government consultations, including commentary surrounding existing rules and regarding the possibility of an extension of auditors’ requirements to engage with shareholders”. He gave the following examples of documents that would have been disclosed by Crowe in response to this issue, extracts of which were included in the exhibits to his witness statement: (1) the ICAEW Guidance issued in February 2005 which refers to the potential impact of “unresolved liability issues” if auditors were

required to engage directly with shareholders; (2) a White Paper entitled “Restoring Trust in Audit and Corporate Governance Command Paper dated 2021”, in which, in response to proposals surrounding the possibility of requiring auditors to attend AGMs to answer questions, the government noted “concerns around implications for auditor and audit firm liability, if shareholders expect the auditor to answer questions which go beyond the conduct of the audit and content of the audit report”, and (3) Crowe’s response to this White Paper dated July 2021 - as to this proposal: “We recognise that investors are often frustrated by a lack of access to the audit process but for this to be a realistic possibility an audit liability management mechanism would need to be put in place to encourage meaningful auditor participation. We also question whether auditor participation in shareholder forums would be welcomed by audit firms’ insurers”.

325. Ms Evans submitted that it is plain that the Company’s proposed re-amendments involve pleading new facts which go far beyond what is already in issue, and that at best very limited weight should be placed on the Company’s arguments about what is in the RFI responses, witness statements or expert reports. As to the changes, and by way of a small sample of the objections available to be made, Ms Evans instanced the following:

- (i) Although the “duty” section of the RAPoC is untouched, the rider at the end of [43] seeks to incorporate swathes of submissions which themselves raise new alleged duties which were not touched on in any RFI answer or expert report, such as duties of integrity or ethics, public interest, dissociation from earlier accounts or the alleged need to report at shareholders’ meetings. These are plainly a substantial broadening out of the facts. As detailed by Mr Roberts, Crowe contends that these new allegations constitute a particularly serious and troubling departure from the pleaded case – not least having regard to the fact that it was made clear during the course of the trial that the Company was holding back “powder” for Mr Main.
- (ii) Instead of reporting to the Company, the thrust of most of the new allegations is an alleged duty to report to shareholders either directly or via Companies House. The fact that the notification lines under ss519-522 of the CA 2006 were referred to in the experts’ reports can at best provide a flimsy basis for allowing these significant additions of newly pleaded facts.
- (iii) The alleged actions of shareholders in rushing off to thwart the directors also branch into new areas not even covered by the existing evidence (and indeed undermined by the shareholders’ own evidence that they would have contacted AdC: Mr Clark at [27], Mr Streather at [19], and Mr Hillson at [23]). The Company chose to plead [45] of the PoC in a cursory way and to serve witness statements that operated by cross-referring back to that pleaded case. It should not be permitted to escape the consequences

of the way it framed its case before trial. It cannot realistically run the new case without new witness statements. On this latter point, the Company would need to apply for relief from sanctions,⁷ and quite apart from the lateness there would be problems about the new evidence seeking to contradict parts of the case that it has already run (e.g. on shareholders approaching AdC).

326. As to whether the proposed amendments have a real prospect of success, Ms Evans submitted that where the court is being asked to permit amendments based on a duty to report to shareholders, that is clearly a novel case. There is no authority properly supporting it - *Sasea* merely assumes a duty to report to an unspecified third party and the Antipodean cases of *Pacific Acceptance* and *Dairy Containers* involve different company law backdrops. Further, there are no formal requirements in the ISAs obliging auditors to report to shareholders, and the process suggested by TWEISL seems to undo the provisions under the CA 2006 whereby auditors are required to notify directors of their resignation first. The fact that this case has proved a “stretch” for TWEISL was laid bare by its attempted late introduction of duties of integrity and ethics, the public interest and prior years’ accounts. Ms Evans submitted: “Seeking to amend at the end of trial is no way to try and introduce a novel claim founded on such flimsy and shifting support. The case does not have sufficient material to support it and/or remains so unclearly pleaded (in the rider at [43] [i.e. in the draft RAPoC]) that the Court could not have confidence in precisely what it would be allowing TWEISL to amend to say”.
327. As to the proposed re-amendments relating to what the shareholders would have done, Ms Evans submitted that the Court is clearly entitled to reject proposed amendments which are self-contradictory or not supported by the evidence: *Elite Property Holdings Ltd v Barclays Bank plc* [2019] EWCA Civ 204 at [42]. In the present case, Ms Evans submitted that: (i) not only was the factual evidence proffered by the Company thin, but certain aspects of that evidence undermine the new case (e.g. the new [45]-[45A] of the RAPoC do not tally with the three shareholders’ written statements saying they would have spoken to AdC; and nor do they stack up with Mr Hardman’s evidence that there was a lack of funding to enable the CVL liquidators to pursue any injunctions); and (ii) [45]-[45A] are “built on wishful thinking and also lack adequate prospects of success”.
328. Moving on to the requirement that the proposed amendments should be coherently and properly particularised (see *Zu Sayn-Wittgenstein-Say v HM Juan Carlos de Borbon y Borbon* [2023] 1 WLR 1162 at [63]-[67]), Ms Evans submitted that large parts of the proposed re-amendments fail this test. For example:
- (i) There is an attempt at [43] of the RAPoC to plead a new case on duty by cross-referring to swathes of submissions. This leaves the case on duty unidentifiable and unmanageable.

- () As to what should have been reported, the cross-references to [40] and [41] at [43a] of the RAPoC are vague and sprawling.
 - () [44] makes no sense as to timing.
 - () There remain large gaps in the case on causation - in that no positive case is being advanced that AdC would have been thwarted.
329. Ms Evans submitted that Crowe would suffer serious prejudice if the re-amendments were to be permitted without a further tranche of trial taking place, for the reasons explained at [5.24ff] of Mr Roberts' witness statement. For example:
- () Crowe did not come to trial understanding it might face allegations based on integrity, ethics, public interest or dissociation with prior years' accounts. The transcript shows that the Company was deliberately electing to keep some of its powder dry to raise with Mr Main. This led to Mr Main being asked questions about a new case, to which Crowe objected. The Company gave assurances that it was not seeking to pursue an un-pleaded case. It now appears to want to undo these assurances by the re-amendments.
 - () Crowe did not cross-examine the three shareholder witnesses on the various remedies they now (by the re-amendment) say they would have pursued.
330. Further, if the re-amendments were to be permitted on the basis that further evidence could be called, Crowe would suffer prejudice by (i) losing the benefit of good limitation defences; (ii) facing a potentially different liability to the one that it and its insurers have been considering to date; (iii) facing delay, and loss of more time to the trial process; and (iv) being put to further costs, in circumstances where it is unclear that the Company's ATE cover is sufficient to cover Crowe's (increased) costs if Crowe won.
331. Ms Evans submitted that the Company had not discharged the "heavy burden" that lies on a party seeking to introduce a very late amendment (see *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 at [38] and the commentary at 17.3.8 of the White Book). Given that the first audit year was 2012, and the liquidators were already relying on s14A of the 1980 Act for part of the case when issuing the claim in 2023, it was incumbent on them to make sure their case was properly pleaded in the first place. Further, once Crowe made clear that it did not understand and was seeking to probe the Company's case, it should have tried to sort its pleadings out. The Company amended the PoC in the summer of 2025 but even then did not seek to include any of these new points. Instead, it allowed this matter to head towards trial ill-developed. Even after trial it floated then dropped the idea of amending (in

correspondence in October 2025). Mr Jarvis provides no explanation for lateness because there is no good explanation.

332. Turning finally to the issue of waiver, Ms Evans submitted that the Company's waiver arguments are misconceived. First, they are factually inaccurate. Crowe identified in its Opening that the Company's case was imprecise. The Company's claim remained vague during the trial, exemplified by language such as the auditors taking "appropriate action one way or another" and the reference to "raising powder". Crowe objected numerous times during trial when new points emerged and its Closing set out its approach plainly.
333. Second, the Company's authorities do not accord with the modern and less permissive approach to amendments, or the observations cited above about the importance of pleadings.
334. In support of this submission, Ms Evans relied on what was said about *Hawksworth* in *Metropolitan Venues v Watson Burton LLP* [2014] EWHC 883 (Ch) by HH Judge Pelling QC (sitting as a Judge of the High Court) at [62]:

"Since that case was decided the approach to late amendments has become significantly less permissive than had become the practice – see *Swain-Mason v Mills & Reeve LLP* [2011] EWCA Civ 14 [2011] 1 WLR 2735. Whilst of course it will be appropriate or even necessary for a pleading point to be taken when it becomes apparent that the party concerned is departing from his her or its pleaded case, the more rigorous approach now taken in relation to late amendments together with the revisions made to the definition of the overriding objective that came into effect on 1 April 2013, means that it is less likely than in the past that such an application will succeed."

335. Third, the *Metropolitan Venues* case also made clear that a party needs to know what it is purportedly waiving. In that case, one reason why the waiver arguments failed was because the case being advanced at trial was so unclear ([62]). The Company is in no position to say that its case was clear and understandable to Crowe (or indeed the Court) throughout. In fact, the Company's case was in a state of flux even during the trial.
336. Fourth, the Company has not attempted to make good the requirements for a "waiver". The two types of waiver are waiver by election and waiver by estoppel. The former arises where a person can choose to act in one of two inconsistent ways and picks one of them. The latter arises where a person agrees with a party in default that it will not exercise its rights or leads the other party to believe that it will not exercise its rights. Neither applies here, but in any event both types of waiver require a clear and unequivocal representation by the person who is waiving rights. The Company has no prospect of showing such a representation. Crowe has not elected to accept that there

is no issue with the state of the Company's pleadings. Also, there is no sustainable basis for saying that the Company in some way relied on Crowe's alleged approach.

337. Ms Evans took the point that the Practice Direction to CPR 17 makes clear that a draft amended pleading should be verified by a signed statement of truth unless the Court otherwise orders (see CPR PD 17, para 1.4), but the draft RAPoC was not thus verified. As I understand it, Mr Lawrence accepted that the RAPoC should be verified in this way, and indicated that a statement of truth would be provided. On that basis, this point falls away. Ms Evans suggested that Mr Hardman could not verify the existing draft (and in particular the pleaded exposition of the fraud, which she considered to be inaccurate in light of concessions in his evidence that the PoC should have referred to the TWIF General Account). Ms Evans relied on this deficiency in the Company's pleading as a free-standing ground of objection to the proposed re-amendment, arguing that no amendment should be allowed unless this part of the case was re-pleaded. As to that, if Mr Hardman declines to provide a statement of truth, then permission to re-amend will be refused for that reason. If Mr Hardman is prepared to provide a statement of truth, I am not minded to refuse permission to re-amend on the grounds that further amendments to the Company's case have not been incorporated in the RAPoC, when Crowe has not hitherto sought to strike out other parts of the PoC in their current form.
338. Ms Evans also submitted that the draft RAPoC contains no case on causation for the Y/E 2012 at [44A]. The only dates set out there are for the audit years 2013 onwards. She argued that either the 2012 claim should be discontinued with costs awarded against the Company or struck out under CPR 3.4.2(a) with costs awarded against the Company. Mr Lawrence countered that if the Court was minded to go down that route, it should also deal with the costs of various issues which Crowe had pleaded and later abandoned. I agree with Mr Lawrence. All costs points should be addressed at the end of the case.

(d) Discussion and conclusions

339. Leaving aside these last, peripheral, points, I have little hesitation in preferring Ms Evans' submissions to those of Mr Lawrence concerning the re-amendment of the PoC.
340. First, in my judgment, the Company's argument based on waiver is hopeless, for all the reasons given by Ms Evans. On the complicated facts of the present case, the Company could not realistically hope to introduce, and to expect Crowe to be required to meet, a case that had not been pleaded in the PoC, through the medium of any or all of (i) the contents of Mr Ashley's report, (ii) the discussions between the auditing experts culminating in the production of their joint statement, (iii) the second round of evidence of the three shareholders (addressing a hypothetical state of affairs that was not even put forward as likely by Mr Ashley or the joint statement), and (iv) other

procedural steps, such as asking whether Crowe agreed that the directors and it were separate persons.

341. That is all the more so where Crowe repeatedly asked for clarification of the Company's pleaded case, and was told in response that its case was already sufficiently pleaded in the PoC, or that it was to be found in the statements of the three shareholder witnesses. There was no response indicating that its true case was as set out in the expert evidence.
342. The present case is quite different from a case such as *Ahmed*, which involved an issue as to the authenticity of a Will which had been clear from the outset, and where the procedural history (including the attempt to introduce the evidence of a handwriting expert) was only explicable on the basis that both sides understood that this was in issue.
343. In fact, in the present case, the Company's case was in a state of constant flux, and the Company itself did not seem to have any clear idea of the case it wished to rely upon. One might ask rhetorically, which departure or departures from the PoC was or were waived by Crowe, and when and how did Crowe waive the right to object to the same?
344. Mr Lawrence placed at the forefront of his argument on waiver the contents of Mr Ashley's report and Mr Ashley's dialogue with Mr Main. In my judgment, however, the Company's reliance on Mr Ashley's report (or, for that matter, the joint statement of the auditing experts) is misplaced, for the reasons explained above. In particular, in my view, Mr Ashley's report did not set out the elements of a complete cause of action, based upon the need for Crowe to report directly to shareholders, even if its contents could be treated as having been transposed wholesale into a differently worded PoC. This is because a case that Crowe "would have reported to shareholders" that is said to be based on the facts is incoherent unless it is asserted that Crowe would have been advised that it should report directly to shareholders. But that is nowhere asserted by Mr Ashley. A case based on a legal duty to report directly to shareholders is even more clearly not made out by Mr Ashley's report, as he did not address the topic of legal duty.
345. Furthermore, Mr Lawrence's reliance on the auditing experts' deliberations for the proposition that by the time of their interaction both sides appreciated that the Company's case was that "a report would have been made to the shareholders if Crowe had done its job properly" bases that case firmly on arguments about the facts. However, and inconsistently (because it is not suggested that the experts addressed the law), both Mr Jarvis and Mr Lawrence argued that the proposed re-amendments should be allowed because the issue that they raise as to what Crowe should have done is a point of law.
346. In addition, the Company could not turn a pleaded case that Crowe acting competently would have reported "to the Company" into one that should be understood by Crowe

as alleging that Crowe acting competently would have “reported directly to the members” by the inclusion in Mr Ashley’s report of a paragraph rehearsing his “understanding” that reporting to the Company “encompasses” reporting directly to the members.

347. Indeed, if that was the case the Company then wished to advance, it is surprising that it did not seek to make this clear when the PoC were amended on 10 September 2025.
348. That said, if the Company had sought to amend the PoC in this way at that time, it would have done so in circumstances where all, or at least many, of any new causes of action that it might be seeking to advance were already time barred under the 1980 Act.
349. It would be remarkable if the Company could deprive Crowe of a limitation defence to a new cause of action by not seeking permission to amend the PoC, and instead (i) inserting a new case in Mr Ashley’s report and/or (ii) letting Mr Ashley and Mr Main discuss the contents of that report and produce a joint statement arising from it and/or (iii) adducing a second round of witness statements that are predicated on that new case.
350. This would circumvent the protections contained in s35(5)(a) of the 1980 Act and CPR 17.4(2) - because, if this approach worked, there would be no need to amend the PoC.
351. At the same time, it would mean that any new cause of action that was introduced into the claim in this way would not be the subject of pleading in any statement of case. That would be a recipe for confusion, and provide fertile ground for dispute, to the detriment not only of Crowe but also the Court, the trial process, and other court users (due to the likely prolongation of the conduct of the trial). Indeed, the course that the present proceedings have taken provides a vivid illustration of these undesirable consequences.
352. In this regard, one of the many difficulties about the waiver argument is to decide what exactly has been “waived”: is it, for example, any new case theory contained in Mr Ashley’s report; or is it only any such case theory to the extent that Mr Main engaged in dealing with it; or is it also (or instead) anything raised in the witness statements?
353. The difficulties do not stop there, however, because even if some new or different case advanced by the Company outside the Company’s pleaded case can be said to have been “waived” by Crowe, it appears to be accepted by the Company that such a “waiver” does not carry with it any requirement for Crowe to plead a response to the same. In the absence of a pleaded case, it is unclear what Crowe’s response may be. If, as happened here, the extent of the “waiver” is brought into focus only during, and towards the end of, the trial, the lack of definition in the pleadings has the effect that

the scope of the issues is unclear. This may place the Court in difficulties in working out what the true issues are. It may also deprive the Court of the benefit of full and considered argument concerning those issues. As appears below, both those difficulties arose in this case.

354. The other major plank of Mr Lawrence's arguments on waiver relied on the contents of the Skeleton Arguments before trial. In my judgment, however, those contents go no further than Mr Roberts accepted in his evidence, namely that Crowe appreciated that the Company sought to advance "some form of duty to report" based on ss519-522 of the CA 2006, the *Sasea Finance* cases and possibly ISA 240 or 260, but did not understand there to be a case that the reporting would go outside the scheme of the CA 2006, or would involve duties of integrity, or the need to dissociate with prior years' accounts, the need to act in the public interest, or reporting to shareholders at meetings.
355. The reference in [87] of Crowe's opening Skeleton Argument to the fact that the evidence of the auditing experts "caused the issues on breach of duty to narrow and the focus to change" is not an acceptance that a new and unpleaded case is available to the Company, but is instead a preamble to the statement that the list of breaches at [40ff] of the PoC no longer accurately encapsulates the dispute between the parties (because, as I read [87], the issues have narrowed). The references in [122] of that document to the shareholders' witness statements appearing "to proceed on the basis that the auditors should have reported to them", to this being "a misconception of an auditor's role", and to Crowe disagreeing that there is a duty to report directly to the shareholders, flag up an issue about the evidence and make clear Crowe's stance on the law, but do not amount to an acceptance that the Company is able to run a contrary case in reliance on the PoC.
356. Accordingly, in my judgment, it is clear that the Company required permission to amend the PoC if it wished to advance a case that, if Crowe had acted competently, Crowe either would (the fact-based scenario) or should (the duty-based scenario) have reported directly to shareholders. It is equally clear that permission to amend should be refused.
357. First, I consider that Ms Evans is right that the proposed new case does not arise out of the same or substantially the same facts as any existing pleaded cause of action, and therefore it cannot be permitted pursuant to s35(5)(a) of the 1980 Act and CPR 17.4(2).
358. In accordance with the guidance given in the authorities, (i) a change in the essential features of the factual basis will introduce a new cause of action, (ii) the exercise to be undertaken is to compare the essential factual elements in a cause of action already pleaded with the essential factual elements in the cause of action as proposed, and (iii) if they are the same, there is no new cause of action and therefore no new claim.

359. To my mind, it is obvious that the proposed re-amendments involve the introduction of new essential factual elements, and so amount to a new cause of action and a new claim:

- (i) The allegation in [43A] of the proposed RAPoC that Crowe acting competently “would have reported directly to the members of TWEISL” is a new factual allegation, and the allegation that Crowe would have done this because it would have been under a duty to TWEISL to do so is a new case on breach of duty, and, as it seems to me, clearly a new basis of claim.
- (i) The allegation in [43B] that Crowe would have resigned introduces an entirely new factual element, as does the allegation that Crowe would have included the same or substantially the same matters as are set out below in the RAPoC in Crowe’s resignation statement, and so do the allegations that the resignation statement would have been sent (i) to TWEISL and (ii) to the registrar of Companies House pursuant to ss519-521 of the CA 2006.
- (i) The reliance on the matters set out at [46]-[54] of TWEISL’s written Closing Submissions and oral submissions on Day 11 in the transcript at pp51-82 brings in a widely expanded case relying on new matters of law, mixed fact and law, and fact involving duties of integrity or ethics, public interest, dissociation from earlier accounts, and reporting at shareholders’ meetings.
- (i) The allegation in [43] that the matters set out should have been reported introduces a new factual element insofar as, in context, this would now mean “reported directly to shareholders”, and the allegation that those matters should have been “contained in the resignation statement” is also a new factual element – but the new words that are underlined in the proposed re-amended [43] are probably little more than repetition of existing pleas.
- (i) The case in [44A] that with reference to each audit year Crowe’s reporting should have occurred on the dates given comprises new factual allegations (i) as to the nature of the reporting (insofar as that incorporates the new factual case on reporting) and (ii) as to the dates for reporting. I am, however, minded to take the view that amendment is not required in order to permit the Company to rely on these dates, as they were notified to Crowe by Mr Ashley’s report, they have been addressed by both auditing and quantum experts, and Crowe has come to trial prepared to deal with them. They can be regarded as providing particulars of the existing pleaded case.
- (i) The case in [44B] that the members of TWEISL would have had notice of Crowe’s resignation notice and/or statement of reasons for resignation

either (i) as sent to them pursuant to TWEISL's obligations under s520 of the CA 2006, alternatively (ii) because (a) within 21 days beginning with the day on which Crowe should have sent the s519 statement to the company it should have sent a copy of the statement to the registrar within 7 days, (b) that statement would have been placed on the website at Companies House within a further 7 days, and (c) that statement would have been accessed by the members within 14 days thereafter, all involves new factual elements.

- (i) The case in [45] that on relevant notification "pursuant to 43A and/or 43B above TWEISL" steps would have been taken introduces a new factual element insofar as, in context, this would now mean "on notification as set out in (new) [43A] and/or [43B]". Further and in any event, many new factual elements are introduced by the case that "securing, preservation and valuation of its assets" would include (i) issuing a petition to wind up the company on just and equitable grounds pursuant to s122(1)(g) of the Insolvency Act 1986 (ii) applying for interim injunctive relief to preserve the assets of the company and/or (iii) applying for the appointment of a provisional liquidator pursuant to s135 of the Insolvency Act 1986. These elements go beyond the provision of particulars of the existing pleaded case.
- (ii) The new [45A] and [45B] consist entirely of new factual elements, in particular that (i) the notified members of TWEISL or sufficient of them would have taken urgent legal advice; (ii) that legal advice would have notified them of (a) their rights in relation to applying for an injunction, (b) their rights to apply for the appointment of a provisional liquidator pursuant to s135 of the Insolvency Act 1986, and (c) their rights to take control of the management of the company by using their power to require a general meeting pursuant to s305 of the CA 2006 and/or if impracticable to call a meeting in the usual way request the court to order such a meeting on the application of a member who would be entitled to vote at such a meeting pursuant to s306(2), (iii) the members would have sought an injunction promptly and within 3 days of the legal advice or such period as the court may find, and (iv) the relevant actions would have led to the preservation and securing of the assets promptly and in any event within 7 days of notification as set out at [44A] and [44B] and/or the general meeting within 8 weeks of the notification or such date as the court may find. These elements clearly amount to more than particularisation of the existing PoC.

360. If the application for permission to re-amend did not founder on the rocks of limitation, it would nevertheless face a series of insuperable hurdles such that it would fail anyway.

361. I start with the issues of coherence, clarity and particularity. In my opinion, it is a misconception to say that Crowe would or could report to the Company by reporting directly to the members of the Company, not as a body but as a number of individuals. The Company and the individual members of the Company are different persons. Further, they are not agents for one another. Even if, contrary to my views expressed above, it might have been permissible (in light of Mr Ashley's "understanding") to expect Crowe and the Court to interpret "report to the Company" as "report directly to the members" for the purposes of [43] of the PoC, once the re-amendment came to be formulated there is no reason not to require the Company to put forward a properly pleaded case. A case that Crowe would or could report to the Company by reporting directly to the members of the Company is, in my judgment, not a coherent pleading.
362. This is not a minor or, in the words of Mummery LJ, "pernickety", point. On the contrary, it is significant, because to plead what I consider to be the correct form of words (i.e. "Crowe would [or should] have reported directly to the members of the Company") would flag up the extent of the change that is being made from the original pleading that Crowe "would have reported to the Company". I can understand why the Company might be reluctant to flag that up. But if it chooses a different form of words in order to avoid confronting that point it must live with the consequences of that choice.
363. The incorporation by reference of [46]-[54] of the Company's written Closing Submissions and the oral submissions on Day 11 in the transcript at pp51-82 also introduces an unacceptable lack of clarity and particularity. Again, this is not a minor or "pernickety" point, because, as set out above, it brings in a widely expanded case relying on new matters of law, mixed fact and law, and fact - involving duties of integrity or ethics, public interest, dissociation from earlier accounts, and reporting at shareholders' meetings. Other than through the medium of incorporation of these materials, there is no mention of those matters in the proposed RAPoC. However, they are at the heart of where this aspect of the Company's case came to rest at the end of the trial. This can be seen from [51]-[52] of the Company's written Closing Submissions. Further, the oral submissions on Crowe's alleged legal duty on Day 11 came back to that self-same text.
364. I would disallow the amendments in the proposed [43A] and the rider under [43B] for these reasons. I consider that [43B] and the remainder of [43] should not be disallowed for these reasons, although they may fail for other reasons. In particular, although the plea as to what should be reported is indeed very wide, its width is, in the main, nothing new; and it cannot be said that it is impossible to follow, widely pleaded though it is.
365. I consider that many of the timings set out in the proposed RAPoC are ambitious, and unsupported by the evidence. But I do not consider these pleas fail for lack of clarity.

366. Ms Evans may well be right that the proposed re-amendment is missing further essential elements on causation, such as a plea that the suggested courses of action would, in fact, have enabled specific cash, wine or other assets to be preserved or recovered; and that an express pleading of these matters should be required either in any event or where, as here, a new factual case relating to the securing and preservation of assets is sought to be added by amendment. In light of the conclusions that I have reached on other points, however, I do not proposed to further lengthen this judgment by deciding that point. If the elements that are said to be missing from the new case are truly essential, then the like argument would apply to the case as previously pleaded, and yet no application to strike out the PoC was made by Crowe. In my view, Ms Evans' submissions under this head are best addressed in the context of deciding what case is open to Crowe in response to the Company's pleaded case. In that context, Ms Evans' point, in short, is that the Company can hardly complain about Crowe raising points on the efficacy of certain suggested courses of action by the shareholders that Crowe has not expressly pleaded if the Company has not put forward a pleaded case concerning those courses of action: the burden lies on the Company to establish causation, not on Crowe to negate it; and if the Company does not plead a proper case on causation in the PoC, it cannot say that Crowe should be expected to (i) set up and (ii) rebut such a case in the Defence.
367. The next point is whether the proposed re-amendments relating to what the shareholders would have done are self-contradictory or not supported by the evidence. In my view, there is substance in Ms Evans' submissions under this head. Without attempting an exhaustive list:
- (i) The allegation in [44B] that the members of TWEISL would have had notice of Crowe's resignation notice and/or statement of reasons for resignation on the basis that it would be sent to them pursuant to the Company's obligations under s520 of the CA 2006 cannot plausibly be reconciled with other aspects of the Company's case. The Company contends (i) AdC and RB were crooks and (ii) these documents emanating from Crowe would have contained a long litany of complaints against them, and detailed fraud or at least grounds to suspect them of fraud. It is unreal to contend they would pass them on.
 - (i) Also in [44B], the alternative plea that within 21 days beginning with the day on which Crowe should have sent the s519 statement to the Company it should have sent a copy of the statement to the registrar within 7 days is not objectionable. However, as far as I can recall, the plea that "the statement would have been placed on the website at Companies House within a further 7 days" is not supported by any evidence. Still less is the plea that the same would have been accessed by the members "within 14 days thereafter". In fact, there was no evidence as to when or how the same might be accessed.

- (i) The plea in [45A] that the notified members or sufficient of them would have taken legal advice “within 4 days” is not supported by the evidence.
- (i) The plea in [45B] that the relevant actions would have led to the preservation and securing of the assets promptly and “in any event within 7 days of notification ... and/or the general meeting within 8 weeks of the notification” is not supported by the evidence (and the latter part is unclear).
- (i) More generally, if and to the extent that it is sought to suggest that notification would have been provided to the shareholders, or that steps would have been taken, before AdC and RB were “alerted”, that does not accord with the evidence. In particular, the shareholders said that they would have contacted AdC. Further, AdC and RB were themselves shareholders.

368. The next point is lateness. The proposed re-amendments are not “very late” in the sense that this expression is used in the authorities, because, as they are sought to be made in the course of the trial, they do not threaten the trial date, or cause it to be lost. That said, they could hardly be any later. Further, if and to the extent (which is one of Mr Evans’ arguments) that they required the trial to be extended – for example, to enable Crowe to recall or cross-examine witnesses to deal with matters that it did not previously address because it did not consider that they needed to be addressed in light of the pleaded issues – the late amendments would have a comparably adverse effect on the trial process.
369. Mr Lawrence invited me to conclude that the explanation for the lateness in this case is “it had always been considered that the issues were properly raised as between the parties”. I am unable to accept that submission in light of the procedural history. This includes repeated requests for clarification of the Company’s case, which were rebuffed; a constantly shifting landscape so far as concerns the formulation of that case; and passages in Crowe’s written arguments which reflect, in my view, a realisation that the Company’s second round of witness statements assume that Crowe would have provided notification to the shareholders, when Crowe regarded that premise as wrong.
370. Ms Evans is right to say that Mr Jarvis provides no explanation for the lateness in this case. Although this may not be a “very late amendment” in accordance with the judgment in *Quah Su-Ling*, Ms Evans is right to submit that the burden of explaining lateness lies on the Company. In my judgment, that burden has not been discharged.
371. The next point concerns the issue of prejudice. On the one hand, if the Company is denied the opportunity to put forward the much-altered case that is set out in the proposed re-amendments it will suffer prejudice. Yet that prejudice is essentially of its own making. It would be a different matter if I considered that Crowe had somehow

strung the Company along, or that I could properly reject Mr Roberts' evidence that Crowe truly did not understand that it was going to face the case that is now sought to be put forward in the RAPoC. However, that is not the view I take. On the other hand, if the proposed re-amendments were now allowed, Crowe would suffer prejudice, for all the reasons identified by Ms Evans. It is not clear to me, even now, whether the Company is truly seeking just to advance a case based on the ambit of Crowe's legal duty, or whether it is still seeking to run a case based on the factual analysis. The consideration that Mr Lawrence's oral submissions on the law on Day 11 ended up back at [51]-[52] of the Company's written Closing Submissions illustrates the difficulty. If the Company is seeking to run a fact-based case, the prejudice to Crowe is obvious. However, even if the Company is only seeking to rely upon a point of law, there is still prejudice to Crowe, not least because the content of the legal duty is, on the Company's case, informed by considerations of ethics and integrity that Crowe did not come to trial prepared to meet. The balance of prejudice clearly comes down against the Company.

372. When considering the issue of prejudice, and indeed the exercise of the Court's discretion more generally, it is vital to keep well in mind the following factors (naturally, among others) which are of importance and which should be well known to all commercial litigators. As the passages from the authorities cited above make clear, (i) pleadings are formal documents which are essential for the fair trial of an action and the saving of time at trial, and (ii) the Court's approach is more rigorous, and applications for late amendments are less likely to succeed, than may have been true in earlier times.
373. Finally, last but not least, there is the question of whether the proposed re-amended case has a real prospect of success. In my judgment, it does not, for the following reasons.

REPORTING DIRECTLY TO SHAREHOLDERS

374. The parties agree that the law is correctly stated in *Caparo Industries plc v Dickman* [1990] 2 AC 605, Lord Oliver at 630:

“Thus, if and so far as the purpose for which the audit was carried out is a relevant consideration in determining the extent of any general duty in tort owed by the appellants to persons other than the company which is their immediate employer, that purpose was simply that of fulfilling the statutory requirements of the Companies Act 1985. That, in turn, raises the question ... of what is the purpose behind the legislative requirement for the carrying out of an annual audit and the circulation of the accounts. For whose protection were these provisions enacted and what object were they intended to achieve?

My Lords, the primary purpose of the statutory requirement that a company's accounts shall be audited annually is almost self-evident. The structure of the

corporate trading entity, at least in the case of public companies whose shares are dealt with on an authorised Stock Exchange, involves the concept of a more or less widely distributed holding of shares rendering the personal involvement of each individual shareholder in the day-to-day management of the enterprise impracticable, with the result that management is necessarily separated from ownership. The management is confided to a board of directors which operates in a fiduciary capacity and is answerable to and removable by the shareholders who can act, if they act at all, only collectively and only through the medium of a general meeting. Hence the legislative provisions requiring the board annually to give an account of its stewardship to a general meeting of the shareholders. This is the only occasion in each year upon which the general body of shareholders is given the opportunity to consider, to criticise and to comment upon the conduct by the board of the company's affairs, to vote upon the directors' recommendation as to dividends, to approve or disapprove the directors' remuneration and, if thought desirable, to remove and replace all or any of the directors. It is the auditors' function to ensure, so far as possible, that the financial information as to the company's affairs prepared by the directors accurately reflects the company's position in order, first, to protect the company itself from the consequences of undetected errors or, possibly, wrongdoing (by, for instance, declaring dividends out of capital) and, secondly, to provide shareholders with reliable intelligence for the purpose of enabling them to scrutinise the conduct of the company's affairs and to exercise their collective powers to reward or control or remove those to whom that conduct has been confided."

375. That decision of the House of Lords makes no mention of any duty or possible duty on the part of auditors to report directly to individual members of the company, and the tenor of the speeches seems to me to be unsupportive of the existence of any such duty. For example, although Lord Oliver speaks of it being part of the auditors' function "to provide shareholders with reliable intelligence", in context what is contemplated is enabling the shareholders to act collectively as a general body by exercising their collective powers by voting at a general meeting of the company. The decision itself was to the effect that auditors do not owe a duty of care to actual, let alone prospective, shareholders in a company in respect of any negligent mis-statements in the auditors' reports. Further, as the passage from Lord Oliver's speech makes clear, the reasoning as to the ambit of auditors' duties was firmly based on the statutory requirements of the applicable Companies Act, such that the starting point is to consider those requirements.
376. The CA 2006 contains detailed provisions as to what is to happen in the event that an auditor resigns (or otherwise ceases to hold office) and the auditor considers that there are matters connected with that event that need to be brought to the attention of members (or creditors) of the company. These provisions spell out that (subject to exceptions that are not material to the facts of the present case) (i) the auditor must

send a statement of reasons for ceasing to hold office to the company (s519), (ii) the auditor must include details of those matters in that statement (s519(3A)), and (iii) in the case of resignation, the auditor must send that statement along with the notice of resignation (s519(4)).

377. The company is then required to send copies of the statement to the members (s520).
378. The auditor is also required to send copies of the statement to the registrar (s521) and to the appropriate audit authority (s522) (as defined in s525).
379. Where the auditor's notice of resignation is accompanied by a statement under s519, the auditor also may (but is not required to) send with the notice a requisition calling on the directors of the company to convene a general meeting of the company for the purpose of receiving and considering such explanation of the reasons for, and matters connected with, the resignation as the auditor may wish to place before the meeting (s518).
380. There is nothing in these provisions which requires the auditor to send a notice of resignation, or statement of matters connected with the resignation, directly to the members. Further, any suggestion that the auditor should communicate directly with members instead of communicating with other persons runs counter to these provisions.
381. The principal authority on which the Company relied in support of the proposition that, on the facts of the present case, Crowe owed a duty to report directly to the members is the decision of the Court of Appeal in *Sasea*. That case concerned a strike out application. It proceeded both at first instance and on appeal on the basis that it had to be assumed that the facts pleaded in the (then) Statement of Claim could be proved. Collins J held that the auditors had a duty to "blow the whistle" and that it was arguable that had they done so at the earliest opportunity losses would have been prevented. However, he held that some losses arose from transactions that were in the ordinary course of business such that any breach of duty by the auditors was only the occasion and not the cause of any loss, whereas others arose from transactions (essentially thefts) that were not in the ordinary course of business. Collins J struck out claims in relation to the former losses but refused to strike out others. The Court of Appeal allowed the company's appeal, and dismissed the auditors' cross-appeal, against that decision.
382. It was accepted for purposes of the appeal that it was the auditors' duty to warn either the directors or "some relevant third party" of any fraud or irregularity likely to result in material loss to the company with a reasonable degree of promptitude. On the basis of that assumption, the Court of Appeal held that all the transactions were of a kind which the auditors had a duty to warn against. The Court delivered a single judgment.
383. With regard to the auditors' duty, the Court said at p993:

“When a firm of accountants accepts instructions to audit the accounts of a company for a fiscal year its primary obligation is to exercise an appropriate level of skill and care to produce fair and accurate accounts within a reasonable time. As mentioned, solely for the purposes of this application KPMG accepts that in certain circumstances a different type of obligation can arise. If, for example, the auditors discover that a senior employee of a company has been defrauding that company on a grand scale, and is in a position to go on doing so then it will normally be the duty of the auditors to report what has been discovered to the management of the company at once, not simply, when rendering the auditors’ report, to record what has been discovered weeks or months later. In that we endorse the view of the judge. The conclusion is supported by the *Auditing Guidelines*. We quote from the February 1990 edition:

‘If during the course of his work the auditor identifies the possible existence of a fraud, other irregularity or error the following action should be taken. The auditor should endeavour to clarify whether a fraud, other irregularity or error has occurred ... unless fraud by senior management is suspected, the auditor should inform senior management of his suspicions.’

The guidelines also acknowledge that there may be occasions when it is necessary for an auditor to report directly to a third party without the knowledge or consent of the management. Such would be the case if the auditor suspects that management may be involved in, or is condoning, fraud or other irregularities and such would be occasions when the duty to report overrides the duty of confidentiality. Among the relevant considerations would be the extent to which the fraud or other irregularity is likely to result in material gain or loss for any person or is likely to affect a large number of persons and the extent to which the non-disclosure of the fraud or other irregularity is likely to enable it to be repeated with impunity.”

384. Under the heading “Scope of duty”, the Court recorded at p994 that:

“It is accepted for present purposes that it was KPMG’s duty to warn either the directors or some relevant third party of any fraud or irregularity likely to result in material loss to the company with a reasonable degree of promptitude. Why should that be? The obvious and common-sense answer is that by so doing the company may be spared such losses.”

385. It is immediately apparent that (i) *Sasea* was an interlocutory decision on a strike out application; (ii) the issue before the Court of Appeal concerned the extent to which certain assumed classes of loss were arguably recoverable; (iii) the Court of Appeal did not decide that the auditors in that case had a duty to report to anybody, but instead proceeded on the basis of an assumption, that was agreed for the purposes of the

appeal, that the auditors owed a duty to warn “either the directors or some relevant third party of any fraud or irregularity likely to result in material loss to the company with a reasonable degree of promptitude”; and (iv) even that agreed assumption was not expressed in terms of informing the members personally and/or as an “organ of the company”, but instead in terms of informing “directors” or “some relevant third party”.

386. Accordingly, in my judgment, *Sasea* cannot be regarded as an authority for the proposition that auditors owe a duty to report fraud or irregularities directly to shareholders, even where the auditors know or suspect that management or the directors may be involved in, or condoning, the same. Leaving aside that whether auditors may need to report to persons other than the company was not a matter in issue: (i) the Court did not discuss which third party or third parties might be “relevant” in this context; and (ii) the Court did not consider the contents of such report as might be appropriate.
387. Nor has *Sasea* been treated as authority for any such proposition in any case or textbook.
388. In *Accountants’ Negligence and Liability*, Salzedo and Singla, the authors write under the heading “Reporting to shareholders and/or those concerned with governance and/or authorities”:

“7.67 Following on from the recognition that a competently conducted audit will be calculated to uncover material fraud if it is present, there arises a duty to report any such fraud to an appropriate organ of the company (‘those charged with governance’ in the language of auditing standards). This duty goes beyond ensuring that the audit report takes account of what the auditor has found and has developed into a free-standing duty to warn which can arise before the audit report is signed. In contrast to earlier times, the existence of the duty to report and warn can no longer be doubted; it is now explicit in ISA 240 at paras 40 to 42:

‘40. If the auditor has identified a fraud or has obtained information that indicates that a fraud may exist, the auditor shall communicate these matters on a timely basis to the appropriate level of management in order to inform those with primary responsibility for the prevention and detection of fraud of matters relevant to their responsibilities.

41. Unless all of those charged with governance are involved in managing the entity, if the auditor has identified or suspects fraud involving: (a) management; (b) employees who have significant roles in internal control; or (c) others where the fraud results in a material misstatement in the financial statements, the auditor shall communicate these matters to those charged with governance on a timely basis. If the

auditor suspects fraud involving management, the auditor shall communicate these suspicions to those charged with governance and discuss with them the nature, timing and extent of audit procedures necessary to complete the audit.

41R-1 For audits of financial statements of public interest entities, when an auditor suspects or has reasonable grounds to suspect that irregularities, including fraud with regard to the financial statements of the entity, may occur or has occurred, the auditor shall, unless prohibited by law or regulation, inform the entity and invite it to investigate the matter and take appropriate measures to deal with such irregularities and to prevent any recurrence of such irregularities in the future. The designation ‘R’ indicates that a paragraph in the standard is derived from the EU Audit Regulation, (EU) 537/2014.

42. The auditor shall communicate with those charged with governance any other matters related to fraud that are, in the auditor’s judgment, relevant to their responsibilities.’

7.68 Further, auditors may have obligations to report certain matters to regulators, to which ISA 240 refers at paras 43 and 43R-1, the latter dealing with the enhanced duty in relation to public interest entities pursuant to the EU Audit Regulation.

7.69 The requirement to report to ‘those charged with governance’ reflects the rather unusual position of the auditor as being appointed by the company as a check on behalf of one of the company’s own organs (the shareholders in general meeting) upon another (the management).

‘Those charged with governance’, as defined at para 10 of ISA 260, is a deliberately flexible term, which requires the auditor to make a judgment as to whom any particular matter should be reported to. In the first instance, executive management could be the appropriate recipient, but if they are themselves implicated in the matter to be reported, then the entire board of directors, the audit committee or appropriate non-executives may have to be informed. If appropriate action is not possible or does not result from the warning, then the auditor might have to consider whether to resign as auditor, bringing with it the right and obligation to make certain statutory reports.

7.70 The above extract from *Dairy Containers* (at para 7.65) refers to the duty to warn, as does the following well known passage from *Sasea v KPMG*: [2000] BCC 989 at 993E–H ...

[The extract at 7.65 reads as follows:

7.65 In *Dairy Containers v Auditor-General*, Thomas J said ([1995] 2 NZLR 30 at 55):

‘In addition, I agree with Moffitt J (as he then was) in *Pacific Acceptance Corporation Ltd v Forsyth* (1970) 92 WN (NSW) 29 that, in planning and carrying out their work, auditors must be mindful of the possibility of fraud. Indeed, many of the tests which auditors habitually apply proceed on the assumption that some person or persons may have been dishonest or fraudulent.

As the Judge observes with complete logic (at p 63):

“Once it is accepted that the auditor’s duty requires him to go behind the books and determine the true financial position of the company and so to examine the accord or otherwise of the financial position of the company, the books and the balance sheet, it follows that the possible causes to the contrary, namely, error, fraud or unsound accounting, are the auditor’s concern.”

I also agree that the question cannot be dismissed by reference to well-known dicta and metaphors concerning dogs and detectives. Such dicta are generally directed to the state of mind of the auditors, such as whether they were sufficiently sceptical or suspicious – or should have been sceptical or suspicious. The questions tend to obscure the auditor’s basic duty to plan and carry out the audit of the company cognisant of the possibility of fraud. If and when the auditors discover an apparent irregularity, they must carry out such further tests or make such further inquiries as may be required to be satisfied that, in fact, no irregularity exists. If an irregularity is found to exist they must be satisfied, or take such further steps as may be necessary to be satisfied, that the irregularity will not affect the truth of the accounts. If the circumstances are such as to give rise to a reasonable suspicion of fraud, they must necessarily proceed further and either determine that no fraud exists or report their suspicion to the general manager, or the board, or even them shareholders of the company, as may be appropriate in the circumstances of the case.’]

7.71 Moffitt J expressed it as follows in *Pacific Acceptance v Forsyth* (1970) 92 WN 29 at 53D:

‘The auditors perform their duty to the company and safeguard the interest of the shareholders by making communication, properly called for, to the appropriate level of management or the directors, during the course of the audit, with an appropriate report to the shareholders at the

annual general meeting. They do not perform such duty if, having uncovered fraud or having suspicion of fraud in the course of the audit, they fail promptly to report it to the directors and perhaps in the first instance, according to the circumstances, immediately to management. If it involves a senior executive or a director or implicates one of them it is difficult to imagine a case where the board should not be informed without delay.’

389. The authors’ discussion relates to reporting to “those charged with governance” or to “an appropriate organ of the company”. To the extent that this contemplates reporting to members, it does not relate to them individually, but as a body or in general meeting.
390. In fact, when the authors discuss the flexibility of the expression “those charged with governance” and how an auditor has to “make a judgment as to whom any particular matter should be reported to”, they make no mention of reporting to shareholders directly as one possible option. Instead, they discuss reporting to “executive management”, “the entire board of directors”, “the audit committee” or “appropriate non-executives”. They then observe that “If appropriate action is not possible or does not result from the warning, then the auditor might have to consider whether to resign as auditor, bringing with it the right and obligation to make certain statutory reports.”
391. This takes one into the territory contemplated by Mr Ashley’s report, and the CA 2006 procedures that Crowe accepts that it might have expected the Company to rely upon at the trial, but it is plainly not the same as reporting directly to shareholders. The fact that the authors do not mention direct reporting to shareholders does not rule it out as being required on particular facts, but it is clearly not an option that occurred to the authors.
392. Mr Lawrence relied on three further decided cases. In my judgment, however, these cases do not assist. They were dealing with different regimes to the present case. In each instance, the applicable regime – mostly statutory, but supplemented to an extent by the articles – required the accounts to be laid before the shareholders or read out at a general meeting, which auditors were entitled to attend. In addition, the scope of the audit was broader. In the present case, the applicable statutory regime concerning the communication of information from auditors to shareholders is contained in ss518-522 of the CA 2006 and involves going through the company, the directors, or the registrar.
393. *In Re London & General Bank* [1895] 2 Ch 673, an auditor presented a confidential report to the directors calling their attention to the insufficiency of the securities on which the capital of the company was invested, and the difficulty of realising them, but in his report to the shareholders merely stated that the value of the assets was dependent on realisation. In the result, the shareholders were deceived as to the condition of the company, and a dividend was declared out of capital and not out of

income. The Court of Appeal affirmed the decision of Vaughan Williams J that the auditor had been guilty of misfeasance under s10 of the Companies (Winding-up) Act 1890, and was liable to make good the amount of the dividend paid. This case was decided at a time when there was a requirement for private companies to lay their accounts before general meetings in England and Wales. This requirement no longer exists. The decision of the Court of Appeal was based on statutory provisions, and indeed articles, that are not applicable in the present case. This is apparent from the judgment of Lindley LJ at 682:

“It is impossible to read s7 of the Companies Act, 1879, without being struck with the importance of the enactment that the auditors are to be appointed by the shareholders, and are to report to them directly, and not to or through the directors. The object of this enactment is obvious. It evidently is to secure to the shareholders independent and reliable information respecting the true financial position of the company at the time of the audit. The articles of this particular company are even more explicit on this point than the statute itself, and remove any possible ambiguity to which the language of the statute taken alone may be open if very narrowly criticised.”

394. In *Pacific Acceptance Corporation Ltd v Forsyth* (1970) 92 WN (NSW) 29, the relevant statutory regime was the Companies Act 1936 (“CA 1936”). Among other things: (i) s133 of the CA 1936 provided that auditors were appointed at an annual general meeting to “hold office until the next annual general meeting” (such that shareholders were therefore necessarily involved in the appointment process); (ii) s115 of CA 1936 included a duty to report on the proper keeping of records; (iii) the auditors’ report to shareholders was laid before the company in the general meeting; and (iv) under s171 of the CA 1936, the auditors had a duty to report on the accounts placed before the general meeting. In addition, wider and more specific duties were imposed on the auditors by the company’s articles. The relevant duty to report was one that arose at the annual meeting, where the accounts were laid before the company. See Moffit J at p53:

“The shareholders are not accessible to the auditors during the course of the audit and, in any event, many matters which call for some communication between the auditors and the company are more appropriate to be raised and dealt with by management or the directors, who are the servants of and represent the company and through it the shareholders. The auditors perform their duty to the company and safeguard the interest of the shareholders by making communication, properly called for, to the appropriate level of management or the directors, during the course of the audit, with an appropriate report to the shareholders at the annual general meeting. They do not perform such duty if, having uncovered fraud or having suspicion of fraud in the course of the audit, they fail promptly to report it to the directors and perhaps in the first instance, according to the circumstances, immediately to

management. If it involves a senior executive or a director or implicates one of them it is difficult to imagine a case where the board should not be informed without delay”. (emphasis added)

395. In *Dairy Containers v Auditor-General* [1995] 2 NZLR 30 (“*Dairy Containers*”), the applicable legislation was the Companies Act 1955 (“CA 1955”). In accordance with s152 and s166 of the CA 1955, the accounts were required to be laid before a general meeting of the company, with the auditors’ report read out at that meeting, which the auditors were entitled to attend. Section 166 provided, in part:

“an auditor is required to report to members on the accounts examined by them and to state whether they have obtained all the information and explanations which they required; whether, in their opinion, and so far as appears from the examination of those records, proper accounting records have been kept by the company; and whether, in their opinion, according to the best of their information and the explanations given to them and as shown by the books of the company, the balance sheet and profit and loss account are properly drawn up so as to give a true and fair view of the state of the company’s affairs as at the end of its financial year and the results of the business of the company for that financial year.”

396. Thomas J’s statement “If the circumstances are such as to give rise to a reasonable suspicion of fraud, they must necessarily proceed further and either determine that no fraud exists or report their suspicion to the general manager, or the board, or even the shareholders of the company, as may be appropriate in the circumstances of the case” (emphasis added) needs to be read in this context. Whether auditors might have a duty to report directly to shareholders (e.g. by letter) was not a point argued before him.
397. The final strand in Mr Lawrence’s submissions concerned material parts of the ISAs.
398. ISA 240, entitled “The Auditor’s Responsibilities Relating to Fraud in an Audit of Financial Statements”, provides:

(i) At [38]:

“If, as a result of a misstatement resulting from fraud or suspected fraud, the auditor encounters exceptional circumstances that bring into question the auditor’s ability to continue performing the audit, the auditor shall:

(a) Determine the professional and legal responsibilities applicable in the circumstances, including whether there is a requirement for the auditor to report to the person or persons who made the audit appointment or, in some cases, to regulatory authorities;

(b) Consider whether it is appropriate to withdraw from the engagement, where withdrawal is possible under applicable law or regulation; and

(c) If the auditor withdraws:

(i) Discuss with the appropriate level of management and those charged with governance the auditor's withdrawal from the engagement and the reasons for the withdrawal; and

(ii) Determine whether there is a professional or legal requirement to report to the person or persons who made the audit appointment or, in some cases, to regulatory authorities, the auditor's withdrawal from the engagement and the reasons for the withdrawal."

() At [40]-[42]:

"40. If the auditor has identified a fraud or has obtained information that indicates that a fraud may exist, the auditor shall communicate these matters on a timely basis to the appropriate level of management in order to inform those with primary responsibility for the prevention and detection of fraud of matters relevant to their responsibilities.

41. Unless all of those charged with governance are involved in managing the entity, if the auditor has identified or suspects fraud involving:

(a) management;

(b) employees who have significant roles in internal control; or

(c) others where the fraud results in a material misstatement in the financial statements,

the auditor shall communicate these matters to those charged with governance on a timely basis. If the auditor suspects fraud involving management, the auditor shall communicate these suspicions to those charged with governance and discuss with them the nature, timing and extent of audit procedures necessary to complete the audit.

42. The auditor shall communicate with those charged with governance any other matters related to fraud that are, in the auditor's judgment, relevant to their responsibilities."

() At [A54] (an explanatory note to [38]):

"Examples of exceptional circumstances that may arise and that may bring into question the auditor's ability to continue performing the audit include:

- The entity does not take the appropriate action regarding fraud that the auditor considers necessary in the circumstances, even where the fraud is not material to the financial statements;

- The auditor’s consideration of the risks of material misstatement due to fraud and the results of audit tests indicate a significant risk of material and pervasive fraud; or
- The auditor has significant concern about the competence or integrity of management or those charged with governance.”

() At [A56], the following explanation:

“The auditor has professional and legal responsibilities in such circumstances and these responsibilities may vary by country. In some countries, for example, the auditor may be entitled to, or required to, make a statement or report to the person or persons who made the audit appointment or, in some cases, to regulatory authorities. Given the exceptional nature of the circumstances and the need to consider the legal requirements, the auditor may consider it appropriate to seek legal advice when deciding whether to withdraw from an engagement and in determining an appropriate course of action, including the possibility of reporting to shareholders, regulators or others.”

399. ISA 260, entitled “Communication With Those Charged With Governance”, provides:

() At [10] – definitions:

“For purposes of the ISAs (UK and Ireland), the following terms have the meanings attributed below:

(a) Those charged with governance – The person(s) or organization(s) (for example, a corporate trustee) with responsibility for overseeing the strategic direction of the entity and obligations related to the accountability of the entity. This includes overseeing the financial reporting process. For some entities in some jurisdictions, those charged with governance may include management personnel, for example, executive members of a governance board of a private or public sector entity, or an owner-manager. For discussion of the diversity of governance structures, see paragraphs A1-A8.

In the UK and Ireland, those charged with governance include the directors (executive and non-executive) of a company and the members of an audit committee where one exists. For other types of entity it usually includes equivalent persons such as the partners, proprietors, committee of management or trustees.”

() At [A44]:

“If the two-way communication between the auditor and those charged with governance is not adequate and the situation cannot be resolved, the auditor may take such actions as:

- Modifying the auditor’s opinion on the basis of a scope limitation.
- Obtaining legal advice about the consequences of different courses of action.
- Communicating with third parties (for example, a regulator), or a higher authority in the governance structure that is outside the entity, such as the owners of a business (for example, shareholders in a general meeting), or the responsible government minister or parliament in the public sector.
- Withdrawing from the engagement, where withdrawal is possible under applicable law or regulation.”

400. The following points can be made:

- () The shareholders as individuals do not fall within the definition of “those charged with governance”.
- () The only mention of communicating with shareholders in ISA 260 occurs in [A44], which is an explanatory note and not a substantive provision.
- () [A44] relates to communicating with third parties or “a higher authority in the governance structure that is outside the entity” and cites as one example of the latter “the owners of a business ... shareholders in a general meeting”.
- () This does not accord with the Company’s argument that “reporting to TWEISL” encompasses “reporting directly to the members of TWEISL”.
- () Nor does it accord with the Company’s argument that Crowe could fulfil any duty on its part to be performed to report to the shareholders, other than by reporting to the shareholders of the Company in a general meeting.
- () Further, communication under [A44] extends to communication with “the responsible government minister or parliament in the public sector”. This does not have the appearance of setting out the content of a legal duty imposed on auditors, whether in tort or by implication in their contract.
- () The only mention of reporting to shareholders in ISA 240 occurs in [A56], which is an explanatory note and not a substantive provision.

- (i) [A56] is cast in qualified, rather than mandatory, terms. In particular, [A56] speaks only of “the possibility of reporting to shareholders”.
 - (i) Further, it is clear that [A56] concerns responsibilities that may vary by country. There is thus no tension between [A56] and the proposition that, in England and Wales, the appropriate procedure for an auditor to follow to discharge its responsibilities is that contained in ss518-522 of the CA 2006.
 - (i) These provisions accordingly do not support the existence of a legal duty to report directly to shareholders, even in a case of fraud or suspected fraud where the only two directors of the company are believed to be implicated.
- 401. In addition to these points concerning the lack of foundation for the duty to report directly to shareholders whether in statute, decided cases, textbooks, or the provisions of the ISAs, other considerations also militate against the imposition of such a duty.
- 402. First, in the present case, the imposition of such a duty runs counter to [3.6] of Crowe’s terms of engagement. As set out above, this states that Crowe will report solely to the Company’s members as a body, and will not accept or assume responsibility to anyone other than the Company and the Company’s members as a body for its audit work.
- 403. Second, the imposition of such a duty would give rise to practical burdens. In the present case, it was accepted that, by reason of its ability to access the Company’s books and records, Crowe could have obtained the names and addresses of all the shareholders. However, even if that could be done without undue expenditure of time and effort – and also without alerting the directors, and thus at least risking that the purpose of obtaining that information would be negated by the directors learning what the auditor had in mind - the next step suggested by the Company, of posting letters to all the shareholders, would involve expense. In the present case, the cost of postage would not have been great. Nevertheless, it was not suggested that the legal duty contended for should depend on costs considerations. In a case involving a large number of shareholders, the cost of compliance with the duty could be considerable. It is, at least, open to question, whether it is appropriate to impose by implication an obligation involving such expenditure
- 404. Third, the names and addresses of the shareholders are their personal data. Therefore, processing of that data gives rise to data protection issues. It is unclear whether an auditor would have their consent to use that data for the purposes suggested, or whether an auditor, who is not the data controller with whom they have a direct relationship, would have any other answer under the material legislation to a complaint of unlawful processing. Any shareholder who was notified of genuine grounds for concern might be slow to complain that their data was used to provide

them with that information. However, shareholders might take a different view if the auditor's misgivings transpired to be without foundation. The data protection issues were not fully argued before me, and I do not propose to further lengthen this judgment by attempting to resolve them. It is sufficient for present purposes to say that, in my view, they are not obviously straightforward, and that it cannot be said that an auditor could safely disregard them.

405. For all these reasons, I consider that the case on legal duty pleaded in the RAPoC has no real prospect of success. For completeness, if and to the extent that (by reason of the incorporation by reference of passages from the Company's submissions) the pleaded case rests on what Crowe, having taken legal advice from competent lawyers, would or should have been advised to do, I consider that the same applies to that case.

THE STATEMENT OF REASONS FOR RESIGNATION

406. The next issue concerning the case pleaded in the RAPoC relates to the contents of the document that, it is alleged, Crowe should have sent to the shareholders. As set out above, the auditing experts were unable to assist with regard to this, beyond saying that it would depend on (i) Crowe's reasons for seeking legal advice and (ii) that advice.
407. In terms of submissions, I have already referred to the Company's written Closing Submissions and the Note prepared by Mr Lawrence and Mr Stacey on Day 10.
408. Ms Evans made no submissions on the contents of the statement of reasons that Crowe should have provided in the event that Crowe decided that it should resign, although the wording that she produced for a draft disclaimer suggested that they might be concise.
409. Neither side suggested that the legislation provided any guidance as to form and content, or submitted that guidance was to be found in any decided case, any textbook, any journal, any discussion within the auditing profession, or even any real life example.
410. In these circumstances, approaching the issue on the footing that the pleaded case relies on legal duty, it is necessary to determine the legal considerations that could properly influence the contents of a statement of reasons for resignation on the facts of the present case. Approaching the issue on the footing that the pleaded case relies on the legal advice that Crowe would have been given, I have looked to see whether guidance is available from any source(s) to which Counsel have not drawn my attention, and in particular any material which casts light on what that advice would probably have been.
411. First, I consider that it is helpful to begin by considering the provisions of the Proceeds of Crime Act 2002 ("POCA"), as they are accepted as relevant by the auditing experts. I received no detailed submissions on this topic. However, the

numerous publications available on the ICAEW website include one entitled “Technical Release – TECH 04/08 - ANTI-MONEY LAUNDERING GUIDANCE FOR THE ACCOUNTANCY SECTOR”. I make reference to this particular publication because I consider (i) that it contains an accurate summary of the law (which I do not propose to set out separately below for that reason) and (ii) that it reflects the legal advice that Crowe would in all likelihood have been given if Crowe had sought the same. It includes the following:

- (1) “The Guidance is addressed to businesses and individuals covered by Regulation 3(1)(c) of the 2007 Regulations, i.e. those who act in the course of a business carried on by them in the United Kingdom as an auditor, external accountant, insolvency practitioner or tax adviser (as defined in Regulation 3(4) to 3(8)), and those who act in the course of business as trust or company service providers under Regulation 3(1)(e) of the 2007 Regulations (as defined in Regulation 3(10)). These services are referred to together for the purpose of this Guidance as the defined services.” [1.4]
- (2) “In UK law money laundering is defined very widely, and includes all forms of handling or possessing criminal property, including possessing the proceeds of one’s own crime, and facilitating any handling or possession of criminal property. Criminal property may take any form, including in money or money’s worth, securities, tangible property and intangible property. Money laundering can be carried out in respect of the proceeds of conduct that is an offence in the UK as well as most conduct occurring elsewhere that would have been an offence if it had taken place in the UK ...” [2.1]
- (3) “Individuals in the regulated sector commit an offence if they fail to make a disclosure in cases where they have knowledge or suspicion, or reasonable grounds for suspicion, that money laundering is occurring. Disclosure must be made to their MLRO [i.e. Money Laundering Report Officer] or direct to SOCA [i.e. Serious Organised Crimes Agency] under ss330, POCA. In this Guidance, disclosure to an MLRO is referred to as an internal report and to SOCA as a suspicious activity report or SAR. MLROs have a duty to make disclosures under s331, POCA if they have knowledge, suspicion or reasonable ground to suspect money laundering as a consequence of an internal report ... These offences are punishable by imprisonment of up to 5 years and/or an unlimited fine.” [2.8]
- (4) “Section 333, POCA is replaced by s333A POCA which applies only to the regulated sector. The criminal offence of tipping off in s333A, POCA arises where a person in the regulated sector discloses either: that a disclosure has been made by a person of information obtained in the course of a regulated sector business either to an MLRO or to SOCA (under either s337 or s338, POCA) or to any other person authorised by SOCA to receive disclosures, or to the police or HMRC, and the disclosure is likely to prejudice any investigation that might

be conducted following the disclosure referred to; or that an investigation into allegations that a money laundering offence has been committed, is being contemplated or is being carried out, and the disclosure is likely to prejudice that investigation, and the information disclosed came to the person in the course of a business in the regulated sector. A tipping off offence will not be committed under s333A, POCA if the person did not know or suspect that the disclosure was likely to prejudice any investigation that followed. The penalty for this offence on summary conviction is a maximum of three months' imprisonment, or a fine on scale 5, or both and on conviction on indictment to imprisonment for a term not exceeding two years, or a fine or both." [2.17]

- (5) "Any of the tipping off offences contained in s333A, POCA will only occur in the circumstances described, but there may be circumstances where a money launderer may be alerted to the possibility that a report will be or has been made or an investigation conducted, other than by a disclosure of such fact e.g. by unexpected delay caused by waiting on consent. These have been distinguished in this Guidance by use of the phrase 'alerting a launderer'. Businesses will also need to take care to guard against alerting a launderer, as part of their policies and procedures aimed at preventing operations related to money laundering". [2.18]
- (6) "However, individuals and businesses in the regulated sector will frequently need to continue to deliver their professional services and a way needs to be found to achieve this without falling foul of the tipping off offence. Section 333D(2) is of assistance in this regard (disclosure to his client for the purpose of dissuading the client from engaging in conduct amounting to a money laundering offence). More Guidance on acting for a client after a money laundering suspicion has been formed is given in section 9." [2.20]
- (7) "This offence (i.e. "Prejudicing an Investigation") is set out in s342, POCA. This offence is committed where a person: knows or suspects that a money laundering, confiscation or civil recovery investigation is being conducted or is about to be conducted; and makes a disclosure which is likely to prejudice the investigation; or falsifies, conceals or destroys documents relevant to the investigation, or causes that to happen. As with tipping off offences, the person making the disclosure does not have to intend to prejudice an investigation for this offence to apply. However, there is a defence available if the person making the disclosure did not know or suspect the disclosure would be prejudicial, did not know or suspect the documents were relevant, or did not intend to conceal any facts from the person carrying out the investigation." [2.21]
- (8) "There are limited exceptions relating to persons carrying out law enforcement or judicial functions, and to legal advisers acting in privileged circumstances provided the disclosure is not made with the intention of furthering a criminal purpose." [2.22]

(9) “Considerations similar to those set out under tipping off above apply in terms of how the offence may be committed and of taking precautions to ensure any disclosure made does not prejudice an investigation. Businesses should ensure they have sufficient document retention policies in place (see Section 3.9 of this Guidance Record Keeping) to meet the needs of this section of POCA and the 2007 Regulations, as well as their legal and professional obligations more generally.” [2.23]

(10) Under the heading “Knowledge or suspicion?”:

“An offence is committed by an individual in the regulated sector if he fails to report where he has knowledge, suspicion or reasonable grounds for suspecting money laundering activity. There is no definition of knowledge or suspicion within POCA and so interpretation of their meaning will rely on judgements in past legal cases, as well as this Guidance and on the ordinary meaning of the words.” [2.24]

“Having knowledge means actually knowing that something is the case.” [2.26]

“Case law suggests that suspicion is a state of mind more definite than speculation, but falls short of knowledge based on evidence. It must be based on some evidence, even if that evidence is tentative— simple speculation that a client may be money laundering is not sufficient grounds to form a suspicion. Similarly, a general assumption that low levels of crime (eg, not declaring all cash takings) are endemic in particular industry sectors does not amount to reasonable grounds for suspicion of particular clients operating in that sector.” [2.27]

“A frequently used description is that ‘...A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to a “slight opinion, but without sufficient evidence”’ (*Queensland Bacon PTY Ltd v Rees* [1966] 115 CLR 266 at 303, per Kitto J). In another more recent case, *Da Silva* [2006] EWCA Crim 1654, ‘It seems to us that the essential element in the word “suspect” and its affiliates, in this context, is that the defendant must think that there is a possibility, which is more than fanciful, that the relevant facts exist. A vague feeling of unease would not suffice.’” [2.28]

412. The problem here, in short, on the facts of the present case, arises from three factors. First, the greater Crowe’s basis for concern, the greater the risk of commission of an offence of “failing to disclose” unless disclosure of those grounds was made by Crowe to an appropriate law enforcement agency. Second, however, once such a disclosure was made it would be difficult for Crowe to say that it did not suspect that the agency proposed to investigate. Third, for Crowe to have then told anyone other than the law

enforcement agency of the basis of any further concerns might prejudice the prospective investigation (e.g. because it could prompt the suspect to fabricate or destroy evidence).

413. This includes telling individual shareholders not only because AdC and RB were among the shareholders but also because of the obvious risk that anything told to this group might get back to the directors, as indeed is illustrated by the case of Ms Peyton-Jones.
414. More generally, even if the auditor does not reveal any further concerns, the auditor has to take care that any other conduct by the auditor (e.g. dragging its heels) does not alert the suspect(s) to the possibility that a Suspicious Activity Report will be or has been made, or that an investigation is being or may be conducted. I am considering this problem in the context of determining the contents of the statement of reasons for resignation that Crowe ought to have produced. As a matter of logic, however, the problem also applies to everything that Crowe ought to have done between (i) the time when Crowe first thought that there was a possibility, which was more than fanciful, that money-laundering was taking place and (ii) the time when Crowe ought to have considered telling the Company that it was minded to issue a disclaimer or to resign. If Crowe's audit procedures and enquiries during that period alerted the directors to the relevant apprehension, Crowe would be at risk of committing a criminal offence. It is right to note, however, that Mr Ashley does not mention this consideration when providing his suggested time line, and that he was not cross-examined on that point.
415. The present case is unusual because, in essence, Crowe could only discuss its concerns with the individuals who were implicated in the suspected offending, i.e. the directors. In cases where some individuals are suspected of involvement in money-laundering and others are not, the auditor can safely discuss its concerns with, or reveal its concerns to, those who are not thought to be involved, without the risk of offending under POCA.
416. One way round this problem would be to make disclosure to the appropriate law enforcement agency, and then ask for confirmation that by disclosing concerns to others, or pursuing particular procedures or enquiries, no offence would be committed. However, it is at best uncertain whether this would elicit a constructive response from the agency, let alone whether a response would have been obtained before Crowe formulated a statement of reasons for resignation to be served when it decided to resign.
417. A similar problem arose in *C v S* [1999] 2 All ER 343. In that case, vast sums had been misappropriated from the claimant company ("C"). C obtained a worldwide freezing injunction against a large number of defendants, including C's finance officer ("S"), and, at the same time, a *Norwich Pharmacal* order against a bank ("B") concerning documents relating to an account in C's name into which S had caused or permitted large sums to be paid without C's knowledge or consent. Unbeknown to C,

B had previously submitted a series of money-laundering reports to the Economic Crimes Unit of the National Criminal Intelligence Service (“NCIS”). These reports were subject to the tipping-off provisions contained in the then-applicable legislation, and they were also caught by the *Norwich Pharmacal* order. B was therefore placed in the invidious position that if it did not comply with that order it might be in contempt of court, whereas if it did comply it might commit a criminal offence by disclosing those reports to C. When NCIS learned of B’s predicament, NCIS sought disclosure from B in the Crown Court of some or all of the banking papers, but declined to allow B to tell C about NCIS’ involvement, or to assist B about what B could safely disclose to C. In the result, the position was resolved in the Court of Appeal by the making of an order in favour of C which was cast in narrower terms and did not catch the money-laundering reports. At the same time, the Court of Appeal gave guidance as to what should be done in the future in similar cases involving banks. Lord Woolf MR observed at p348 “This case demonstrates how statutory provisions, designed to achieve the highly commendable objective of combating serious crime, can interfere with the individual’s rights.”

418. In my judgment, that is the difficulty that would have arisen in the present case if Crowe’s procedures and enquiries had led it to suspect the kind of serious wrongdoing that the Company claims it ought to have suspected. The submissions that I received did not grapple with this problem, as the case pleaded in the RAPoC evolved in the manner described above, and Crowe did not have to plead to it. As Lord Woolf MR observed, the effect of POCA may be to interfere with private rights. In this instance, I consider that what Crowe could have done and said without facing the risk of prosecution would have been highly circumscribed, even if that resulted in detriment to the shareholders.
419. Put shortly, it cannot credibly be suggested that Crowe would have come under a duty to notify shareholders unless Crowe perceived “a possibility, which is more than fanciful, that the relevant facts exist”. However, once Crowe gained that perception, it would have needed to make a Suspicious Activity Report. Once it made a Suspicious Activity Report, Crowe would be severely constrained as to what it could say and do (including as regards communicating with shareholders) without being at risk of committing the offence of “prejudicing an investigation”. The more that Crowe revealed about what it knew or suspected, the greater the risk of prejudicing an investigation in the event that the information got back to the directors. If Crowe decided to resign, these considerations would apply to any statement of reasons for resignation provided by Crowe. The statement would therefore need to avoid revealing much by way of reasons.
420. Second, the risk of defamation would need to be considered. This is so in any event, but, in addition, the availability of a complaint of defamation is expressly recognised in the legislation, and one consequence of even arguably over-stating the position might be that the directors could apply to the Court to restrain publication of the

statement. Leaving costs considerations to one side, that could delay publication, which would not be in the interests of anyone whose attention ought to be drawn to matters relating to the resignation. Without embarking on a detailed exposition of the law of defamation, the following considerations, at least, would appear to be relevant. First, a defamatory publication may impute guilt, or reasonable grounds to suspect guilt, or grounds to investigate guilt (see *Chase v News Group Newspapers Ltd* [2002] EWCA Civ 1772, [2003] EMLR 11). Second, in the event that it becomes necessary to defend the imputation as true or substantially true (see s2 of the Defamation Act 2013), the evidence required to make good that defence will depend on the imputation – i.e. an allegation of guilt requires proof of guilt; whereas an allegation of reasonable grounds to suspect or of grounds for investigation only requires proof of grounds to suspect or grounds to investigate, which is an easier hurdle to surmount. Third, if a defamatory statement is one of opinion rather than fact, it can be defended on the footing that the opinion is honest, provided the basis for the opinion is indicated (see s3 *ibid*). Accordingly, there is an advantage in formulating a publication in terms of opinion. Fourth, publication on an occasion where there is a reciprocity of interest between the publisher and the audience will attract the protection of qualified privilege (i.e. in essence, it will be protected unless it is published dishonestly). This last point may not loom large if and to the extent that an auditor is complying with a legal obligation to bring matters to the attention of members and others who have an interest in knowing them, as that may provide a protection in itself. However, I believe that many lawyers would err on the side of caution when considering all these factors, and the last point would be significant if the auditor was considering deploying the statement outside the statutory scheme, as it might then be published to someone with no such interest (e.g. because an attempt to send letters to members results in some strangers being told).

421. Third, in terms of the advice that Crowe is likely to have received, I have found a number of publications issued by the ICAEW. These publications post-date the events with which I am concerned. However, they make reference to a report and a White Paper – which I regard it as beyond my remit to research – which refer to a state of affairs which appears to date back to the enactment of the CA 2006. They include the following:

- (1) “Auditor Resignations: Your Responsibilities” dated 5 October 2022 states:

“Cessation statements issued under s519 must include: reasons for cessation; and any matters in relation to the cessation that need to be brought to the attention of the members and creditors ...

Drafting a statement that complies with s519 can be difficult, given the possible sensitive nature of ‘matters’ relevant to the members and creditors, whilst not ‘tipping off’ under the Proceeds of Crime Act 2002. Cessation statements which properly include ‘matters’ are in the public interest, and can inform prospective audit firms’ risk assessments and acceptance decisions”.

- (2) A help sheet issued in January 2016 and last reviewed in January 2025 states:

“Where there are matters connected with the auditor ceasing to hold office that the auditor considers need to be brought to the attention of members or creditors of the company, the statement must include details of those matters (CA06 s519(3A)).

Depending on the nature of the matters to be included in the section 519 statement, auditors may wish to seek legal advice to ensure that the wording used is not defamatory. If the client applied to the court under section 520 and the court is satisfied that the auditor is using the provisions of section 519 to secure needless publicity for a defamatory matter, then the court could order the company’s costs to be paid by the auditor.”

- (3) “Driving More Informative Auditor Resignation Statements” dated 7 April 2022 states:

“In his report, [Sir Donald] Brydon suggested that the vast majority of resignation statements say little of substance and that this information is not being shared in a timely manner. He recommended that amendments are made to the Act to clarify and strengthen the process by which auditors and companies inform shareholders and other stakeholders of an auditor’s resignation, dismissal or decision not to participate in a re-tender.

According to Brydon, the lack of clarity in the explanation required to be given for why the auditor has ceased to act contributes to the difficulty of improving audits. The belief is that this lack of clarity leads to boilerplate statements that are of little value to anyone ...

The Government, in its 2021 White Paper, Restoring Trust in Audit and Corporate Governance, agreed with the Brydon Review that the existing Companies Act provisions in this area are failing to provide meaningful information to shareholders and the regulator about the reasons for an auditor’s departure. It noted, however, possible concerns around auditor liability and that an unexpected departure of auditors may already be perceived by shareholders and others as a sign that a company has questions to answer about its financial reporting, regardless of whether the precise reasons are set out in the auditor’s departing statement ...

The Act does not provide guidance on the kinds of matters that should be brought to the attention of members and creditors. It is left to the auditor’s judgement ...

Auditors may be in for some difficult conversations with those charged with governance of a company about resignation statements, if their decision to resign comes out of the blue, without concerns or issues having previously

been raised with them. Auditors should ensure that concerns are brought to the attention of those charged with governance as the audit progresses, and that these issues are clearly documented in their files. This will help to support auditors' judgements as to what matters to bring to the attention of members and creditors."

(4) "Auditor Resignation Statements: Why Clarity is Vital" dated 8 April 2022 essentially repeats extracts for the 7 April 2022 publication.

422. When considering the contents of the statement of reasons for resignation that, having taken advice, Crowe could in principle have sent, there are further complicating factors.
423. First, as Mr Lawrence submits and the experts agree, this will depend on the concerns that Crowe ought to have had, taking into account the responses of the directors to proper audit enquiries and procedures. Speaking generally, I consider the later matters came to a head the more concrete those concerns are likely to have become. For audit Y/E 2012 the hypothesis advanced by Mr Ashley is that grounds for concern would have arisen around the time of the Audit Clearance Meeting on 30 July 2013, and that Crowe would have started to consider issuing a disclaimer or resigning, and seeking appropriate legal advice, sometime in January 2014. For the reasons given below, I have taken the view that by that time Lilliput would have been introduced into the picture, and that it should not have taken long after that occurred for Crowe to have at least suspected, and in all probability felt driven to conclude, that it was being confronted by dishonesty and dissipation of assets. That might warrant a strongly worded statement.
424. Second, however, it seems to me likely that the directors, and in particular AdC, would have realised that Crowe was moving towards issuing a disclaimer or resigning well before matters came to a head. They would probably have realised this even if Crowe sought to keep its concerns to itself. However, it is understandable that Crowe should want to bring its concerns to the attention of the directors, and indeed, as the ICAEW publications suggest, this might be regarded as a counsel of prudence. That promotes accuracy, and protects the auditor from being accused of acting precipitately, and the client from being castigated unfairly. In that event, it seems to me, it is almost inevitable that the directors would have seen which way the wind was blowing some time in advance of the final separation. As, ultimately, they had no audit evidence to provide, they would have had an incentive to part company with Crowe before it bottomed out its concerns. In those circumstances, a more guarded statement might be called for.
425. The Company's draft RAPoC case, and submissions, as to what the putative resignation statement would have said were not made good by the evidence. The impression that I gained from the auditing experts, reinforced by the ICAEW publications, is that at all times material to this case auditors' resignation statements

contained no particular (and no minimum) details. It may be that the, or a, reason for this, in the language attributed to the relevant White Paper, was that what was perceived within the profession as complying with the legislation “fail[ed] to provide meaningful information to shareholders and the regulator about the reasons for an auditor’s departure.” In circumstances where the legislation was imprecise, although auditors might not be complying with the steps intended by Parliament, it was hard to blame them for that.

426. In principle, what, at widest, Crowe could have included in a statement of reasons for resignation may have varied from one audit year to another. However, regardless of the differences of detail that arise in respect of different years, there are certain considerations that apply to every year. It is convenient to address those matters here.
427. The joint statement of Mr Ashley and Mr Main records that Mr Main agrees that “the types of matters listed in Mr Ashley’s report are those that, if reflective of the circumstances, might have been discussed with legal advisers”. Both Mr Ashley and Mr Main agree that they cannot say “what an auditor’s legal advisers would have advised should have been included in Crowe’s communications in relation to their resignation or otherwise, should the outcome of Crowe’s further audit procedures have led them to consider that resignation was the appropriate course of action”. They do, however, agree that “this is unlikely to have included all the detail discussed with the legal advisers”.
428. Mr Ashley was asked in cross-examination about the ISA provision that “The auditor shall disclaim an opinion when the auditor is unable to obtain sufficient appropriate audit evidence on which to base the opinion, and the auditor concludes that the possible effects on the financial statements of undetected misstatements, if any, could be both material and pervasive”. He replied “As I think I mentioned in my report, quite often, if you are ‘threatening’ to disclaim an opinion, the directors would ask you to step down anyway, because they do not particularly want a disclaimed opinion floating around the place. Resignation, therefore, tends to go hand in hand”.
429. It was then put to Mr Ashley that if an auditor disclaimed an opinion and did not carry on, the resignation would just be on the basis of inadequate evidence. He replied: “Not necessarily. It would depend upon what other reasons I was advised to make clear to the shareholders, why I was resigning and the potential circumstances of what had given rise to the inadequate evidence”.
430. In spite of his very extensive experience, Mr Ashley was only able to recall one instance of a resignation relating to fraud. He explained that “it was a case of a subsidiary of an overseas company, where we were concerned, very concerned, that there was a fraud going on, and we did not have hard evidence that it was, but we reported to the shareholder, because that was the overseas company, that that was the grounds for our resignation, and the reason being, when we raised it with the overseas company, they failed to take the action we thought was appropriate. So we did record

in that resignation letter that was effectively the reasons for our resignation, and that presumably would have found its way on to the register of companies at some point”. Mr Ashley clarified that, in this instance what he meant by a “report to the shareholder” was a letter to the subsidiary, which would have reached the overseas company because the overseas company had representation on the board of the subsidiary. Mr Ashley further clarified “I cannot remember the terms of the resignation letter. It may not have said ‘fraud’, but we made it pretty clear that we felt that the company was not handling its affairs appropriately and we were not prepared to continue” and “As I say, I cannot honestly remember what we said, but we certainly had reasonable grounds”.

431. Reverting to the interrelation between disclaimer and resignation, Mr Ashley explained that if the auditor indicated that without further answers it did not consider that it would be able to sign off on the accounts, and the Company then indicated that it would rather use another auditor, that this would still constitute a resignation. He continued: “then you beetle off to the lawyers to say, ‘This is the set of circumstances I have got. This is what I have found out so far. This is what I know. What sort of resignation letter can you help craft for me, and/or do I need to do anything else?’”
432. Having read and listened to all the evidence in the case, and the arguments, I consider that a statement of reasons for resignation that contained anything like the detail alleged by the Company in the RAPoC, or even in the Note of 11 November 2025, would be unprecedented. There was no evidence to contradict my impression that such statements are almost invariably far less specific. The closest that the evidence came to addressing a case involving fraud was the instance cited by Mr Ashley, where he could not remember the details but said that “we made it pretty clear that we felt that the company was not handling its affairs appropriately and we were not prepared to continue”.
433. Something along those lines would avoid the quandaries that, in my view, Crowe would have faced as regards the various scenarios discussed below, and probably offers the best guide available to me as to the content of the statement of reasons for resignation that Crowe had a legal duty to make and/or that Crowe would have been advised by competent legal advisers to make. Words such as “the auditor feels” connote a statement of opinion; words such as “not handling its affairs appropriately” cover a wide field, but capture the gist of likely concerns; “not prepared to continue” fairly states the upshot.
434. Most importantly, this form of words would seem to avoid real problems under POCA.
435. Pulling these strands together, the Company has failed to persuade me that it has a case that has any real prospect of success that the statement of reasons for resignation that, according to it, Crowe ought to have produced or sent to members would have contained anything like the details asserted in the RAPoC. As set out above, that

pleaded case was deliberately cast in far wider terms than the Note dated 11 November 2025, but, for completeness, I should say that the same conclusion applies to the contents of the Note.

SHAREHOLDER KNOWLEDGE OF THE REASONS FOR RESIGNATION

436. The next question concerning the case pleaded in the RAPoC relates to what would have happened pursuant to the requirement in s521 of the CA 2006 that:

“... unless within 21 days beginning with the day on which he sent the statement under s519 (i.e. the statement of matters connected with the auditor’s ceasing to hold office that the auditor considers need to be brought to the attention of members or creditors of the company) the auditor receives notice of an application to the court under s520 (i.e. an application made to the Court within 14 days of receipt of the notice complaining that the auditor is using the provisions of s519 to secure needless publicity for defamatory matter), he must within a further seven days send a copy of the statement to the registrar”.

437. I am prepared to assume that, at some time after its receipt by the registrar, the statement would be placed on the Companies Registry, where it would be publicly accessible.
438. However, neither the Company nor Crowe filed any evidence as to how and where the statement would appear on the Companies Registry. Nor did they make any submissions on these topics. This is in spite of me asking several times during the trial for assistance.
439. Mr Lawrence asked Mr Main the following question in cross-examination, to which Mr Main gave a positive answer: “So if one posits a situation in which the deadline for the annual accounts, in this case end of September each year, has come and gone, so a shareholder would expect the accounts to be up on Companies House ... the shareholder who goes on to the relevant part of the Companies House website, looking for the accounts, will find, in the hypothetical circumstances we are considering, not the accounts, but the statement from the auditors explaining why they have resigned?”.
440. However, this answer has to be viewed against the background that it appeared to be uncontroversial that, in contrast to a qualification or disclaimer by Crowe of its audit opinion, in the event of a resignation the statement of reasons would not form part of the Company’s financial statements. Indeed, following a resignation, there would be no further opinion supplied by Crowe. Further, the implication of Mr Ashley’s evidence is that it might well be that there would not be any further financial statements at all, as, depending on the precise reasons for the resignation, the Company could find it hard to find any replacement auditor to take over where the previous auditor had resigned. Accordingly, I do not consider that this answer should

be interpreted as meaning that the statement of reasons would be found in the same place as the financial statements.

441. In the result, I have no clarity as to how and where the statement would appear. I suspect, although I do not know, that it would appear under “filing history” or the like.
442. In short, of the three shareholder witnesses, Mr Clark paid the most attention to the materials available concerning the Company on the register at Companies House. Mr Clark goes into considerable detail as to what materials he accessed, when he accessed materials, what he gleaned from what he saw, and what concerns he would have had (i) if the materials he read had contained different contents, or (ii) in the event that the appearance of the financial statements was delayed or did not occur. However, there is nothing in his evidence to suggest that he ever looked beyond the financial statements.
443. In particular, in spite of being aware of “situations where auditors have been fired and newly appointed auditors have undertaken a fresh review of the company’s accounts and have identified problems which have prompted them to refuse to sign-off auditors’ reports”, Mr Clark’s evidence in the event that “Crowe [had] declined to submit auditors’ reports” is that “My first thought would have been that there must be a (relatively substantial) issue which meant that the auditors were not comfortable with signing-off the financial statements”. It is not that he would have looked to see whether there was a statement of reasons for Crowe’s resignation, and what those reasons were.
444. It is unsurprising that Mr Clark’s first witness statement makes no reference to a statement of reasons for resignation, as the word “resignation” nowhere appears in the PoC. By the time Mr Clark made his second witness statement the issue of whether Crowe ought to have resigned had been considered by the auditing experts. Mr Clark therefore addressed in his second witness statement the issue of what would have happened if Crowe had resigned. However, he does so on the premise that he would have “received a letter of resignation or other communication from an auditor”. He then sets out his “response and actions in the event that Crowe had issued a letter of resignation or other communication to the shareholders of [the Company] referring to the key issues identified by Mr Ashley”. That is plainly different from a statement of reasons for resignation from Crowe being provided to the registrar and being placed on the Companies House website. Mr Clark’s evidence does not deal with that situation, or state that he would have seen the statement of reasons for resignation if it applied.
445. The evidence of Mr Streather is no more helpful to the Company on this topic. In his first witness statement, he speaks of his “annual review of the Company’s financial statements”. In his second witness statement, like Mr Clark, he addresses what would have happened if he had “received a letter of resignation or other communication from Crowe”. He does not say that he would have seen a statement of reasons for

resignation if the same had being placed by the registrar on the Companies House website.

446. The evidence of Mr Hillson is less helpful to the Company, as he does not appear to have looked for the Company's financial statements or read them on the Company's records at Companies House. His evidence in his second witness statement is to the same effect as the evidence in the second witness statements of Mr Clark and Mr Streather. (Indeed, this is unsurprising, as each of the three shareholders confirmed that their second witness statements were prepared in draft by Fieldfisher. Ms Evans complained that this was in breach of CPR 57AC PD 3.3 (to the effect that a statement must be in the witness's own words and drafted in their own language) and that it undermined the reliability of their evidence, as it was unclear to what extent that evidence had been suggested to them. I do not consider it necessary to determine these points. I am prepared, for purposes of argument, to take all their evidence at face value.)
447. In any event, even if the members might have accessed Crowe's resignation notice or Crowe's statement of reasons for resignation after the same had been placed by the registrar on the website at Companies House, there is no evidence that the members would have done this promptly. The three shareholders are all professional men, and it is fair to assume that they have been selected as witnesses because their evidence is as favourable to the Company as it could obtain. None of them looked at the Company's records at Companies House on anything like a fortnightly basis. Even Mr Clark, who looked every year, took 17 days after the date when the Company's accounts were due to be filed in 2018 to raise the fact that they had not been filed with AdC, and waited a further 5 months (until 8 March 2019) before following up on their absence with AdC.
448. For the reasons and in the circumstances set out above, I do not consider that the Company's pleaded case that the members "would have had notice of the resignation notice and/or statement" because "within 21 days beginning with the day on which Crowe should have sent the s519 statement to the company it should have sent a copy of the statement to the registrar within 7 days" and "That statement would have been placed on the website at Companies House within a further 7 days and been accessed by the members within 14 days thereafter" is a case that has a real prospect of success.
449. The Company's alternative case under this heading (see [44B] of the RAPoC) is that the members "would have had notice of the resignation notice and/or statement" as sent to them pursuant to the Company's obligations under s520 of the CA 2006. As discussed above, s520 places an obligation on the Company within 14 days of receipt from an auditor of a statement under s519 either (i) to send a copy of the statement to anyone who under s423 is entitled to be sent copies of the accounts or (ii) to apply to the Court.
450. This alternative case falls to be considered on the basis that (i) the Company was controlled by AdC and RB and (ii) AdC and RB were both fraudsters. In addition,

unless the Company's pleaded case in the RAPoC as to the contents of the statement is to be substituted by some un-pleaded scenario (such as that the statement would be along the lines discussed above of: "Crowe is of the opinion that the Company is not handling its affairs appropriately and Crowe is therefore not prepared to continue as auditor") the statement would include (see [43](g)) a statement that a long list of factors that "were clear evidence of and/or indicative of and/or raised suspicions of, a significant fraud being committed against TWEISL by its management or Directors (or some of them)".

451. I do not consider that alternative case has a real prospect of success. I am unable to see why it should be thought that AdC and RB would be scrupulous to comply with s520 when they were otherwise behaving in a systematically dishonest way, and where compliance would have the effect of alerting the members to their fraud or suspected fraud, and risk their "Ponzi" scheme being brought to an end sooner rather than later.
452. The case that Crowe, acting competently, would or should have resigned and informed the shareholders about the reasons for its resignation by requiring the Company to call a general meeting pursuant to s518 of the CA 2006 is not included in the RAPoC.
453. In any event, that case faces the different difficulties identified above, namely that, although this procedure, if invoked, would have brought the reasons for resignation to the attention of the shareholders, I consider that there is no real prospect that they would have learned about the matters pleaded in the RAPoC by this means, principally because Crowe could not be expected to do anything to place itself in jeopardy under POCA.

IMPLICATIONS FOR THE COMPANY'S CASE

454. The judgment of the Court of Appeal in *Sasea*, and the commentary of the authors in Salzedo and Singla, recognise that in addition to the auditor's primary obligation "to exercise an appropriate level of skill and care to produce fair and accurate accounts within a reasonable time" the auditor may also have a different type of obligation, namely "a free-standing duty to warn which can arise before the audit report is signed".
455. In essence, the PoC put forward a case that Crowe (i) breached its primary obligation by submitting "unqualified" auditor's reports for each of the years ending 2012 to 2018 which stated that the financial statements of the Company gave a true and fair view of the state of the Company's financial affairs and were otherwise properly prepared and (ii) breached its further obligation "to warn" by not giving warnings to the Company.
456. The first round of shareholder witness statements mirrored the ingredients of that pleaded case, and addressed at length how Mr Clark, Mr Streather and Mr Hillson would have reacted if Crowe had declined to submit auditor's reports, or if they had

received notice of various troubling matters following Crowe reporting the same to the Company, and the steps that they would have considered taking in those circumstances.

457. The second element of that pleaded case faced the difficulty, identified in [37.12.2] of the Defence, that even if Crowe had a duty to advise the Company about concerns that it should have had, that would have made no difference, because “The persons [Crowe] would notify of any concerns would be the directors [and] [o]n TWEISL’s own case, the directors had acted dishonestly and had misappropriated the money themselves”.
458. Mr Ashley’s report began to move away from that pleaded case, (i) by concentrating on the thesis that Crowe would have been driven to resign, either because of concerns about (in short) fraud, or possibly because Crowe would need to issue a disclaimer which the directors would find unpalatable, leading to a parting of the ways which would be treated as a resignation, and (ii) by trailing the possibility that, having taken legal advice, Crowe would discharge the duty to warn by writing directly to the shareholders.
459. The second round of shareholder witness statements assumed that this possibility would have materialised, and that it would have involved Crowe providing them, directly, with a mass of detail about Crowe’s findings or concerns relating to (in brief) fraud.
460. In light of my rulings on the Company’s application for permission to re-amend to plead the RAPoC, the case that Crowe owed a duty to warn, or would have been advised to warn, the shareholders directly is at an end. Even if that case was not entirely at an end, the case that the statement of reasons for Crowe’s resignation would have contained the information that the shareholders’ second witness statements assume it would is over. On this basis, the evidence contained in that second round of statements is irrelevant.
461. As the free-standing duty to warn essentially takes the Company nowhere on the facts of the present case if it is confined to a duty to warn the Company, the practical effect of the above rulings is that the Company’s case on causation is restricted to one based on the shareholders’ evidence as to what they would have learned, how they would have reacted, and what steps they would have considered taking in the event that, instead of submitting auditor’s reports as it did, Crowe had declined to submit auditor’s reports.
462. That evidence is not based on the premise that Crowe would have resigned, as resignation was not mentioned in the PoC, and so did not form the basis of the first round of shareholders’ witness statements, which mirrored the case pleaded in the PoC.

463. The Company's case pleaded in the PoC and the resignation scenario discussed by Mr Ashley lead to different consequences. This can be illustrated by Mr Clark's evidence in relation to the financial statements for Y/E 31 December 2017, which were due to be filed by 30 September 2018. Mr Clark noticed that the deadline for filing had been missed, and asked AdC about this in an email dated 17 October 2018. When the accounts had still not been filed by 8 March 2019, Mr Clark sent a further email to AdC asking "are the auditors still in place?" On the basis of this evidence, and bearing in mind that Mr Clark was the most vigilant of the three shareholders who the Company chose to call as witnesses, it seems to me that the Company would struggle to say that, in respect of the Y/E 31 December 2017, the shareholders would have thought of taking action based on concerns about Crowe declining to submit an unqualified auditor's report (as [42] of the PoC alleges Crowe should have declined to do) before March 2019. However, as the list of dates that the Company applied to insert in [44A] of the RAPoC reflects, in accordance with the scenario discussed in Mr Ashley's report, the date on which he says "shareholders would have been made aware that [Crowe was] not able to provide an audit opinion either through the issue of financial statements with an opinion disclaimed or more likely through a letter explaining its resignation or some other communication" in respect of the Y/E 31 December 2017 is "on or around August/September 2018". On this basis, the Company's quantum expert, Mr Pearson, has taken 1 September 2018 as the date for quantification of loss in respect of the audit for Y/E 31 December 2017. Because of an element of disagreement about Mr Ashley's timings, Crowe's quantum expert, Mr Conti, has taken 30 September 2018 as the date for quantification of loss in respect of that audit. In any event, whichever end of September 2018 is properly to be preferred, that date is very different from March 2019.
464. These anomalies are a product of the unfocussed way in which this claim has unfolded.
465. At the same time, I have to do my best to make findings of fact which will assist the Court of Appeal in the event that this case goes further, and my analysis is revisited.
466. In these circumstances, I feel compelled to consider what would have happened in each audit year if Crowe had not acted in breach of duty by reference to the scenario discussed by Mr Ashley, even though that forms no part of the PoC. In doing that, I will focus on the implications of resignation, as the notion that Crowe could properly have addressed the concerns that it should have had by issuing financial statements with an opinion disclaimed was considered less likely by Mr Ashley and was disputed by the Company.
467. With these thoughts in mind, I will consider the claims for each audit year, starting at the beginning, because I am unclear whether or not the claim for the first year is live.
468. Before doing that, however, it is sensible to consider two further arguments of Crowe.

CROWE'S "WINE DISCOUNT" ARGUMENTS

Crowe's Updated Counter-Schedule of Loss

469. On 18 September 2025, Crowe served an Updated Counter-Schedule of Loss in accordance with the Order of Master Kaye dated 17 July 2024. This stated at [12(d)] that Crowe “will in fact seek appropriate discount from the Court to the stock figures at each Relevant Date ... on account of uncertainties surrounding ownership of assets and/or the ownership of funds used to purchase assets recorded as held by the Company at each Relevant Date that would serve to impact upon the realisation of assets in an earlier notional liquidation”, and at [19] that Crowe was seeking “a discount to the Net Realisable Value of assets at each Relevant Date on account of uncertainties surrounding the ultimate ownership of assets in the event of an earlier notional liquidation”.
470. In [175] of Crowe's Skeleton Argument for trial, it was submitted that the Court would not be able to work out how much of the Company's stock would have been subject to claims by others in an earlier liquidation, but that there was sufficient evidence to show that there were issues as to whether the Company owned all of that stock and could have retained all of it free from cross-claims in the event that it had gone into liquidation holding wine. Discounts to value of 25%, 50% and 75% were advanced as options.
471. The immediate factual foundation for these arguments was based on analysis of the TWIF bank account, which, it was common ground, contained co-mingled funds. Mr Conti provided one worked example of the kind of transaction history which underlies Crowe's arguments. This is included in the joint statement of Mr Conti and Mr Pearson dated 5 September 2025. This example has the following stages: (i) on 4 October 2017, TWIF transferred two amounts (£98,000 and £102,000) totalling £200,000 to TWEISL, (ii) TWIF 2012 transferred two amounts (£107,000 and £100,000) totalling £207,000 to TWIF, (iii) TWEISL subsequently transferred £105,600 and £90,000 to TWIF 2012 with the references “TWIF 2012 2 PART INV 880” and “TWIF 2012 2 LAST PART INV 0880” (i.e. a total of £195,600), and (iv) this was recorded in the Company's Sage records as an investment in wine stock. Accordingly, in short, it would appear that this wine was purchased with money provided by TWIF and (indirectly) TWIF 2012.
472. (Of the £207,000 emanating from TWIF 2012, £195,600 was paid back to TWIF 2012 ostensibly for the purchase of wine from TWIF 2012. This at least gives rise to the suspicion that the entire transaction was a purely paper exercise, and did not, in fact, involve any genuine transfer of property to TWEISL. However, that is a different point, which is not pursued by Crowe. Instead, it is assumed that TWEISL obtained legal title.)

The Company's application in opposition

473. The inclusion of [12(d)] in the Counter-Schedule of Loss provoked a strong reaction from the Company. It issued an application dated 3 October 2025 seeking an Order pursuant to CPR 3.4 striking out [12(d)] (other than the first sentence) and Appendix 1 of the Counter-Schedule of Loss, further or alternatively treating the issue raised in those passages as an amendment and refusing it under CPR 17.1 (amendments to statements of case) or CPR 17.2 (power of court to disallow amendments made without permission) on the grounds that the raising of an issue questioning the reliability of the figures relating to the “wine stock” held by the Company on Relevant Dates is (a) new, (b) un-foreshadowed in any earlier statement of case, (c) unsupported by expert evidence, and (d) would require very significant review/disclosure and evidence by the Company to address fairly, and accordingly would necessitate the adjournment of the trial. That application was supported by the first witness statement of Mr Jarvis, of the same date.

Crowe’s case on the beneficial ownership argument

474. Ms Evans’ submissions in response were, broadly, to the effect that (i) this point was already in issue, and (ii) if it was not, the responsibility for that could be traced back to the Company’s failure or refusal to plead the nature of the fraud correctly, and, allied to that, the failure to make proper disclosure, in particular of the TWIF bank statements, which were only included in disclosure provided late on 24 March and 7 April 2025.
475. In support of her case that the point was already in issue, Ms Evans relied, first, on the fact that the figures pleaded in [48] and [49] of the PoC were not admitted by [47] of the Defence. Second, [34] of the Amended Defence (served after disclosure of the TWIF bank statements had been provided) pleaded not only that monies were co-mingled in the TWIF account but also that those monies were used for trading. Third, in [56] of the PoC the Company itself had advanced a loss of a chance case in the alternative in respect of (among other things) the stock of wine. Ms Evans suggested that this acknowledged the prospect that the Company would not have been able to retain the stock of wine for itself due to the position of third parties. Fourth, Mr Ashley had raised questions about the ownership of stock in his report. Fifth, Mr Pearson and Mr Conti had agreed in their joint statement that the recoverability of stock in an earlier liquidation was a matter for the Court to decide, and that the co-mingling of funds makes it “difficult to identify ownership and obligations associated with specific funds and/or the assets that might have been acquired with them”. Ms Evans further relied on the fact that Mr Conti had set out his views on the impact of the co-mingling of funds on the ownership of stock in the “unagreed” part of the quantum experts’ joint statement, and that it had not been suggested that he was not entitled to do this. With regard to that last point, however, the response is: “Mr Pearson notes Mr Conti’s comments with regards to the sources of TWEISL’s funds which may have been used to fund the purchase of stock. To Mr Pearson’s knowledge, neither the Claimant nor

the Defendant are contending in these Proceedings that TWEISL did not own the stock recorded on its balance sheet”.

476. In support of her case that, if necessary, the point should be allowed in by way of a re-amendment to the Defence, Ms Evans began with criticisms of the way in which the Company’s case had been pleaded. These included not only a failure to plead particular steps that it is alleged the Company or the member would have taken and how it is alleged those steps would have preserved assets or prevented loss, but also a failure to plead the nature of the fraud accurately, portraying it as essentially extractive when, in truth, it was more complex than that. In addition, the pleading omitted reference to the role of the TWIF General Account, and focussed on what AdC had said in interview on 20 November 2020. Mr Hardman accepted in cross-examination that the pleaded case involved over-simplification, and that he was in error in “not clocking TWIF”.
477. In particular, [30(b)] of the PoC pleaded that “over a lengthy period the investors’ funds had been taken from TWEISL and paid into various third party bank accounts ... in the names of Anpero Capital Limited, Huntsman Wine EIS Ltd, Alladin Limited and the Wine Investment Fund Limited and/or the personal bank account of ADC” and [40] of the PoC, as originally pleaded, alleged that there were no payments to or deposits with Lilliput and that instead “TWEISL monies had been paid over to Anpero and/or other parties (such as those mentioned above at paragraph 34b) to be used (by Anpero at least) on day to day expenses and for other purposes and/or not for the benefit of TWEISL”. By the RAPoC, [40] was sought to be amended to read (emphasis added): “TWEISL monies had been paid over to the TWIF General Account and subsequently to Anpero and/or other parties (such as those mentioned above at paragraph 34b) to be used on day to day expenses and for other purposes and/or not for the benefit of TWEISL”.
478. Ms Evans submitted that guidance as to what needed to be pleaded by the Company in the present case was to be found in *Guang Xin Enterprises v Kwan Wong Tang & Fong* [2003] HKCU 2248. That case concerned a claim by a company in liquidation against its firm of auditors in respect of the accounts for the company’s final trading years. The defendant’s primary case was that the statement of claim lacked essential averments that would be necessary to constitute a valid cause of action, although, so far as that aspect of the case was concerned, it was conceded that the company might be able to formulate a claim which would be sustainable, at any rate, on the pleadings.
479. The judgment of the Hong Kong Court of Appeal was delivered by Rogers VP. At [15], he said that a pleading along the lines under discussion in the appeal might be viable save for one matter, namely that “... it seems to me be necessary for the pleading to contain particulars as to precisely who would have taken what steps had the matters, which were alleged to have been deficient in the auditors’ report and accounts, been revealed”. At [23], he discussed a precedent form of pleading that was relied on by the auditors in the appeal, and said: “In those circumstances it is easily

understandable that a logical connection may be made between the company, which was previously unaware that a fraud was being committed against it, becoming aware of the fraud and taking steps to recover in respect of it and to prevent repetition”. At [24], Rogers VP said:

“On the other hand, a company that knew irregularities were taking place, seems to me to be in a different position. In such circumstances it is by no means clear that, even if the auditors were to draw attention to the irregularities, the company would take any steps to prevent the continuation of those irregularities, because the company had known about them and would, without more, be presumed to have approved of its own conduct. In my view, the logical conclusion that a company would take immediate steps in respect of a hitherto unknown fraud does not apply in a situation where a company itself knows that it is committing ‘irregularities’ and the matter happens to be spelt out in the accounts. This is particularly so in the case of a private company, because the accounts are not generally published. Since the matter has now reached the stage where the plaintiff will have to amend its pleading in order to save it, there is no doubt in my mind that those particulars should be provided as part of any amendment, if indeed this is the plaintiff’s case”.

480. Ms Evans submitted that this last position applies in the present case. Further, Crowe’s Defence should be viewed in the context that Crowe could not be expected to plead detailed facts in response to a case that the Company had failed to plead in proper form.
481. If permission to amend is required, Ms Evans submitted that it should be granted. Ms Evans’ central points were that the wine stock discount argument is based on the source of funds of the material purchases, that the evidence relating to this is already before the Court, and that questions about the co-mingling of funds (and, indeed, in the case of Mr Ashley’s report, of wine inventories) had been flagged up in the experts’ materials.
482. Further, Ms Evans submitted that, as a matter of law, the argument has, at least, a real prospect of success. She submitted that, in a notional earlier liquidation, claims by other entities, such as Huntsman, TWIFL, TWIF would likely have been made on the basis that their money had been obtained by TWEISL by fraud on the part of its director AdC, and that TWEISL was therefore a constructive trustee of the money: see *Grant on Civil Fraud*, para. 9.060, and *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669. In the alternative, she submitted that insofar as AdC was a fiduciary as regards the company whose money he was misapplying via the TWIF General account, the observations at para. 9.073 of *Grant* apply: “There are numerous cases ..., in which a third party who has received property from the principal/beneficiary pursuant to a fiduciary’s breach of duty (other than a bona fide purchaser for value of the legal estate without notice) has been found to receive it on constructive trust.” In this regard, she submitted that AdC’s dishonesty would have

been attributed to TWEISL for the purposes of such a knowing receipt claim (see *Grant* at para. 19.051) such that TWEISL could not claim to be a *bona fide* purchaser for value without notice.

483. Ms Evans further submitted: (i) Huntsman and others could pursue an equitable proprietary claim against the wine purchased with their money (*Grant*, paras 23.036 to 23.037), (ii) that would enable them to claim the wine, or to follow or trace the proceeds of the same (*Grant*, paras 23.044, 23.007, 23.014), (iii) it is not uncommon for property to be swapped for only part of a new asset, with the balance of consideration for that asset coming from another source, (*Grant*, para 23.016), (iv) when the claimant's property is mixed with the wrongdoer's own property (here TWEISL's property), presumptions are made with the purpose of preserving the value of the claimant's property at the expense of the wrongdoer (*Grant*, para 23.018), (v) if the property in question forms part of a mixture of which the claimant is one of several other contributors, he can only claim beneficial ownership of a portion of the mixture (*Grant*, paras 23.045 and 23.019) and (vi) in general, any withdrawal of money is treated as having derived from the money that has been in the bank account for the longest – although in the present case the running balance of both the TWIF General and TWEISL accounts tended to be low before moneys were paid from TWIF to TWEISL for a stock transaction, and then by TWEISL to the seller; and it is often clear from the bank statements whose money is being transferred by TWIF to TWEISL and applied to stock.
484. The amendment that Crowe sought to make was to [47] of the Defence, and consisted of deleting the words crossed out below and adding the words shown underlined below:
- “As to paragraphs 47 to 49, it is denied that Crowe is liable for those alleged “losses”. In addition to the matters pleaded above, TWEISL did not lose the wine stock assets while it was trading. The assets were purchased and then sold, by TWEISL (subject to paragraph 34 above). ~~That was precisely the business model of TWEISL, of which its shareholders were (or should have been) aware.~~ Further and in any event, the figures pleaded in paragraphs 48 and 49:
- (a) are irrelevant, as they do not represent sums lost by TWEISL; ~~and~~
- (b) are not admitted, in terms of their accuracy (although as to this:
- (i) no challenge is made to the Tromino figures but allowance must be made for selling costs ;
- (ii) the figures do not allow for the likelihood or risk of directors selling wine set out at paragraph 41 above;

(iii) the figures are (for the avoidance of doubt) subject to paragraph 34 above, which makes clear that money commingled from other ADC-related companies in TWIF General Account were used by TWEISL for trading (namely buying wine).”

485. I doubt that this is an adequate pleading of the wine beneficial ownership point. As also happened in the case of the Company’s draft RAPoC, it seems to me that this wording reflects an attempt by Crowe, while asking for permission to amend in case it is necessary, to keep alive the argument that no real change is being made to the pleaded case by the draft amendment. Hence the reference back to [34] of the Defence. However, I have held (below) that [34] is insufficient to bring in the beneficial ownership point.

The Company’s case

486. In his witness statement in support of the Claimant’s application, Mr Jarvis begins by saying that the PoC and the Defence give rise to no issue as to the audit of wine stock which might lead to debate about the figures for wine stock contained in TWEISL’s audited accounts. Mr Jarvis relies, in particular:

- (i) On the PoC (i) at [40(j)], alleging that Crowe had failed to investigate monies coming in and out of TWEISL to connected third parties and (having investigated) to flag serious problems, (ii) at [43(c)], alleging that Crowe had failed to report for each audit year from December 2012 onwards that TWEISL monies were being used and/or mixed with the monies of other companies, (iii) at [43(f)], alleging that the actual destination of funds was from the TWEISL bank account to Anpero/other third parties and/or that the funds were used for their purposes or the purposes of the Directors but not the benefit of TWEISL, (iv) at [47]-[49], alleging that TWEISL was entitled to claim for assets which would have been preserved had prompt or proper reporting by Crowe taken place, and that it relied on Tromino’s figures for wine stock and the figures in TWEISL’s audited accounts.
- (i) On the Defence, (i) at [38.1.2] where Crowe said, amongst other things, as regards [43(c)] of the PoC, that it was not unusual for monies to be pooled and there was a sound commercial rationale in this case, (ii) at [39.1], pleading that TWEISL’s case was premised on fraudulent misappropriation of monies by the Directors, through Lilliput, TWIFL, Anpero and/or other unidentified third parties, and (iii) at [47], pleading that TWEISL did not lose its wine stock assets, the assets were purchased and then sold by TWEISL, which was its business model.

487. Next, Mr Jarvis refers to Mr Malkin’s witness statement at [42], and say that this deals with the treatment of wine stock, in the context of explaining why he considered that Crowe had an adequate understanding of TWEISL’s business.
488. Turning to the expert evidence on liability, Mr Jarvis says that Mr Ashley made various comments about wine stock in his report dated 2 April 2025. However, Mr Ashley acknowledged that TWEISL had not made allegations of negligence around the audit of wine stock and so he had not considered the audit of wine stock in any detail (see [5.1.2] of his report) and any views are expressed as “preliminary” (see [6.1.3]). Mr Jarvis points out that in [6.3.1] Mr Ashley states “it is in my view quite possible that further evidence would have been available to satisfy the requirements in ISA 500 – Audit Evidence. Such evidence would have consisted in my view of direct confirmation each year from the bonded warehouse of stocks held in an account in the name which was clearly under the control of TWEISL (rather than any other related party) and reconciliations in detail of movements between the date of any such confirmation and 31st December of the relevant year based on records of movements also obtained from third party evidence. As such I have not considered this further”. Mr Jarvis adds that Mr Main’s report dated 11 April 2025 makes no substantial reference to wine stock.
489. Moving on to TWEISL’s disclosure, Mr Jarvis rejects the criticisms made by Crowe. He states that TWEISL disclosed to Crowe all relevant bank statements that would have demonstrated co-mingling of assets by (at the latest) 11 April 2025.
490. With regard to expert evidence on quantum, Mr Jarvis states that the relevant bank statements had been disclosed almost three months before Mr Conti’s report, which is dated 4 July 2025 and “Had Mr Conti required extra time to consider the TWIF bank statements, or the TWIFL tranche statements then I am sure that would have been agreed (earlier extensions of time for the service of expert quantum reports were agreed)”.
491. Mr Jarvis notes that at [3.3.3] of his report, Mr Conti states that he had been provided with a copy of Mr Ashley’s report and noted his consideration of stock balances. However, Mr Conti says that he understood that this is an element of audit work that is not subject to TWEISL’s claim. Mr Conti then goes on to detail his assumptions about wine stock at paragraphs 3.36, 3.37 and 5.2.3(a).
492. Mr Jarvis concludes by saying: “... it appears to me that Crowe has recently come up with the idea that it can seek to knock down TWEISL’s claim by asserting that the wine stock figures that Crowe audited are not reliable as a result of co-mingling of funds and/or assets. That has not been the basis upon which the case has proceeded, and the fact of co-mingling has been very apparent to Crowe from the very start of this claim (if not well before it). Crowe has had every opportunity to make the point that it now seeks to make in an appendix to the CSOL served on 18 September 2025, before a trial that is listed to start on 6 October 2025”.

493. Mr Jarvis then turns to the “real and substantial practical problems” arising from this argument being raised at this late stage”. Mr Jarvis continues: “Had it been raised in good time, I can say that the Liquidators would undoubtedly have sought a great deal of factual evidence to support TWEISL’s wine stock figures from various sources as I detail below. The further evidence that would have been sought would have included:

- () Direct engagement with wine warehouse providers (in particular LCB (as referred to in paragraph 42 of Mr Malkin’s witness statement)) to obtain disclosure of documents relevant to TWEISL’s ownership of stock held by LCB at all relevant times. The liquidators can see that LCB held records of TWEISL stock. We would have wished to see those records to rebut Crowe’s case that there is uncertainty as to ownership. We would also have wished to explore the electronic system referred to by Mr Malkin and details of LCB’s engagement with those at Anpero who dealt directly with Crowe in respect of stock. If necessary, the liquidators might have relied upon section 236 Insolvency Act 1986 to compel information.
- () Direct engagement (again under section 236 Insolvency Act 1986 if necessary) with individuals other than Mr della Casa and Mr Birrell at Anpero in respect of stock lists of TWEISL wine at all relevant time, and the valuation of that wine. There were individuals (in particular Chris Smith) at Anpero who were directly involved in the provision of wine stock information to Crowe in the context of the audit of TWEISL’s wine stock ...
- () Further engagement with Tromino (Fabian Schonenberg in particular) as to its role in what the Crowe Skeleton itself notes was Tromino’s role in “... putting in place internal financial controls ... monitoring assets and dealing with valuation issues” (see paragraph 3(a)).
- () Further engagement with Mr della Casa and Mr Birrell and with Mr Patel (under section 236 Insolvency Act 1986) to ask them explicitly about the ownership and valuation of TWEISL’s wine stock.
- () The liquidators would have sought to adduce witness evidence from some or all of the above and/or would have included specific reference to their enquiries and information gathered in the context of those enquiries in Mr Hardman’s witness statement.”

494. Mr Jarvis continues by saying that (i) further, TWEISL would have explicitly sought disclosure from Crowe of documents relevant to the issue of TWEISL’s wine stock figures, (ii) the issue would have been the subject of extensive debate in the expert audit reports and in the expert quantum reports, (iii) the Court would therefore have been assisted by a detailed examination of the wine stock lists to see the extent to which TWEISL’s audited wine stock figures were supportable and readily realisable

from LCB (in particular) and other sources, and (iv) none of the above is now possible as a practical matter before trial starts on 6 October 2025 with the wide array of other tasks that need to be carried out by my team and Counsel.

495. It can be seen that, although this evidence (i) contains one reference to “co-mingling of funds and/or assets”, and (ii) mentions the issue of ownership when discussing the further evidence that the Company would have wished to obtain, it largely appears to be addressing a different point to the one that is relied on by Crowe. The argument that Crowe wishes to advance does not involve any challenge to the wine stock figures produced by Tromino (or any suggestion that Crowe was negligent in accepting those figures for audit purposes). Crowe’s point is to do with beneficial ownership of the wine, and involves looking at the source of the monies that were used to purchase it. I am not persuaded that any of the further evidence that Mr Jarvis says the Company has been deprived of the opportunity of obtaining would have any material bearing on that issue, or that the Company is prejudiced in dealing with that issue by not having that evidence. In particular, I cannot see that wine warehouse providers would be able to shed light on beneficial ownership, or that AdC, RB and Mr Patel could be relied on to do so. The evidence is, however, helpful in setting out how the Company understood the Defence.
496. By a Note dated 15 October 2025, and in subsequent oral submissions, Mr Lawrence and Mr Stacey advanced further arguments in opposition to the wine discount point.
497. In summary, with regard to the facts, they made two principal submissions. First, they submitted that Crowe’s argument does not take account of the following points:
- (i) At the time of the notional earlier liquidation, all the relevant entities were controlled by AdC and RB. TWIFL did not enter into liquidation until March 2023; Huntsman did not do so until July 2023; and Anpero is not yet in liquidation. Accordingly, there would have been no liquidator to mount a challenge to TWEISL’s ownership of the wine stock in its name.
 - (ii) It is inconceivable that, on the liquidation of TWEISL, AdC/RB would have made a claim on behalf of Huntsman, TWIFL or Anpero. This would have involved them detailing, and relying upon, their own wrongdoing.
 - (iii) Furthermore, it is highly improbable that any liquidator, and still less AdC/RB, would have thought it worth spending a significant amount to obtain legal advice concerning such a claim: see the range of potential considerations and indeed defendants contemplated by *Grant* as “the necessary defendants to an equitable proprietary claim” (23-040 – 043).
 - (iv) The putative claimants would (assuming their claims to be sustainable - which they are not) be vulnerable to cross-claims brought by TWEISL on the basis that its money had been used for their benefit.

498. Second, they submitted that issues of the type that Crowe wished to rely upon are highly fact-sensitive. However, these issues are not covered by the trial documentation and are not addressed in the expert evidence. Taking Huntsman as an example: (i) this putative claimant was audited by Crowe; (ii) neither its accounts nor its bank statements are in the trial bundle; (iii) the experts on quantum say next to nothing about it. There is no suggestion that the case should be adjourned, but these issues are not capable of being fairly determined on the evidence and materials that are at present before the Court.
499. With regard to the law, Mr Lawrence and Mr Stacey began by submitting that the relevant payments made by TWIF to TWEISL were part of an overall pattern of money being moved between the various entities by AdC. They referred to [5.14] of Mr Pearson's report as summarising the overall position in relation to monies moving between TWEISL and TWIF: netted off, TWIF benefited in a sum exceeding £3m. Accordingly, when TWEISL received money from TWIF, it gave consideration in that the (re)payment *pro tanto* discharged the liabilities arising out of earlier transfers to TWIF from it. TWEISL was therefore a purchaser for value of the relevant payments.
500. Mr Lawrence and Mr Stacey accepted that a constructive trust arises by operation of law whenever the circumstances are such that it would be "unconscionable" for the owner of property to assert his own beneficial interest in the property and deny the beneficial interest of another: see *Paragon Finance Plc v DB Thakerar & Co* [1999] 1 All ER 400, Millett LJ at 409. However, they submitted that: (i) no such constructive trust can be imposed where the monies are received by a party *bona fide* for value without notice; (ii) no trust can be imposed where the monies are received as meeting a subsisting liability, (iii) it would not be "unconscionable" for TWEISL to utilise those funds in the circumstances, and (iv) the monies received from TWIF appear to have been mixed either in TWIF's account or before then and cannot be traced.
501. Mr Lawrence and Mr Stacey submitted that TWEISL was a *bona fide* purchaser for value without notice. TWEISL received the monies from TWIF in satisfaction of the monies it had previously paid to TWIF, and AdC's underlying fraud is nothing to the point.
502. In any event, the principle that the knowledge of a fraudulent director may be attributed to a company when it is sued by a third party does not apply to the present facts.
503. Further or alternatively, Crowe has cited no case in which one victim of a Ponzi fraud has sued another 'prior' victim who has been paid out by the fraudster, and there are multiple reasons in law why such claims cannot be maintained. The potential claimant entities put forward by Crowe were all under the control of ADC. TWIF was invariably or almost invariably the entity to which the TWEISL funds were initially paid, so any claim by TWIF would be met by the answer that the payment to TWEISL discharged TWIF's liabilities to it. Huntsman was controlled by AdC. Crowe says that

nobody knows what TWIF was, but it danced to AdC's tune. If it is right to attribute the knowledge of AdC to TWEISL then it is right also to attribute his knowledge to the other companies/entities involved in the movement of money. For example, Huntsman knowingly consented to the transfer of its funds to TWIF to be paid over to TWEISL.

504. There are also significant problems with any attempt to trace into the wine stock held by LCB. Common law rules “do not permit money to be traced once it has become mixed with other money (so that, for example, misappropriated money cannot be traced once paid into a bank account with an existing positive balance or used to pay part only of the purchase price of an asset alongside money from a separate source)”: see *Grant* at 23-008. As to equitable title, it is necessary to show a distinct equitable title to the original property (*Grant* at 23-009). Where the claim is based upon having been the “absolute beneficial and equitable owner of property”, the common law rules apply (as to which see above) (*Grant* at 23-009-010).
505. Even if it could be shown that the monies were paid over in breach of trust by the directors of Huntsman, tracing into the wine would be highly problematic. Where the moneys are transferred to a person who takes for value without notice, the claim of the owner of the moneys is extinguished just as all other equitable estates or interests are extinguished by a purchase for value without notice: *Re Diplock* [1948] Ch 465, 539 and see also *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2013] Ch 91.
506. The putative claimants would in any event be defeated by the “clean hands” principle:
- (i) Their actions would be those of AdC (whose hands were unclean).
 - (i) They had benefited from the distribution of TWEISL's money via TWIF.
 - (i) They would indeed “by seeking to invoke [equity] have put themselves beyond the pale by reason of serious immoral or deliberate conduct such that the overall result of equitable intervention would not be an exercise but a denial of equity”: *CF Partners (UK) LLP v Barclays Bank Plc* [2014] 3049 (Ch), per Hildyard J at [1133].
 - (i) That is *a fortiori* where TWEISL was a victim of the depredations of AdC who paid its monies to the putative claimants.

Discussion and conclusions

507. In spite of the amount of time that was spent on this issue at trial, the series of Notes produced by each side on it, and the intricacies of the evidence and of the arguments that are summarised above, I consider that this point can be dealt with quite shortly.
508. First, although I consider that there is substance in Ms Evans' complaints about the Company's pleaded case, I do not accept that any deficiencies prevented Crowe from pleading the wine discount/beneficial ownership point, or excused Crowe from

pleading it. I also consider that this is a point that, if it was to be taken, needed to be pleaded.

509. Second, I do not consider that the point has been pleaded in the Defence, or, for that matter, that it has been introduced by anything that the experts have done. As to Ms Evans' specific points: (i) the non-admission of the figures pleaded in [48] and [49] of the PoC is not sufficient to raise this point; (ii) nor is the plea in [34] of the Amended Defence that monies were co-mingled in the TWIF account and that those monies were used for trading; (iii) the fact that [56] of the PoC advances a loss of a chance case in the alternative in respect of (among other things) the stock of wine does not bring in this point or enable Crowe to rely on it without pleading it in the Defence; (iv) although Mr Ashley did raise questions about the ownership of stock, that was in a different context, as Mr Jarvis's evidence reflects (namely, suggesting that further grounds for criticism of Crowe may exist, but he did not understand them to be part of the Company's case); (v) the contents of the joint statement of Mr Pearson and Mr Conti did not have the effect of making this point an issue in the case; and (vi) although Mr Conti did set out his views on the impact of the co-mingling of funds on the ownership of stock, Mr Pearson's response made clear that the Company did not understand Crowe to be contending that the Company "did not own the stock recorded on its balance sheet".
510. Third, I consider that although the disclosure concerning the TWIF General Account should have provided earlier, and although Crowe could not have been expected to identify the wine discount/beneficial ownership point until Crowe had sight of that disclosure, there is no reason why Crowe should not have pleaded the point prior to service of the Updated Counter-Schedule of Loss. Crowe has not explained this delay.
511. Fourth, I accept the submission made on behalf of the Company that the issue cannot be fairly or properly decided on the documents and other evidence currently available. The central reason for this is that the immediate source of the monies that were used to buy the Company's wine stock does not provide the full picture. The fact that monies were credited to the TWIF General Account by, say, Huntsman, does not establish whether and to what extent Huntsman owned those monies. Those monies, or some of them, may well have been TWEISL's monies, that were simply transferred (probably through the medium of the TWIF account) to other entities controlled by AdC, and then back to (in this instance) Huntsman, before being transferred back to the Company. Accordingly, the Company would suffer irremediable prejudice if this point were allowed in now, in circumstances where it may be the Company's fault that the point could not be pleaded before April 2025, but Crowe has failed to plead it with reasonable expedition promptly after that. In these circumstances, if Crowe suffers prejudice as a result of not being allowed to run the point, that is primarily of Crowe's own making.
512. Fifth, I do not consider that Crowe is being exposed to any substantial prejudice in any event, because I strongly doubt that the point has any significant value for Crowe. I

agree with Mr Lawrence and Mr Stacey that the suggestion that any of the potential rival claimants to the wine would bring claims asserting beneficial ownership is fanciful. It is obvious that AdC and RB would not instigate any such claims, for the reasons given by Mr Lawrence and Mr Stacey. The fact that no claim has been intimated by the liquidators of Huntsman and TWIFL, who have been in place since 2023, also speaks volumes. If they did bring claims, they would face, in simple terms, the task of showing why they should be entitled to claim equitable remedies vis-à-vis the Company and its assets without at the same time behaving equitably towards the Company: those who seek equity must do equity, and must come with clean hands. There is no evidence that the Company got back more than was extracted from it, so unless any entity could show that it was seeking to trace monies that it had obtained free of any claim by the Company, or indeed other entities controlled by AdC/RB, its claim would be defeated by the need to give credit to the Company for what it had obtained from the Company, or because it could not establish beneficial ownership of the sums credited in its name to the TWIF bank account. The prospects of any entity doing that are nebulous, because the evidence of AdC and RB as to who owed what to whom could not be relied upon, and even if the paper trail could be made complete there would probably be intractable problems in resolving priorities. Even if any entity could do that, Crowe's only argument that the Company was not a *bona fide* purchaser for value without notice would depend on attributing to the Company the knowledge of AdC that the funds coming in to the Company belonged in equity to another entity; but, at the same time, AdC's knowledge that all the transactions were part of a fraudulent enterprise designed to harm the Company would be attributed to that entity, and it would not have clean hands. In reality, all the entities in this case were used as instruments for AdC's dishonest ends. Ms Evans' arguments to the effect that, because it would be seeking redress, AdC's knowledge should not be attributed to a putative claimant, are based on cases where a company is seeking to make its own director an accomplice for purposes of its claim against a third party, whereas in the present case the involvement of AdC is not limited to abstraction from the putative claimant but amounts to conspiring to harm the Company's interests.

513. Sixth, I do not consider that the proposed draft re-amendment to the Defence pleads the point sufficiently. As I said with regard to the Claimant, I can understand why Crowe should be reluctant to accept that an amendment is required to introduce the point, but if it tries to avoid confronting that issue, it must live by the form of words it chooses.
514. For these reasons, I consider that the wine discount/beneficial ownership point is not available to Crowe. Even if it had been available, I would not have accorded it substance. This makes it unnecessary for me to deal with the remaining points discussed above. In the round, however, if those points had arisen for decision, I consider that Ms Evans' submissions on the law are to be preferred to those of Mr Lawrence and Mr Stacey, save (vitaly) to the extent indicated above: specifically, I consider that Ms Evans is right in saying that AdC's knowledge should be attributed to

the Company, and that any rival claimant would potentially be able to assert equitable proprietary remedies.

The risk of dissipation of wine

515. A related point relied upon by Crowe concerns the risk that, in the event that the Company or the members decided to take steps to preserve assets, the Company's stock of wine would be reduced in value before those steps became effective. Crowe does not accept that any amendment to the Defence is required to enable it to rely on this point.
516. If an amendment is required, however, Crowe has already pleaded a case on dissipation of monies in [41] of the Defence. Crowe seeks permission to amend [41] of the Defence to add the words that are underlined below:

“Further, TWEISL's case is that there was a fraud by its directors. Even if (in the light of further steps by Crowe) further measures had been taken to recover monies paid to or held by third parties, and ensure that all sums were held by TWEISL in TWEISL's own bank account (or some other identified location) or to secure or preserve wine,

(a) the directors would have had authority to make payments out of that bank account (or other location);

(b) the directors would have been able to sell wine in advance of any steps being taken that would have prevented this;

(c) As such, the directors could have misappropriated the sums at any time, and/or could have sold wine before steps were taken preventing this, resulting in the same or similar alleged losses to TWEISL (or substantially reducing those alleged losses).”

517. In his second witness statement, Mr Jarvis describes this as the “smash and grab” case. He says that (i) it was raised for the first time by the Court on Day 4 of trial, (ii) it is not pleaded, (iii) it is not dealt with in the expert or other evidence, and (iv) had it been properly identified at the right time, it would have been addressed in evidence.

518. Mr Jarvis continued as follows:

“It is clear that there is additional evidence that would be relied upon had this point been run at the appropriate time, for example evidence (both fact and expert) going to:

- (i) How quickly Mr della Casa would have sought to sell the wine and (if so) how quickly he would have been able to sell the significant quantity of wine at the bonded warehouse. This might encompass an assessment

of whether other people involved at Anpero in managing TWEISL's wine stock would have raised significant concerns about an auction sale or fire sale of all or part of TWEISL's wine stock (as to which see below). It is not clear to me that if he had become aware that Crowe had reported concerns about fraud to TWEISL's shareholders, Mr della Casa would have necessarily sought to immediately sell all or a substantial part of TWEISL's wine rather than, as Crowe has suggested, continue to try and obfuscate and deceive TWEISL's auditors and shareholders. Such evidence as is available appears to show that Mr della Casa took relatively small sums of money repeatedly over time towards household expenses (for example payments towards mortgages) (it is fair to say the sums taken accelerated post 2016 – see Mr Pearson's report at paragraphs 5.25 – 5.38), but not large lump sums as would be the case in a "smash and grab" scenario. But this has not, of course, been a focus of the evidence to date.

- (ii) Whether the bonded warehouse (LCB) would have been cautious about acting on instructions in respect of the auction or fire sale all or a significant part of TWEISL's wine on the basis of instructions solely from Mr della Casa. It is noted that even though this has not been an issue for disclosure in this case (because it has not been pleaded by Crowe), the following appears from preliminary searches to be the case:
- (iii) Documents on Trial View indicate that contact with LCB in the context of stock takes by Crowe in the context of its audit work was conducted through Chris Smith or William Grey at Anpero, not through Mr della Casa.
- (iv) Documents disclosed in this case indicate that contact with LCB was primarily through William Grey at Anpero; there were no instances of Mr della Casa giving instructions covering the sale of wine to LCB directly.
- (v) I have also arranged for searches to be conducted of documents that were not disclosed by TWEISL to be carried out. That has also identified documents that indicate that Mr della Casa did not give instructions to LCB to sell wine directly and that the primary contact with LCB was through either Mr Grey or Mr Smith at Anpero.
- (vi) These preliminary searches indicate to me that any direct instructions from Mr della Casa concerning the sale of all or a substantial part of TWEISL's wine stock urgently which did not copy in Mr Grey and/or Mr Smith would have appeared inherently odd to LCB. It seems far from clear to me that LCB would simply have acted on instructions from Mr della Casa which were not copied to Mr Grey and/or Mr Smith and

without checking with Mr Grey and/or Mr Smith. There has been no suggestion (from either TWEISL or Crowe) that Mr Grey or Mr Smith were dishonest or would voluntarily involve themselves in fraud (and therefore potential personal liability), when they would at the relevant time (as far as I or the Court is aware) likely have been thinking that TWEISL was in the process of conducting an orderly and measured sale of TWEISL's wine stock leading to an MVL process in due course. What rationale could Mr della Casa have provided to those two individuals for a fire sale of all or a substantial part of TWEISL's wine stock in double quick time? This has simply not been explored in evidence to date because it was not part of Crowe's case. A further issue would be whether Nirav Patel would have been aware of the concerns of Crowe and what his reaction (as a qualified accountant not directly implicated in the suspected fraud) would have been. Would he have taken steps to stop Mr della Casa preparing a fire sale of all or part of TWEISL's wine?

- (vii) Whether shareholders notified by Crowe of the likelihood of director fraud at TWEISL would have immediately acted to prevent the same, including urgently getting in contact with the bonded warehouse to ensure that the bonded warehouse did not act on instructions from the directors of TWEISL to sell wine held for TWEISL and, if so, what the bonded warehouse would have done if it had become aware that Crowe had raised such concerns about TWEISL's directors with the shareholders.
- (viii) Whether Mr della Casa would have been forced to pay duty and tax on the wine held for TWEISL when conducting an auction or a fire sale of the same. My understanding is that if the wine held by TWEISL in the bonded warehouse was to be sold out of bond, then VAT and duty would become payable on that wine. VAT of approximately £800,000 (i.e. 20% of £4m), plus approximately £3.20 per bottle of Duty would have to be paid before the wine could be removed from the bonded warehouse. There is simply no evidence as to whether it would be practically possible to sell a very significant amount of wine in bond at auction or in a fire sale so as not to incur that Duty and VAT. In any case, such an auction or a fire sale in bond would seem unlikely if Mr della Casa wished then to dissipate the proceeds – it would leave an obvious trail. Mr della Casa (and any potential purchaser) would no doubt be alive to the fact that whether the wine was sold in bond or not there was an obvious risk in a fire sale of a large amount of wine below market value (which was readily ascertainable from Liv-ex) of challenge by a liquidator subsequently appointed to TWEISL (for example as a transaction at an undervalue under section 238 Insolvency Act 1896 or

similar, particularly if such fire sale was to an entity connected in some way to Mr della Casa).

- (ix) If Mr della Casa had attempted to sell the wine via an auction or a fire sale, whether shareholders would have become aware of his attempts to do so and would have reacted to the same irrespective of whether they had been notified by the auditors of fraud or suspected fraud at TWEISL by Crowe.”

519. Mr Jarvis is mistaken in saying that the case that Crowe claims to be entitled to run was first raised by the Court on Day 4 of the trial. On the contrary, in her opening submissions Ms Evans said “fraudulent directors are not going to sit and do nothing with money in the bank account and.... stock in a warehouse unsold”, and that even if the shareholders did find out about audit concerns, then there would still be time for AdC to do something in the meantime. I remarked that I had that “very much in mind”.

520. For the rest, in his fourth witness statement, Mr Roberts responded to Mr Jarvis’ evidence by making the following points:

- (i) Crowe has already put TWEISL to proof on causation at [2.2] of the Amended Defence.
- (ii) TWEISL has nowhere acknowledged that the issue about whether AdC would have dissipated stock has in part come to the fore because of its own attempted shift of emphasis away from it going into liquidation and onto the idea of more urgent steps being taken. However TWEISL would have met its end the Court needs to decide what stock it would have held. In accordance with usual principles, that is a matter for TWEISL to show.
- (iii) It is only if and insofar as the Court ultimately concludes that more needs to be said, Crowe seeks permission to the proposed Re-Amended Defence. The new wording at [41] seeks to deal with TWEISL’s specific criticism that that paragraph referred to cash being dissipated but not stock (although there was a general requirement on TWEISL to prove causation).
- (iv) Crowe strongly objects to the idea that TWEISL has suffered any prejudice - or any prejudice that is not self-inflicted. The LOID included in it an issue about what the directors as well as the shareholders would have done.
- (v) TWEISL should already have called all of the evidence that it wanted to rely on about its own shareholders.

- (i) Nobody was ever going to call evidence from AdC, his Anpero assistants (Mr Smith and Mr Grey) or Mr Patel.
- (i) It was always TWEISL's responsibility to articulate why it says the wine would still have been there and available to any liquidators.
- (i) Crowe is not suggesting a trial within a trial but that based on the evidence as to AdC's modus operandi, the court should form a view about the likely speed at which he would and could have sold wine if he had thought there was a risk of the fraud coming to light.
- (i) The arguments put up in this regard by Mr Jarvis are "straw men". For instance:
 - There is no reason to think that ADC would be impeded by a need to pay VAT/duty.
 - It is not the case that there is no evidence on large sums having been taken from TWEISL by Mr della Casa. On the contrary, the evidence shows that in the run up to the MVL, wine was sold at a substantial rate.
 - Crowe's Closing already has a time lag analysis for several months of each year but an extended version is at [JPR4/19]. Indeed, per that analysis, in the 9 month period following the notional notification date in respect of the FY2016 audit year in the run up to the liquidation, over £2 million of 'deposit' funds were transferred from TWEISL to TWIF General, being the proceeds of the sell off of TWEISL's stock over this period. For the avoidance of doubt, this figure broadly accords with the table at [125] of TWEISL's Closing - this also substantiates a sell off of over £2m in stock between December 2017 and September 2018.
 - Crowe's Opening Skeleton set out evidence that Messrs Grey and Smith either did what they were asked or were easily placated by ADC. For example:

At [53], Crowe referred to emails from Mr Smith to the directors regarding TWEISL's cashflow needs, including an email on 27 July 2017 in which Mr Smith was clearly aware of commingling of funds across TWEISL and TWIFL funds. At [54], Crowe referred to an email from Mr Grey to ADC dated 1 August 2016 chasing for money: "S**T! May have to change priorities now can you think of anything to say to Graham".

At [55], Crowe referred to an email from Mr Smith dated 26 September 2016 stating as regards Huntsman "I was mildly horrified to see in Fabian's accounts that the amount of HWEISL funds on deposit actually rose in August, even though the deposit problem was confirmed in July. Is this really

right. I guess it must be as the recent subscriptions don't seem to be available for investment. But if so.....".

At [57], Crowe referred to a note of a meeting between Mr Smith, AdC and RB on 12 October 2016 which reads "Negotiations ongoing about releasing cash from deposit early, but fallback position still everything available as from 1 Jan 2017".

At [71], Crowe referred to an email from Mr Grey to ADC on 11 January 2018 referring to Mr Matel having reconciled TWEISL's accounts "showing a bank balance of £419,632.07 yet the current a/c only shows 18k". He asked "can we not access the other 400k – presumably from deposit.....We don't want the rumours to start going round the trade again that we can't pay our bills".

Far from indicating that either Mr Smith or Mr Grey would have taken steps to intervene to prevent a fire sale, the evidence overwhelmingly points to the likelihood that both individuals would have continued to give effect to ADC's instruction. TWEISL has not identified any persuasive evidence to the contrary.

(i) Even more surprising is Mr Jarvis' suggestion that Mr Patel might have taken steps to a stop to a fire sale. Crowe's arguments surrounding the role of Mr Patel are addressed in [204] of Crowe's Opening and [214]-[216] of its Closing submissions. TWEISL's case now seems to suggest that Mr Patel was relevant - but that his role was opposed to the case put forward by Crowe on contributory negligence (which has already been raised).

521. In my judgment, Crowe is fully entitled to deploy the argument that if measures had been initiated to secure or preserve wine, the directors would have been able to sell wine in advance of any steps being taken that would have prevented this, regardless of whether [41] of the Defence is amended in the form for which, as a precautionary or fall back measure, Crowe seeks permission. I accept the points made by Mr Roberts. So that there can be no doubt about the matter, I grant permission for that amendment. In particular, in view of the Company's failure to plead a fully articulated case on what protective measures would have led to what recovery or preservation of assets, it would be entirely unreal to deal with the issues on causation constrained by the assumption that whatever assets the Company had at the time when protective steps were initiated those assets would remain undiminished either by the passage of time or by steps taken by the directors to line their own pockets and reduce what was available to the members.

522. That is the approach that I have followed below, and that I consider to be plainly right. I observe that, in fact, almost all of the reduction in wine stock for which I have made allowance in coming to my conclusions relates to sales at a rate which was achieved at times when the directors were under no pressure from Crowe or the shareholders. I

have made a further allowance for accelerated sales which I think plainly reasonable and fair.

523. The “smash and grab” scenario addressed by Mr Jarvis is different. I agree that if Crowe wished to advance a positive case to the effect that the directors would or might resort to “scorched earth” or “fire sale” tactics, that ought to have been pleaded. I consider that it would be prejudicial to the Company to allow such a case to be advanced at trial when it has not hitherto been pleaded, because there might be evidence which the Company would thereby be deprived of the opportunity to call that this would be impracticable, or that it could only be achieved in a way which would attract attention and thus lead to enhanced prospects of putting an end speedily to the dissipation of assets. That was the thrust of oral submissions made by Mr Lawrence on the topic of prejudice. I do not consider that there is any prejudice in allowing Crowe to rely upon a case of depletion at the rate that, on the evidence, was achievable in the ordinary course of business, or at a rate that is modestly accelerated in comparison to that rate and which does not involve resorting to any out of the ordinary methods of sale, because (i) such a case relies on the evidence already before the Court, and does not require any additional evidence either to advance it or to rebut it, and (ii) the Company should have come to court prepared to deal with such a case (and indeed, should have pleaded a case that pre-empted it).
524. I have taken the view that I have about the “smash and grab” case for the reasons given above, and not because I consider that there is force the points made by Mr Jarvis, which, in agreement with Mr Roberts, I regard as mostly lacking in substance. For example, Mr Jarvis suggests that “an auction or a fire sale in bond would seem unlikely if [AdC] wished then to dissipate the proceeds – it would leave an obvious trail”. I do not consider that there is any evidence to suggest that AdC would be deterred by any such concern. Similarly, Mr Jarvis states: “[AdC] (and any potential purchaser) would no doubt be alive to the fact that whether the wine was sold in bond or not there was an obvious risk in a fire sale of a large amount of wine below market value ... of challenge by a liquidator subsequently appointed to TWEISL”. Again, I do not consider that AdC would be worried about this, and the suggestion that any prospective purchaser would be is (rightly) merely floated. Indeed, I regret to say that AdC would have been right to be sanguine about such matters: he seems to have made off with at least £1.9m with complete impunity; neither the CVL liquidators nor the police have troubled him at all.

THE AUDIT FOR Y/E 2012

History of the audit

525. This was the first audit year. It is different to all of the other 6 audit years because, initially at least, the Company claimed that its cash was held with Investec not Lilliput.

526. The Company was in its infancy at the time of the first audit, having been incorporated in November 2011, and having sent out an offer for subscription to potential shareholders from around late 2011/early 2012. This stated (among other things) that (i) “The objective of the Company is to achieve capital growth, as measured in pounds sterling, through trading in physical stocks of superior quality wines from established producers and of very good to outstanding vintages”, (ii) “It is not envisaged that any income or gains derived from the Company’s trading activities will be distributed by way of dividend”, and (iii) “It is intended that the Directors will consider options for realising the value of Shares, probably either by way of sale or liquidation, after the end of the EIS qualifying period of three years. Any such decision will take account of obtaining the maximum value for Shareholders and it is hoped that this will be achievable in a 4 to 5 year timeframe from the commencement of the Company’s trading activity but there can be no guarantee that realisation will take place within this period”.
527. The offer for subscription also stated that both AdC and RB were directors of Anpero and that:
- “The Scheme Manager has been appointed by the Company to trade the Company’s wine stocks on its behalf and will use its disciplined methodology based on its proprietary stock picking philosophy and its relative value analysis of the wines to be traded by the Company to provide the framework through which purchases and sales of wine will be made.”
528. On 29 April 2013 Crowe sent its engagement letter.
529. According to the draft accounts in existence by April/May 2013, the Company had cash and cash equivalents of £189,199.
530. On 26 July 2013, Crowe sent the Company an agenda for an Audit Clearance meeting, which then took place on 30 July 2013 with AdC and the Company’s self-employed bookkeeper, Mr Patel. Item 4 under the heading “Outstanding items of audit evidence” recorded a discussion of the Company’s money. The version of this agenda available at the trial reads as follows (the second paragraph recording work to be done by Crowe, and the third paragraph recording the work that was later done by Crowe):
- “ADC explained that monies from the various investment vehicles that Anpero are scheme manager for are pooled and place together on deposit as this saves on charges and maximises the potential interest rate that can be obtained. In total, an amount of £357,000 was placed on deposit with Investec on 21 December (with this deposit maturing on 21 Jan 2013), which included £137,000 of TWEISL’s funds. A copy of the money market trade confirmation has been provided (see 1 C16).

In order to obtain further confidence regarding the value of monies placed on deposit by TWEISL as at 31/12/12 we need to evidence the payment of £137,000 going out on 21 Dec and being received back in on 21 Jan.

This has been followed up with Nirav. Rather than £137,000 being paid over in Dec and then being received back in Jan, it is the case that transfers were made in and out of the money market deposit during 2012, which resulted in a net amount of £137k being held at 31/12/12, and further amounts were then added into the deposit following the year end. The transfers in and out of the deposit during 2012 have therefore been agreed to TWEISL's bank statements – see 1 C19 – and it has been agreed that a written representation confirming the portion of the deposit as a whole that relates to TWEISL funds will be provided in the LOR [i.e. the directors' Letter of Representation].”

531. The Money Market Confirmation (“MMC”) from Investec is dated 21 December 2012. It is addressed to TWIFL. The version disclosed for trial contains manuscript markings which break the £357,000 down into “TWEISL £137,000” and “2012(4) £220,000”.
532. The contemporaneous emails show that Crowe also looked at the Company's Hoare & Co bank statements and at the nominal ledger. The latter documents, and manuscript markings on them made by Crowe, reflect numerous anomalies, but also suggest that Crowe considered how they could be reconciled with the narrative provided by AdC. For example: (i) a manuscript note on the nominal ledger states: “Net of these transactions = £137k, being the amount held on deposit as at y/e. The individual transactions have been agreed to supporting bank statements – see the following pages”, (ii) in respect of a number of bank statement entries, including the entry for 26 November 2012 showing £228,000 coming in from TWIFL, it is noted as follows: “Part redemption of Investec deposit. Redemption funds paid out by Investec to [TWIFL] and then transferred by them to TWEISL”, and (iii) in other instances, the manuscript notes on the bank statements record that: “A portion of monies received on 19 June are actually funds that were placed on deposit by another entity managed by Anpero, being Wine Investment 2011 tranche 4”.
533. The directors' Letter of Representation (“LOR”) dated 6 August 2013 was signed by RB, and included the following representations:
 - (1) “£137,000 of the amount of £357,000 held on deposit with Investec at 31 December 2012 in a pooled money market term deposit is cash of the Company, as opposed to being cash of another entity also managed by [Anpero].”
 - (2) “Complete information has been provided to you regarding the identification of related parties and that we are not aware of any significant transactions with related parties.”

534. Crowe signed its audit opinion on 6 August 2013.

The auditing experts' evidence

535. Mr Ashley was highly critical of Crowe's efforts in this audit year. His principal criticisms with regard to the treatment of deposits included:

- (1) In Mr Ashley's view, the explanation provided by AdC for the Investec deposit lacked credibility, because any marginal increase in the interest rate (which was in any event only 0.4%) or avoidance of an increase in bank charges would not have compensated for the increased risk that the Company was running by "co-mingling" its cash with other funds. Nonetheless, Crowe accepted this explanation without question.
- (2) In Mr Ashley's opinion, the express representation that Crowe required or accepted for inclusion in the LOR showed "a fundamental lack of understanding by Crowe of the legal and commercial effects of the transactions". It was apparent from the MMC from Investec, supported by the subsequent cash movements observed by Crowe flowing through the current account bank statements, that Investec regarded the deposit as one made by TWIFL. The Company had no contractual claim on those funds as against Investec; any contractual claim could only be against TWIFL. Even taking the explanations at face value, a reasonably competent auditor should have concluded that the effect of these transactions was that the Company had lent money to TWIFL and that is how it should have been reported in the financial statements.
- (3) There is no audit evidence as to whether the Company's deposit with TWIFL actually existed and that TWIFL acknowledged this debt.
- (4) In considering the "value of monies placed on deposit by TWEISL as at 31/12/12" as indicated in the second paragraph of the Audit Clearance document, Crowe seemingly only had regard to the face value of the amounts paid to and from Investec, TWIFL or TWIF. Crowe had no audit evidence as to their recoverability. Even if TWIFL had repaid the amount in full later in 2013, that would not have provided sufficient evidence that TWIFL would have been able to repay the funds when due on 21 January 2013, or would be able to repay any amounts advanced in the future.
- (5) In fact, on Mr Ashley's analysis of the documents, Crowe had evidence on file that, far from being repaid, the amount recorded by the Company seemingly as a bank deposit had increased to £665,936 by 26 June 2013. Indeed, entries from the nominal ledger on the audit file for 2013 indicate that by 6 August 2013 (the date on which the 2012 audit opinion was signed) that amount had grown to £891,000. All the payments and receipts giving rise to this net increase are seemingly shown on the bank statements for 2013 as transfers to/from TWIF

apart from one payment of £100,000 on 21 February 2013 which is shown as a faster payment in relation to an Investec deposit. To the extent that any such funds were forwarded by TWIF to Investec (or another similar financial institution) either directly or via TWIFL, there is no reason to believe that this would not also have been regarded as a deposit made by TWIFL or some other fund.

- (6) In Mr Ashley's opinion, the amounts seemingly lent to TWIFL do not meet the definition of cash and cash equivalents as defined in ISA 7 - Cash Flows, namely "cash on hand and demand deposits" and "short-term, highly liquid investments that are readily convertible to known amounts of cash and which are subject to an insignificant risk of changes in value" respectively. The credit risk inherent in such a loan means that there is more than an insignificant risk of changes in value. Even if Crowe had obtained sufficient appropriate audit evidence as to existence and recoverability, the categorisation in the financial statements should have been as a debtor. Also, the relevant related party disclosures should have been made.
- (7) Note 12 to the financial statements includes the following disclosures in relation to credit risk and liquidity: "The Company ensures that bank accounts are held with reputable banks. The carrying amount of these financial assets represents the maximum credit exposure" and "In order to ensure liquidity, the Company maintains sufficient cash and cash equivalents to meet the Company's obligations as and when they fall due." Further, Note 1.5 states that: "The Company has no significant concentrations of credit risk. The Company has credit risk management policies in place and exposure to credit risk is monitored on an ongoing basis." The amounts purportedly lent to TWIFL do not meet the criteria in Note 12, and, in Mr Ashley's opinion, the disclosure was grossly misleading in implying that they did. Further, there was clearly a concentration of credit risk, and Crowe seemingly did no work to establish whether the comment about having credit risk policies in place and monitoring credit risk was justified. Given the level of credit risk actually incurred, in Mr Ashley's opinion these disclosures were therefore also grossly misleading.
- (8) As the purported deposit of £137,000 constituted nearly 20% of the net assets of the Company of £741,836 as at 31 December 2012, Crowe did not have sufficient evidence to sign an unqualified audit opinion on the 2012 financial statements of the Company.

536. Mr Main's evidence is more equivocal. In some instances Mr Main agrees with Mr Ashley's views. In other instances Mr Main does not directly confront a number of the points made by Mr Ashley. Among other things, Mr Main states:

- (1) With regard to the handwritten narratives on the nominal ledger and on the bank statements, Mr Main points out that the source is not explained and “nor is it explained how these explanations were obtained and verified”.
- (2) The narrative on the bank statements suggests that apart from an original deposit of £700,000, the other transactions that are material to the claimed balance of £137,000 appear to relate to payments to, or receipts from, TWIFL. This appears to accord with Mr Ashley’s view that the Company only had claims against TWIFL.
- (3) Mr Main looked at the financial statements of TWIFL for Y/E 31 December 2012 to 31 December 2015, which have been disclosed in these proceedings. He explains that, according to these financial statements, TWIFL is a Segregated Accounts Company established under the law of Bermuda, such that assets and liabilities of TWIFL are segregated into separate sub funds, with the assets and liabilities of each sub-fund being ring-fenced and attributable only to investors in that sub-fund. 2011 (4) Tranche is identified in those financial statements as a sub-fund of TWIFL. I observe that this appears to corroborate what is suggested by the manuscript notes on the Company’s bank statements, namely that some monies received by the Company “are actually funds that were placed on deposit by another entity managed by Anpero, being Wine Investment 2011 tranche 4”. I further observe that the notes themselves (i) indicate that there was a failure properly to segregate different entities’ monies, and (ii) suggest that the monies in question might be the subject of claims by others against the Company.
- (4) The MMC provided by Investec is addressed to AdC at TWIFL, and appears to set out details of a money market trade made by TWIFL in relation to a fixed term deposit dated 21 December 2012 and maturing on 21 January 2013 in the sum of £357,000, with interest payable at a rate of 0.40% on the maturity of the deposit. A handwritten annotation on this certificate states “TWEISL £137,000 and 2012(4) £220,000”. These amounts are then totalled to £357,000. Mr Main points out that (i) it is not clear who annotated this document, and (ii) no further explanation has been provided as to how the amounts were split as suggested by the handwritten annotation.
- (5) Mr Main refers to the contents of the Audit Clearance meeting document which I have set out above. He also refers to an audit working paper entitled “Cash Lead Schedule” which shows that the balance in respect of “cash and cash equivalents” included on the balance sheet comprised the current account with Hoare & Co of £52,199 and a deposit account of £137,000. The working paper has the following annotation against the deposit account balance: “See 1C11 and 1C12 – audit evidence obtained via the process of audit clearance meeting”. Mr Main notes that no other audit procedures are recorded on the audit file in relation to the amount of £137,000 which was included within the total for “cash and cash equivalents” in the balance sheet on 31 December 2012.

- (6) Mr Main observes that the explanations recorded on the Hoare & Co bank statements appear to have been provided by Mr Patel, as the note of the Audit Clearance meeting states “This has been followed up with Nirav”. Mr Main points out that Crowe did not record on the audit file how it had verified that it had been agreed with TWIFL that of the total balance held in the Investec bank account £137,000 related to the Company.
- (7) Mr Main comments that Crowe’s actions suggest that it formed the opinion that the Investec deposit was a form of pooled banking arrangement whereby separate entities can, by arrangement with their bankers, agree that the beneficiaries of a bank account shall be segregated between separate entities. Mr Main points out, however, that (i) the fact that Crowe formed this opinion is not documented on the audit file, and (ii) there is no evidence on Crowe’s audit file that Crowe confirmed that any such arrangement was in place. Mr Main states that, in the absence of such an agreement with Investec, if the balance of the Investec account was held only for the benefit of TWIFL, the correct treatment of the £137,000 would be to show this as a debtor amount owed to the Company by the counterparty (apparently TWIFL) or any other counterparty who was the beneficiary of the Investec account rather than disclose this as a bank balance. These observations are in line with Mr Ashley’s views, and both men concur on the last point.
- (8) Mr Main notes that Crowe obtained a LOR signed by RB on behalf of the Company setting out formal representations made by the directors to Crowe in relation to its audit, which included the representation concerning the £137,000 which I have referred to above. Mr Main explains that “The main purpose of such a letter is to ensure that the directors are aware of their responsibilities to disclose all relevant information to the auditors and to remove any ambiguity that might exist in verbal representations and explanations that the auditors have received”. Mr Main observes that these written representations confirm that the directors of the Company represented in writing to Crowe that the Investec account was a pooled bank account in which the Company had a direct interest rather than being money held by TWIFL on behalf of the Company. Mr Main does not appear to suggest that this confirmation meant that Crowe did sufficient to allay concerns about the £137,000, although it may be relevant to contributory fault.

537. Mr Ashley and Mr Main produced a joint statement dated 22 May 2025. This states:

- (1) Under the heading “Understanding the Business – Areas of Agreement”:

“The Experts agree that Crowe was advised in the course of their 2012 audit that TWEISL’s cash had been pooled with other funds managed by Anpero in an Investec bank account in the name of [TWIFL]. TWEISL’s directors represented to Crowe that this Investec bank account held £137,000 belonging

to TWEISL. Crowe did not indicate in their audit documentation that they understood the pooling arrangements and hence whether TWEISL had any direct interest in the Investec account.”

- (2) Under the heading “Crowe’s audit of the Deposit Account – Areas of Agreement”:

“The Experts agree that Crowe failed to obtain sufficient appropriate audit evidence in respect of the existence or recoverability of the Deposit Account in any year. The Experts also agree that a reasonably competent auditor would have recognised that the Deposit Account represented a significant audit risk, including the risk of fraud specifically by the directors. The Experts agree that Crowe did not adequately identify the significant audit risks in relation to this balance including in relation to the co-mingling of funds and therefore did not apply an appropriate level of professional scepticism.

The Experts agree that it is unlikely that in any financial year it would have been appropriate to describe the Deposit Account balance as cash and cash equivalents in the financial statements of TWEISL, but instead it should have been presented, to the extent the balance was recoverable, as a debtor (receivable) and where appropriate disclosed as due from a related party.

The Experts agree that the further audit procedures that a reasonably competent auditor should have performed, or attempted to perform, in order to obtain sufficient appropriate audit evidence would have necessitated obtaining information either independently of the directors and/or independently corroborating the same. Examples of the steps that might have been taken include those described in paragraphs 6.2.5 to 6.2.9 and 6.2.15 to 6.2.18 of Mr Ashley’s report and in paragraphs 6.4.35, 6.4.36 and 6.4.46 to 6.4.48 and 6.4.83 and 6.4.84 of Mr Main’s report and the further evidence referred to in paragraphs 6.4.83 and 6.4.84 of Mr Main’s report would apply equally to 2012 if on further inquiry Crowe had established that the counterparty to the balance was not Investec.”

- (3) Under the heading “Possible outcomes of further audit procedures that could have been, but which were not, performed in respect of the Deposit Account - Areas of agreement”:

“The Experts agree that in relation to the 2012 audit that if it was identified that the Deposit Account at that date may have been materially misstated because there was either a lack of sufficient appropriate audit evidence as regards its existence or recoverability or that there was evidence that this had become irrecoverable, then a reasonably competent auditor would have needed to have considered whether this might also have applied to any increase in the balance after 31 December 2012 and before they issued their audit opinion on

6 August 2013. If further material loss was shown to have arisen or there was a continuing lack of sufficient appropriate audit evidence as to the recoverability of the Deposit Account after that date, then that would have been reportable in the financial statements as a non-adjusting post balance sheet event in accordance with paragraph 21 of IAS 10.”

- (4) Under the heading “Possible outcomes of further audit procedures that could have been, but which were not, performed in respect of the Deposit Account - Areas of disagreement”:

“Mr Ashley considers that in each financial year a reasonably competent auditor having carried out or attempted to have carried out the further audit procedures described in the Experts’ reports is very unlikely to have been able to obtain sufficient appropriate audit evidence on either the existence or the recoverability of the Deposit Account balances in each financial year. Mr Main explains that it was outside the scope of his report to form a view on what the results of such audit procedures might have been, as explained further below.

Mr Ashley considers that further investigation of the background and financial position of Anpero would have been carried out by a reasonably competent auditor. Mr Main agrees that investigation into the financial position of Anpero should have been carried out, but only if there was a material amount owing by Anpero to TWEISL or if there were material amounts owing by another debtor of TWEISL and that debtor would only be able to repay TWEISL if that debtor was in turn repaid amounts owed by Anpero. Mr Ashley also considers the most likely course of action is that a reasonably competent auditor would have contemplated resigning and sought legal advice regarding the action they should take and in respect of the content of any letter explaining their resignation or some other communication with shareholders. Mr Main cannot comment on whether a resignation would have been an appropriate course of action as he cannot say what the outcome and explanations received in respect of the further audit procedures would have been.”

538. Crowe conceded before me that the audit evidence that it obtained did not go far enough to support the recoverability of the balance held at Investec. Crowe also accepted that it did not do enough to probe the pooled banking arrangement alluded to by the Company and whether the Investec balance was held for TWIFL rather than the Company. These concessions reflect some of the areas of agreement contained in the joint statement.
539. The main area of disagreement between Mr Ashley and Mr Main in respect of the Y/E 2012 relates to what further enquiries Crowe should have made and what the results of those enquiries would have been. In particular, in relation to Anpero, Mr Ashley took the view that a reasonably competent auditor would have “identified the risks of fraud due to the comingling of assets (and specifically cash) by Anpero”, and would then

have “enquired further into Anpero’s financial position regardless of whether or not it was at that stage identified as a debtor”. Mr Ashley further expressed the opinion that “it would have been very unlikely that a reasonably competent auditor could have obtained sufficient appropriate audit evidence as to either the existence or recoverability of the Deposit Account. Moreover in seeking such evidence it would have been apparent that there was a significant risk of fraud by the directors leading to the auditors considering resigning and taking legal advice as outlined in his report”.

540. Mr Main’s position, in short, is that it was outside the scope of his instructions to consider what the result of any further audit procedures and enquiries carried out by Crowe (as a reasonably competent auditor) might have been, but that he considered that there were a range of possible outcomes, and that the end result might have differed depending on what further information Crowe obtained.

541. Mr Ashley fleshes out what he says Crowe should have learned about Anpero as follows:

“In relation to the 2012 audit, had Crowe reviewed the public information on Anpero filed with Companies House [Crowe] would have established the following from [Anpero’s] unaudited financial statements for the year ended 31st December 2011 (the last set of financial statements filed before Crowe signed the 2012 audit opinion):

- As at 31st December 2011 Anpero had debtors of about £371,000, creditors of about £1,433,000 and an overall net deficit of £1,057,000.
- Included in creditors were amounts owed to Bristol, a related party of RB and Alladin, a related party of AdC, of £382,000 and £545,000 respectively.
- The related party disclosures note also shows that included in creditors were amounts owed to “The Wine Investment Fund Limited – 2011(2) Tranche” of £245,000. The comparative amount was an amount of £150,000 owed to “The Wine Investment Fund Limited 2010(6) Tranche”.
- There is no information on the remaining creditors of about £261,000.”

542. Mr Ashley broadens his contentions concerning Anpero, and his criticisms of Crowe, in an earlier part of his report in which he deals with the factors which he considers Crowe should have had in mind when considering the possibility of fraud by the directors, in particular AdC. Mr Ashley makes these points in the context of the proper approach to audit planning, but they are also relevant to how sceptical Crowe should have been, and to whether it should be concerned by what it was told or learned. Mr Ashley’s opinions include the following:

- (1) When (as set out in the audit files) Crowe commented on whether the industry or sector was known to be susceptible to fraud, it is apparent that Crowe only

considered the nature of the Company's underlying business (i.e. trading in fine wine) and not the fact that the company operated effectively as an unregulated investment scheme. Crowe should have appreciated that many such schemes have been prone to misappropriation of assets by their management/promoters. Indeed, Mr Ashley's researches show that wine investment scams were being reported on even at the time of the first audit.

- (2) It is unclear what part RB, (the other director of both the Company and the Scheme Manager, Anpero) played in the day-to-day operations of the Company. It appears from the audit files that Crowe's involvement was almost exclusively with either AdC or the contracted bookkeeper, Mr Patel. In Crowe's Systems Review summary, in considering the risk of management override of controls Crowe noted that "Accountant is consultant (sic), reducing risk". However, Crowe acknowledged elsewhere that Mr Patel prepared the accounting records based on information provided by management. Therefore, in Mr Ashley's opinion, this consideration did not reduce the risks of management defalcation. Accordingly, Mr Ashley takes the view that Crowe should have given serious consideration to whether there were any controls exercised over the actions of AdC or whether, as effectively the dominant chief executive, he was able to appropriate funds for his own benefit. The Company was effectively an unregulated investment scheme soliciting third party investments from a wide range of individuals, and this pointed to an enhanced need for (i) controls and (ii) consideration of the same.
 - (3) Crowe was aware that both the directors of the Company and the Scheme Manager were involved with other entities or funds with similar objectives to the Company. This possibility was noted in the 2012 Information Memorandum. In addition, as appears from the Audit Clearance meeting, during the course of the 2012 audit Crowe became explicitly aware that (according to AdC) "monies from the various investment vehicles that Anpero are scheme manager for are pooled and place (sic) together on deposit". Mr Ashley regards this is completely contrary to what a conscientious fund manager would do – namely to establish controls to ensure that the assets of the various funds were properly segregated. In spite of this, Crowe appears to have given no consideration to whether such pooling of funds might facilitate fraud or misappropriation.
 - (4) Taking into account these factors, Mr Ashley considers that a reasonably competent auditor would have concluded that the risk of fraud by the directors was significant and that such an auditor would have planned its audit work accordingly.
543. Focussing on the monies allegedly held on deposit on behalf of the Company, Mr Ashley considers that if Crowe had acted as a reasonably competent auditor, it should have (i) sought sufficient appropriate evidence as regards both the existence and recoverability of the monies due from TWIFL, (ii) been concerned to ensure that it

had sufficient appropriate evidence as to the recoverability of the deposit outstanding at the time of signing its audit report, and (iii) enquired whether the increased deposit reflected a continuation of the same arrangement as described in the Audit Closing meeting on 30 July 2013 (i.e. a “pooled money market deposit” effected through TWIFL).

544. Mr Ashley recognises that the response to such enquiries may well have been that the Company’s money was now deposited with Lilliput. If that was the response, Mr Ashley considers that Crowe, acting as a reasonably competent auditor, should have sought further information on Lilliput and the nature of the arrangements including:

- (1) Understanding why funds were being routed via TWIF (as the explanation of there being a “pooled money market deposit” would no longer be valid).
- (2) Ascertaining exactly what Lilliput was, how the Company had heard of it, and why it was a suitable entity with which the Company had placed so much money.
- (3) Understanding the term and other conditions of the deposit.
- (4) Asking how Lilliput was able to pay a significantly higher return on the deposit than was obtainable for conventional money market deposits on the same terms.
- (5) Seeking evidence regarding the financial position of Lilliput, the existence of the deposit, and the ability of Lilliput to meet the terms of the deposit.

545. Mr Ashley considers that if Crowe had acted as a reasonably competent auditor events ought to have unfolded as follows:

- (1) Crowe should have identified (i) that the amount outstanding as at 31 December 2012 was if anything an advance made to TWIFL and should be categorised as such, (ii) that TWIFL was a related party which had not been disclosed as such in the draft financial statements, and (iii) a significant risk of fraud by the directors of the Company.
- (2) Crowe should have (i) sought sufficient appropriate evidence as regards both the existence and recoverability of the monies due from TWIFL, (ii) been concerned to ensure that it had sufficient appropriate evidence as to the recoverability of the deposit outstanding at the time of signing its audit report, and (iii) enquired whether the increased deposit reflected a continuation of the same arrangement as described in the Audit Closing meeting on 30 July 2013 (i.e. a “pooled money market deposit” effected through TWIFL). Mr Ashley recognises that the response to such enquiries may well have been that the Company’s money was now deposited with Lilliput.

- (3) If Crowe had made appropriate enquiries, it would as a minimum have been presented initially with similar explanations and information as occurred in respect of the 2015 audit, comprising (i) the explanation that Mr Malkin says was given in that later year “Andrew della Casa explained in the FY2015 planning meeting that the rationale for holding funds with Lilliput was that it was able to provide a better return on cash holdings than compared to a bank account in the UK at the time”, and (ii) similar financial information on Lilliput (i.e. simply a balance sheet as at 28 February 2013).
- (4) Crowe should then have made further enquiries in order to corroborate the financial information for Lilliput, including evidence of any purported cash holdings and other assets. As Lilliput did not in fact have a bank account, these enquiries would have identified that any such balance sheet of Lilliput was false.
- (5) Having regard to the significance of the amounts involved and the pervasive nature of the concerns surrounding cash paid to TWIFL via TWIF, Crowe should have concluded that in order to properly report to the shareholders it should either disclaim an opinion or more likely consider resigning. ISA 240 A54 cites as an example of “exceptional circumstances that may arise and that may bring into question the auditor’s ability to continue performing the audit include” those where “the auditor has significant concern about the competence or integrity of management or those charged with governance.”
- (6) If Crowe proposed issuing a disclaimer, it is possible that the directors would have asked it to stand down as auditor. While the directors could not have insisted on such a step (the removal of auditors before the end of their term of office is reserved to the members by section 510(4) of the Companies Act 2006), Mr Ashley considers that a reasonably competent auditor “would likely either in response to such a request or otherwise have decided that they should consider resigning without issuing a report”.
- (7) ISA 240 further notes that “Given the exceptional nature of the circumstances and the need to consider the legal requirements, the auditor may consider it appropriate to seek legal advice when deciding whether to withdraw from an engagement and in determining an appropriate course of action, including the possibility of reporting to shareholders, regulators or others”. Mr Ashley considers that Crowe is likely to have determined, even without taking legal advice, that in the circumstances outlined above it was appropriate for it to consider resigning. He believes, however, that it would have taken legal advice on the exact steps to be taken as a consequence of that conclusion. In this context, and given the serious legal issues to be considered, the reasonably competent auditor would work closely with either in-house or external lawyers in respect of the following points, taking legal advice until the conclusion of this matter: (i) the provisions of ss519, 521 and 522 of the CA 2006, and the fact that, pursuant to s518, Crowe could require the directors to convene a general

meeting of the members to consider any explanation it wished to present of the circumstances connected with its resignation; (ii) any duty that it had to inform the Company (or the shareholders); and (iii) the obligations under the POCA to file a Suspicious Activity Report and not to commit a “tipping-off” offence.

- (8) It is reasonable to assume that “shareholders would have been made aware that [Crowe was] not able to provide an audit opinion either through the issue of financial statements with an opinion disclaimed or more likely through a letter explaining its resignation or some other communication sometime in February or early March 2014”.

546. In keeping with this evidence, the Company’s quantum expert, Mr Pearson took 1 March 2014 as the appropriate date for the quantification of loss in respect of the first audit year. Crowe’s quantum expert, Mr Conti, took 31 March 2014 as the appropriate date.

547. The difference between the parties in this regard is therefore not large. Nevertheless, the reasoning behind Mr Ashley’s time line is important for other reasons. It is as follows:

- (1) Crowe apparently carried out much of its fieldwork in May 2013. An email sent to Mr Patel on 14 May 2013 requested among other things “Deposit account statement as at 31/12/12”. A further email was sent to AdC and Mr Patel on 26 July 2013 asking “Could we please have a copy of a bank statement that confirms the amount of cash held on deposit at the y/e. At present, we have no supporting documentation for this balance as it isn’t included on the bank letter received”. At the Audit Clearance meeting on 30 July 2013, the Money Market Confirmation from Investec was then produced to Crowe.
- (2) Given the length of time the Company took to respond to the first request for evidence of the bank deposit, one would not expect responses to have been provided quickly.
- (3) In addition it is “quite likely” that an alternative explanation would have been provided that the purported deposit was with Lilliput and that might also have added to any delay. Mr Ashley reasons that this delay in itself would have also increased the likelihood that any explanation would be that the purported deposit was with Lilliput, as the longer the delay the nearer the explanation would be provided to 31 December 2013. I believe that this part of Mr Ashley’s reasoning is based on the fact that, when a DTC was later produced, it made reference to £723,750 being on deposit with Lilliput by that date. This DTC was a fabrication, and thus does not evidence any deposit with Lilliput. But it is reasonable to surmise that the same story would have been provided in 2013.

- (4) At the same time, AdC would have been under a certain amount of time pressure given that at this stage the Company had produced no audited financial statements and was still seeking to raise subscriptions (some £250,000 was subscribed between 6 August 2013 and 31 December 2013, and nearly £400,000 was subscribed between 1 January 2014 and 6 April 2014). The lack of audited accounts would have been increasingly untenable, particularly after the statutory filing date of 30 September 2013.
 - (5) Accordingly, it would be reasonable to assume that the first response would have been provided sometime during September or early October 2013. Depending on the response, this would have led Crowe, acting as a reasonably competent auditor, to make further enquiries. Mr Ashley would not expect the response to these enquiries to have been provided quickly, but that in itself would have caused a reasonably competent auditor to start having concerns, particularly as Crowe would have been aware that the Company had four subscription dates per year and was continuing to raise subscriptions. As such, Mr Ashley would expect Crowe to have indicated to the Company that it required timely answers to its questions if it was to continue as auditor.
 - (6) It is therefore reasonable to assume that at a minimum the Company should have provided some access to the records of TWIFL, alternatively the initial answers to the effect that monies were now on deposit with Lilliput for sound commercial reasons, during November 2013; and for a reasonably competent auditor to have pursued the further enquiries into TWIFL or to corroborate the Lilliput claim at around that time.
 - (7) It is hard to say what information AdC might have produced either to substantiate the financial position of TWIFL or to substantiate the assets of Lilliput, particularly as in the latter case Lilliput did not have a bank account. The difficulties in providing any credible response suggest that AdC would have sought to prevaricate and delay the production of information. That would have provided further cause for a reasonably competent auditor to have concerns, and again to have indicated to the Company that it required timely answers to its questions if it was to continue as auditor.
 - (8) A reasonably competent auditor would have started to consider issuing a disclaimer or resigning, and seeking appropriate legal advice, sometime in January 2014.
548. In his report, Mr Ashley said that Crowe should have considered the need to resign, and should have taken legal advice in that regard, including as to the contents of any resignation notice. As rehearsed above: (i) Mr Ashley's report goes no further than this, and does not state what, in his view, any resignation notice produced by Crowe should have contained, and (ii) in cross-examination, Mr Ashley made clear that he

could not say what the suggested resignation notice should have stated, as that would depend not only on legal advice but also on the reasons for the resignation.

549. In his report, Mr Ashley gave various formulations of the key considerations that, in his view, ought to have led to Crowe considering resignation, or even deciding to resign. He later retreated from, or qualified, some of these, as they depended on a failure to disclose some “related parties” which he later accepted were not, in fact, “related”. One of these formulations (stripping out points that were later modified) reads as follows:

“[Crowe] knew that the funds of TWEISL had been co-mingled with a related party also advised/managed by the Scheme Manager in that purported bank deposits as well as some purchases and sales of wine had been routed through TWIF.

An amount represented to [Crowe] in the draft financial statements as a cash and cash equivalent as at 31st December 2012 was seemingly due from TWIFL. This purported deposit had also seemingly increased significantly since the year end and (assuming this was now after 31st December 2013) was now [£723,750].

Whether the balance was still represented as being with TWIFL or (more likely) with Lilliput they did not have sufficient appropriate audit evidence as to its existence (given the payments that had been routed through TWIF) or its recoverability. In relation to Lilliput they had also received no satisfactory explanation as to why the payments had been routed through TWIF. They also had no evidence that the purported deposit met the definition of cash and cash equivalents under IFRS.

TWIFL [and maybe TWIF] ... had not been identified by the directors as related parties. This might also apply to Lilliput given that when the existence of Lilliput first came to light in the 2013 audit it was not seemingly identified by the directors as a related party.

There did not seem to be any controls operated by either the directors or Scheme Manager to prevent future comingling of TWEISL’s funds with those of other funds managed/advised by the Scheme Manager. Indeed the arrangements with TWIF were seemingly designed explicitly to facilitate this.

The Scheme Manager’s own accounts showed that it had a significant net liability position and was supported certainly by loans from the directors (RB and AdC) and also at least in the past by borrowings from one of the wine funds that it advised/managed.

The Company was continuing to raise funds from investors.

As a consequence of the above [Crowe] had grounds for serious concern about the integrity of the directors and that TWEISL's cash funds may have been and may in future be diverted for the benefit of the directors and/or Anpero in a manner that may constitute fraud."

550. I have already set out above parts of the joint statement of Mr Ashley and Mr Main in which they make clear that they cannot say "what an auditor's legal advisers would have advised should have been included in Crowe's communications in relation to their resignation or otherwise, should the outcome of Crowe's further audit procedures have led them to consider that resignation was the appropriate course of action". I have also set out material parts of the cross-examination of Mr Ashley concerning the possible contents of a statement of reasons for resignation. In addition, I have set out Mr Ashley's evidence as to the interrelation between disclaimer and resignation.

Discussion part 1 – the resignation issue

551. Crowe was told by AdC at the Audit Clearance meeting on 30 July 2013 that the sum of £357,000 that had been placed on deposit with Investec included £137,000 of the Company's funds. However, the MMC from Investec dated 21 December 2012 was addressed to TWIFL, and made no mention of the Company. Accordingly, it was, or should have been, clear to Crowe that the Company had no contractual claim to the sum of £137,000 (or any sum) as against Investec. Further, Crowe obtained no audit evidence that TWIFL had received £137,000 from the Company, or that TWIFL had deposited any money that it had received from the Company with Investec, or that TWIFL acknowledged any liability to pay that sum (or any sum) to the Company. Even if Crowe had obtained that evidence, Crowe obtained no audit evidence that TWIFL was able to repay that sum. In addition, even if that sum was recoverable from TWIFL, it should not have been described as cash and cash equivalents in the financial statements of the Company. Instead it should have been presented as (i) a debt and (ii) moreover, one due from a related party. All this appears to be common ground between the auditing experts.
552. In addition, it seems to me to follow that it was not appropriate to state in the Company's financial statements either (i) that the carrying amount of assets held in bank accounts with reputable banks represented "the maximum credit exposure" of the Company or (ii) that the Company had "no significant concentrations of credit risk". Nor was it accurate to state in the LOR that £137,000 of the sum deposited with Investec "was cash of the Company, as opposed to being cash of another entity also managed by [Anpero]".
553. Further, it is obvious that the effective control over the Company and its assets of the directors put them in a strong position to perpetrate fraud, and it appears to be common ground between the auditing experts, and in any event is right, that the comingling of the Company's monies with the monies of other entities controlled by the

directors and managed by Anpero (which was also controlled by them) increased the risk of fraud.

554. Accordingly, if Crowe had given proper consideration to matters, the suggestion that £137,000 of the deposit with Investec was “the Company’s money” would have been shown to be wrong, Crowe should not have accepted the above wording of the LOR, and the financial statements should not have contained the statements that they did. But whether, if Crowe had acted competently, it should also have taken the view that these particular inaccuracies reflected a lack of integrity on the part of the directors, as opposed to its own failure to probe fully into the true position, is more difficult to say.
555. As to disclosures concerning related parties, Mr Ashley initially put the case too high, and seemed inclined to accept in evidence that innocent failures can arise in this context.
556. If Crowe had sought confirmation that TWIFL had received the money, and accepted an obligation to repay, AdC was in a position to procure that confirmation, because he controlled TWIFL. If TWIFL could not show that it had the means to repay it, that would have been of concern. However, it does not follow that Crowe should have progressed from grounds for concern about recoverability to being concerned about impropriety.
557. These various factors alone might not justify the conclusion that Crowe should have had grounds for concern about the integrity of the directors, or should have considered resigning as auditor. As far as one can tell, with regard to these matters no false documents were put forward by AdC (or RB); the fact that funds had (supposedly) been co-mingled was volunteered; and even if, on proper analysis, the supposed commercial advantages of the alleged pooling arrangement were outweighed by the risk to the Company’s funds arising from that arrangement, it might be said that to say that Crowe, acting competently, should suspect a lack of integrity, as opposed to perhaps a lack of prudence and irresponsible conduct, would be expecting Crowe to assume the worst.
558. However, in a case like the present, it is wrong to confine one’s gaze to individual points. When deciding whether there are grounds for concern about lack of integrity or risk of fraud the case may be “stronger when the wider picture is examined” (cp *Independent Trustee Services Ltd v GP Noble Ltd* [2009] EWHC 161 (Ch), Lewison J at [20]).
559. Accordingly, even if matters stopped there, I would be inclined to accept Mr Ashley’s evidence about whether Crowe should have reached the point of considering disclaimer/ resignation, especially as his analysis is not directly contradicted by the evidence of Mr Main. It is necessary to guard against the wisdom of hindsight. Further, AdC and RB were plainly plausible: they took in the shareholders, who were, judging by those who gave evidence before me, neither ignorant nor inexperienced.

But, in my judgment, the features of undoubted concern were manifold, and difficult to explain convincingly.

560. However, matters do not stop there, because the auditing experts agree that “in relation to the 2012 audit ... if it was identified that the Deposit Account at that date may have been materially misstated because there was either a lack of sufficient appropriate audit evidence as regards its existence or recoverability or that there was evidence that this had become irrecoverable, then a reasonably competent auditor would have needed to have considered whether this might also have applied to any increase in the balance after 31 December 2012 and before they issued their audit opinion on 6 August 2013”. Mr Ashley states that by 26 June 2013 the amount recorded by the Company as a bank deposit had increased to £665,936, and by 6 August 2013 (the date on which the 2012 audit opinion was signed) it had grown to £891,000. Crowe had, or could have obtained, evidence of these figures.
561. There do not appear to be any documents recording when monies were last deposited with Investec. However, Mr Ashley’s evidence is that the last reference to Investec on the nominal ledger is dated 28 August 2013.
562. Moreover, a series of DTCs were produced by AdC which were said to evidence deposits with Lilliput. The first of these is dated 1 September 2014, and was not provided to Crowe until 9 September 2014. According to that document, £723,750 of the Company’s money was held with Lilliput on a “Rolling Term Deposit” as at 31 December 2013, subject to an interest rate of 1%, and interest in the sum of £4,894.02 had accrued as at 31 December 2013. It is now common ground between the Company and Crowe that this document was a fabrication. However, Crowe did not challenge it at the time, and therefore, it seems to me, its contents must have accorded with other information which Crowe had been given by AdC or the Company (i.e. Crowe must have understood in 2013 that monies were deposited with Lilliput just as that DTC, produced in 2014, stated). Further, according to that DTC, that sum of £723,750 would have been deposited with Lilliput for over 8 months by 31 December 2013.
563. Considering all this evidence together, I am of the opinion that Mr Ashley is right to suppose that if, following the Audit Clearance meeting on 30 July 2013, Crowe had “questioned the recoverability of the balance held at Investec”, and “probed the pooled banking arrangement alluded to by the Company and whether the Investec balance was held for TWIFL rather than the Company”, it is probable that these inquiries would not have been completed until well after 28 August 2013 (when Investec is last mentioned).
564. In any event, I also consider that, in response to these inquiries, and as Mr Ashley contemplates, AdC would have said that the Company’s monies, or the lion’s share of the same, were deposited with Lilliput. Among other things, this would have been a convenient explanation for AdC to provide to Crowe, as it would have consigned any concerns that Crowe expressed about the co-mingling of funds to the past.

565. On that basis, all the issues concerning Lilliput would have arisen in this first audit year.
566. The best evidence that AdC was able to produce in later years, when Crowe did raise questions concerning Lilliput, were DTCs and balance sheets, which did not constitute sufficient appropriate audit evidence as to the existence or recoverability of the monies that the Company was said to have deposited with Lilliput. Among many other deficiencies and suspicious features, the DTCs that AdC produced long post-dated the creation of the deposits that they were supposed to confirm. This is in contrast to usual practice which, as evidenced by the MMC that was provided by Investec, is that such documents are produced contemporaneously with the date of the deposit. In any event, the DTCs and the balance sheets alone did not establish, and could not have established, that Lilliput either (i) retained or (ii) was in a position to repay any sums deposited.
567. There is no reason to suppose that AdC (or the Company) would have been able to produce any better evidence in the first audit year. On the contrary, the entire story was a lie, and no evidence corroborating the same was capable of being produced.
568. In my judgment, it is inevitable that this fabrication would rapidly have unravelled if and when, as Crowe has expressly accepted that it should have done, Crowe had (i) acted with scepticism, (ii) considered the business rationale for the arrangement to deposit funds with Lilliput and the risk of fraud and other undisclosed transactions, (iii) assessed the ability of Lilliput to repay the amounts owed by seeking evidence as to this, and (iv) sought audit evidence that was independent of the directors or which independently corroborated the evidence tendered by the directors (i.e. the DTCs and balance sheets). It is hard to see how initial enquiries concerning how Lilliput had been found, why it had been chosen, and whether it was sound, could have produced satisfactory answers. It is accepted by Crowe that “Had further investigations been carried out once Lilliput had been identified as holding the funds in 2013 it is likely that Lilliput would have been identified as a related party” (see [37.7(b)] of the Defence), and this would have sent up further red flags. Even if AdC/Lilliput got over these last mentioned issues, points (iii) and (iv) identified above would have been fatal.
569. In fact, the transcript of the interview conducted by the CVL liquidators (and others) with AdC and RB on 20 November 2020 shows how rapidly the supposed arrangement with Lilliput would have been exposed as lacking any commercial validity or substance if AdC had been asked to explain what role Lilliput played and whether it had assets.
570. Within a matter of a few minutes of fairly gentle questioning, it emerged in that interview that: (i) Lilliput was effectively run solely by AdC (with his only fellow director being his sister, who was a housewife), (ii) Lilliput had no bank account, (iii) Lilliput never held (and indeed could never have held) any monies, (iv) Lilliput had no

assets which would enable it to discharge any substantial payment obligation to the Company, (v) Lilliput had allegedly been interposed between the Company and the true recipient of the Company's monies to keep matters "separate" and to avoid "confusion" although that explanation made no sense, and (vi) the true beneficiary of the Company's monies was said to be another AdC/RB entity (Anpero), which used them for expenses.

571. Crowe accepts that it would have been appropriate for it to resign as auditor if its enquiries indicated that AdC and RB may have behaved fraudulently. If Crowe had acted with appropriate scepticism and vigilance, I consider that this would have happened during the first audit year, and the Company's case puts the relevant date as around 1 March 2014 (although Crowe argues for 31 March 2014 instead).
572. In accordance with Mr Ashley's evidence, which I accept, it would make no difference to the result if Crowe decided to make a disclaimer. That would still lead to a resignation.

Discussion part 2 – the resignation statement

573. I consider that the most likely scenarios are (i) that AdC would have realised quite early on that Crowe was becoming increasingly unhappy with the audit evidence, and that he was unlikely to be able to assuage Crowe's concerns, and would have brought matters to a head by parting company with Crowe before it unearthed problems, or (ii) that AdC would have carried on trying to talk his way out of difficulty until Crowe had evidence of, or strongly indicating, fraud. If I had to decide which scenario would have been more likely, I would opt for the latter. This also accords with Mr Ashley's suggested time line. Once Crowe's retainer came to an end, the Company might have difficulty in finding a replacement auditor, and this would make scenario (i) unattractive. As to scenario (ii), looked at objectively, the prospect of assuaging Crowe's concerns might be vanishingly small in the long run, but trying to placate Crowe would buy time, and I think it likely that AdC would have had confidence in his powers of deception.
574. I consider that, in either case, having taken legal advice, Crowe would be as terse as it reasonably could be in what it said in its statement of reasons for resignation. I have already explained my reasons for reaching this conclusion above. In either instance, I consider that Crowe would be advised, if it was not already aware, that this would be in keeping with a widespread practice within the profession of providing scant information in statements of reasons. In the case of scenario (i), the main concern would be that matters were unclear at the time of the parting of the ways, and that the more that was said the greater the risk of saying something that might expose Crowe to criticism. However, it is not unlikely that even at that stage Crowe would have made a disclosure under POCA by making a Suspicious Activity Report, giving rise to an attendant concern of commission of an offence under POCA. In the case of scenario (ii), I consider that Crowe would by then have made a disclosure under

POCA, and the main concern would be about committing an offence under POCA, and specifically under s342.

575. I do not consider it probable that, in either instance, Crowe would be advised to mention difficulties with audit evidence concerning the existence and recoverability of the deposit with Lilliput, issues about the existence and non-disclosure of related parties, or concerns about integrity of the directors or the risk of fraud – in the case of scenario (i) because it would be hazardous to make such statements if resignation occurred while enquiries were at an early stage, and in the case of scenario (ii) (and possibly also in the case of scenario (i)) because of the risk of committing an offence under POCA. Among other things, once concerns about integrity and/or fraud arose, it would give a false picture to mention other matters (such as lack of audit evidence about the existence and recoverability of monies deposited with Lilliput or concerns about related parties) without also mentioning those concerns, yet mention of those concerns could not be made without exposing Crowe to the risk of committing an offence under POCA.
576. Accordingly, as indicated above, I am not persuaded that any statement of reasons for resignation that Crowe ought to have made, or would have been advised to make, would go beyond giving reasons to the effect that “We formed the opinion that the Company was not handling its affairs appropriately and were therefore not prepared to continue”.

Discussion part 3 – the knowledge of the shareholders

577. For the reasons given above, I am not satisfied on the balance of probabilities that, if Crowe, acting competently, had been required to resign and produce a statement of reasons pursuant to s519 of the CA 2006, that statement would have been read by the shareholders, whether (i) due to it being sent to them directly, (ii) by reason of it being placed by the registrar on the website at Companies House, or (iii) pursuant to s520.

Discussion part 4 – preservation and recovery of assets

578. As it happens, for this audit year there is no material difference as between the declining to report scenario pleaded in the PoC, on the one hand, and the resignation scenario put forward by Mr Ashley, on the other hand, in the date when shareholders might first be expected to consider taking action. According to Mr Pearson’s table of losses, £837,382 had been received from investors as at 31 December 2012, and £1,864,918 as at 1 March 2014. Therefore, roughly 45% of the total monies that were ultimately invested had been received by the latter date. If the proportion of investors was roughly in line with the proportion of investments, there would have been approximately 65 shareholders by the latter date. Mr Clark was among those investors, but Mr Streather and Mr Hillson were not among them. Using the dates which applied in respect of the audit for the Y/E 31 December 2017 as the most reliable guide that I have as to what Mr Clark would have done in the event that Crowe had declined to

submit an auditor's report by 30 September 2013, I consider that he would have begun to have concerns by around March 2014. As there is no basis for thinking that any other investor was more vigilant than Mr Clark, this date can safely be taken as the earliest date on which investors might have concerns. This date falls to be compared with Mr Ashley's and Mr Conti's "trigger dates" for the investors to be told of problems, of 1 March 2014 and 31 March 2014 respectively.

579. Mr Clark's evidence is predicated on the assumption that Crowe "declining to issue auditor's reports" includes (i) Crowe reporting various specific concerns with regard to Lilliput and monies deposited with Lilliput and (ii) Mr Clark receiving notification of those concerns. In my judgment, that assumption is ill-founded, because any such concerns would be reported to the Company, and would not be notified to shareholders (whether by a qualification or disclaimer on the auditor's report or in any other way). Accordingly, in my opinion, all Mr Clark and other shareholders would have had to go on is the absence of an auditor's report. However, even on the basis of the assumption that he makes, it is clear from Mr Clark's evidence that he would not have considered taking action without contacting other shareholders, discussing the issues with them and deciding on a course of action (which might have included obtaining legal advice).
580. The time taken by Mr Streather to contact 23% of the shareholders in the context of a drive to remove the MVL liquidators is not a sure guide to the time that would have been taken by a smaller cohort of shareholders (which did not include him) to make contact with one another in different circumstances where the most vigilant among them, such as Mr Clark, were concerned about the absence of an auditor's report in 2013. However, I consider that it is the best evidence that I have as to likely initial timings. Building on that foundation, I consider that it would have taken until at least June 2014 for the shareholders to convene a meeting. What would have happened then is, inevitably, uncertain, as it depends on so many variables. However, the inference which Mr Lawrence invited me to draw was that the shareholders would have started by obtaining legal advice. Assuming that is right, that would have taken further time.
581. What the legal advice would have been is, again, uncertain. However, among the most pro-active measures that might have been advocated would have been to replace the directors, and to apply for a freezing (and/or proprietary) injunction and/or *Norwich Pharmacal* orders, to prevent dissipation of the Company's assets or their traceable product, to ascertain the value and location of those assets, and to restrain dissipation of the directors' assets if and to the extent that the Company's assets were not available to be preserved or recovered due to their breach(es) of fiduciary duty. These measures would have involved expenditure, not only in seeking relief, presumably without notice and with urgency, but also in attending Court on the almost inevitable early Return Date.
582. Among other things, if relief was sought without notice to AdC (and/or others) it would be necessary to satisfy the duty of full and frank disclosure, and this in itself

would be likely to introduce complications. The shareholders would each have had different histories of dealings with AdC and the Company. I consider that the evidence of Mr Clark, for example, would have needed to make clear that, as far as he was aware, AdC and/or the TWEISL team had a successful history of investing in wine, that he had carried out his own due diligence before deciding to invest in TWEISL, and that he had spotted nothing of concern at that stage. In addition, Mr Clark states that he would have contacted AdC “to discuss the situation and ask questions” and would have requested AdC to convene a shareholders’ meeting to discuss “issues” and “decide on a course of action going forward”. In accordance with my analysis, the “situation”, “questions” and “issues” would have revolved around the absence of financial statements on and since 30 September 2013. But whether or not that is right, Mr Clark would need to detail the questions that he had asked AdC and AdC’s responses. In the round, it would be necessary to ensure that, on an application made without notice to the directors, anything material to be taken into account in their favour was placed before the Court. It would take time and cost money to discharge the duty of full and frank disclosure in this case.

583. If the application was made before a shareholders’ meeting had been convened, it would be necessary explain why relief was being sought at that stage even though AdC had been asked to convene a shareholder’s meeting, as (i) the change of stance between making the request and waiting for AdC to comply with it would need to be explained, and (ii) whether the request had alerted AdC to the shareholders’ concerns would also need to be addressed. If the application was not made until after the shareholders’ meeting, it would be necessary to say why relief might nevertheless still be effective.
584. Both from practice and as result of sitting as a Judge, I have extensive knowledge of the costs of applications for freezing/proprietary injunctions and *Norwich Pharmacal* relief.
585. I consider that in 2014 the costs of such an exercise for the applicants, taking account of a hearing on the Return Date, and even assuming that proceedings could be brought in the name of the Company and that the VAT element of costs could be set off against the Company’s VAT liability on trading profits, could well have amounted to, or exceeded, £100,000. Unless that sum remained available from an account in the name of the Company by the time any decision to apply for an injunction was made, if there were 65 shareholders at that time, and the costs were spread equally between them, that would require a contribution of £1,500 per head. Even if money could be taken from a Company bank account, whatever was expended on legal proceedings would, in the first instance, represent a reduction in the assets of the Company, and a potential further loss of the shareholders’ investments. For the more substantial investors, such as Mr Clark who had an investment approaching £50,000, a sum like £1,500 might not be significant, but for an individual who had invested, say, £10,000, it would be significant, not only as a matter of proportionality but, perhaps, also in

absolute terms. If the shareholders agreed to distribute their liability for costs in line with the value of the investments, different considerations would apply, but first, of course, the shareholders would need to reach agreement on that matter. In round terms, on the figures I have discussed above, the investors would be risking more than 5% of the sums invested on the costs of the early stages of an asset freezing/tracing/recovery exercise, and at the same time the investors would need to take account of other downsides, such as loss of EIS tax relief.

586. If the investors' only concrete basis for concern was that Crowe had declined to issue an audit report, it is far from certain that this would have been regarded as sufficient to justify recourse to what was once described as one of the "nuclear weapons" of the law, or that, if sought, the Court would be prepared to grant a freezing injunction on the basis of the lack of an auditor's report and AdC's responses. According to the materials before me, the Company had a significant stock of wine which AdC could point to as evidencing honest trading, and the possibility that he would have conjured up funds to show that concern about dissipation of monies was baseless can also not be ruled out. This is effectively, it seems to me, what he did later on with wine when it suited him. In 2017, TWEISL was able to build up stocks of wine with monies paid from the TWIF account, the immediate source of which was various other entities controlled by AdC.
587. At the same time as the shareholders were deliberating whether they should take steps to protect their investments, I consider that they would be mindful of the scale of those investments and the fact that they had obtained EIS tax relief when making them. In my opinion, at least some of the shareholders would be likely to take account of losing their EIS tax relief if they brought the operation of the Company to an end. In addition, each £10,000 invested in the Company would only have cost the investor £7,000, and at least some investors would consider the potential loss of the latter sum (and not £10,000) to be of relevance when determining whether to expend legal costs on taking action.
588. In sum, depending on a host of variables, an individual who had made an investment of £10,000, which had only cost them £7,000, might be asked to provide a further sum (in accordance with my analysis, perhaps £1,500) to fund legal expenditure, as well as (perhaps) having to agree to support the cross-undertaking in damages that the Company would probably be required to provide to the Court, while losing the £3,000 tax relief that they had claimed on their investment at the time that it was made. Risking £4,500 in the hope of avoiding a loss of £7,000 might not have appealed to many of them.
589. In any event, I do not consider that it is safe to assume that the shareholders would all have been of one mind, and even if they were it might take time to establish that. If some wanted to take action and others did not, issues about apportionment of costs between those who did want to proceed would need to be resolved, taking up more time.

590. Looking at the matter more generally: I have evidence from only three shareholders, all of whom are professional men, and two of whom are on the Creditors' Committee; it is unsafe to assume that the shareholders generally would have been as assiduous and as willing to take action as these three witnesses; even these three witnesses are unable to say that they would definitely, or even probably, have taken any particular steps – the tenor of their evidence is more to the effect that they would have supported the taking of a variety of possible steps; and the only witness who mentions freezing injunctions is Mr Streather, who does so in a passage which addresses various possibilities and includes the words “reasonable action ... may have included seeking a freezing order”.
591. If I understood him correctly, Mr Lawrence submitted (i) that I needed to decide what the shareholders would have done on the balance of probabilities, although (ii) when assessing whether whatever steps I was persuaded that they would have taken would have been effective, I should adopt a loss of a chance approach. Ms Evans submitted that both of these issues should be approached on a loss of a chance basis. Ms Evans relied on the decision of Waksman J in *PCP Capital Partners v Barclays Bank* [2021] EWHC 307 (Comm) at [640]-[646], in which the court approached causation on the basis that a party's shareholders should be treated as third parties for these purposes.
592. I consider that Ms Evans is probably right on this issue. That said, it is not easy, at least in my view, to apply the loss of a chance approach to the present case where the issue is not binary, but instead consists of a host of variables. For example: would the shareholders have sought legal advice; if so, what would they have been advised; if they were advised to seek a freezing injunction, would they have been inclined to follow that advice; if so, would they have been able and willing to fund the necessary application and/or to support a cross-undertaking in damages if that was required? It is possible that the right approach in these circumstances is to multiply the chance of one outcome by the chance of the next step – for example, an 80% chance that the shareholders would have sought legal advice, followed by a 50% chance that they would have been advised to apply for an appropriate injunction, followed by a 50% chance that they would have decided to follow that advice, would produce a 20% chance of making an application.
593. If the application would then have had a 60% of success, and, if successful, a 50% chance of preserving wine worth £800,000, the claim for lost wine is worth £48,000.
594. The four major heads of claim identified in the Company's opening Skeleton Argument in respect of each audit year are (i) losses of preservable assets, (ii) subsequent losses, (iii) additional liquidation and legal costs (in respect of which the sum of £993,130 is claimed in Mr Pearson's table of losses in respect of every date from the earliest date in that table of 31 December 2012 to the latest date in that table of 1 September 2019), and (iv) interest. Items (iii) and (iv) do not depend on the correct resolution of this issue, but the recoverability of item (i) appears to do so, and that of item (ii) may do so as well.

595. According to Mr Pearson, as at 1 March 2014, the Company had received a total of £1,864,918 from investors, and its stock of wine was worth £758,458. The difference had either been spent or was, allegedly, held on deposit, entirely or substantially with Lilliput. In fact, according to the financial statements for Y/E 31 December 2013, the Company held cash and cash equivalents of £862,570 at that date, £723,750 of which was said to be held with Lilliput. That is the most proximate date to March 2014 for which I have figures. I have little doubt that even the most pro-active and potentially effective steps that the shareholders might have decided to take would not have had the effect of preserving or recovering any of the cash, wherever it was held at the time that they embarked on those steps, and most particularly if and to the extent that it was said by AdC to be deposited with Lilliput. That story was a lie, and the only logical purpose for telling that lie was to cover up the fact that the money had already been extracted. Even if money could be traced into other accounts, and if they had not been emptied before any protection was put in place (as I consider they would have been), any sums left would be co-mingled with other funds, and issues about beneficial ownership would be complex and expensive to resolve, as the CVL liquidators appear to have accepted. The suggestion that there would, or might, nevertheless be prospects of effecting recovery from further recipients (such as AdC, or entities such as Huntsman) is not supported by the evidence, including the CVL liquidators' failure to do this in any way.
596. This is confirmed, if confirmation were needed, by the answers that AdC gave when interviewed by the CVL liquidators on 20 November 2020. These revealed that money was never received by Lilliput, and that the sums allegedly deposited with Lilliput were, in fact, dispersed by other companies (specifically Anpero) controlled by AdC and RB.
597. In my view, the improbability that any cash is likely to have been saved from the privations of the directors is borne out by the history of the balance on the Company's Hoare & Co bank account. According to a spreadsheet analysis produced by Mr Pearson, the balance on that account had fallen to £4,798 by 31 December 2018, and to £16 by 31 August 2019. It was later reduced to £6.50. This illustrates the meticulous nature of the operation to denude the Company of almost every available penny.
598. Perhaps even more telling is the history of AdC's bank account with HSBC. Although no full tracing exercise has been attempted, the statements for this account have been obtained. Between 2011 to 2020 a total of £1,963.302 which was derived from TWEISL (as to around £1.018m) and other wine investment operations with which AdC was concerned, passed through this account. The details are set out in Appendix 2(a) to Mr Pearson's report. The final sum paid in was £99, in 2020, which mirrors the point made in the preceding paragraph of this judgment. Yet this account remained in overdraft throughout, typically to the extent of around £10,000, although in the first and last years of this period to the extent of around £4,000. No matter how large the sums that were paid in, and many were substantial, they left the account very rapidly

on each occasion. This illustrates the speed and efficiency with which AdC moved funds, with the purpose and the effect (as has happened in this instance) of hiding their ultimate destination.

599. A similar pattern of efficient movement of funds is apparent from the history of the TWIF account, upon which Ms Evans cross-examined Mr Pearson in some detail for the purpose of demonstrating that when the Company's stock of wine was built up to the value of £4.375m as at 1 December 2017 this was achieved using monies which emanated from entities other than TWEISL. In brief: (i) the TWIF account typically had a low running balance, (ii) large sums were paid into the TWIF account from time to time by (according to the entries on the bank statements) other entities such as Huntsman, and (iii) the briefly increased balances were used to make purchases of wine for TWEISL.
600. I do not consider that the outcome of this head of claim depends on whether the balance of probabilities approach or the loss of a chance approach is correct. My conclusion is based on whether any steps, if taken, would have been effective to preserve or recover cash. In my view, they would not. On that basis, (i.e. that there was no prospect of making a recovery of cash) whether or not the shareholders would have taken particular steps on the balance of probabilities or whether there is only a chance that they would have taken them, is not the real issue. If I am wrong about that, I am not satisfied on the balance of probabilities that the shareholders would have sought or obtained an injunction, and in the absence of an order granting an injunction before the directors had time to dissipate any cash that had not already been dissipated, I consider that there is no prospect that any steps taken by them would have been effective to preserve or recover cash. In those circumstances, Ms Evans' loss of a chance approach is, potentially, more favourable to the Company. If that is the right approach to adopt, I would say that there was a 20% chance that the shareholders would have not only sought but also obtained an injunction, but that there was no chance that such an injunction would have been effective in preserving or recovering any cash owned by the Company.
601. As to the stock of wine worth £758,458, the value of the Company's stock increased steadily over time, until it reached the maximum value given in Mr Pearson's table of losses of £4,464,749 as at 31 December 2017, after which time it was run down to £0. There is no evidence that the wine worth £758,458 was not retained until the stock was eventually run down in that way. If it was not retained until then, there is no evidence that it was not traded, in which case, in my judgment, it cannot be said to have been lost.
602. The Company (i) is claiming the loss of wine worth £4,375,390 in respect of the audit for Y/E 2016, (ii) accepts that if it cannot succeed in its claim in respect of that year, it cannot succeed at all, and (iii) also accepts that it cannot make double recovery.

603. In these circumstances, I am unable to see what purpose is served by requiring the Court to determine whether a claim for loss of wine is made out in respect of the audit for Y/E 2012: if it is, and as the Company accepts that double recovery is impermissible, it will simply reduce *pro tanto* the value of the Company's claim for the audit for Y/E 2016, which the Company regards as the claim which has the greatest prospect of success.
604. It is not as if the £758,458 was actually lost on 1 March 2014 or thereabouts, even if the Company can make out its case that, if Crowe had acted competently, the shareholders would have placed the Company into liquidation not long after March 2014. If that case is right, (and provided always that the wine was not traded by the Company in later years) Crowe's negligence in the audit for Y/E 2012 caused that wine to be lost. But it was only lost when the part of the stock worth more than £4m that it represented was lost, after 31 December 2017. So the Company's claim for interest on this alleged loss of £758,458 is unaffected by whether the loss is attributable to Y/E 2012 or Y/E 2016.
605. It is true that if the wine had been recovered by steps initiated by the shareholders or a liquidator, and sold, in 2014, the Company would have obtained the proceeds of sale at that time, and can, in principle, claim to be compensated by a payment of interest for not receiving those proceeds at that time. However, there is no evidence as to whether the wine appreciated in value between 2014 and the time when it was eventually sold, and the Company is seeking to recover compensation for the loss of the wine, and the proceeds of sale of the wine, after 31 December 2017. I am not satisfied, therefore, that the Company has made out an entitlement to interest since 2014 even on that hypothesis.
606. I am therefore disinclined to determine this head of claim for the audit for Y/E 2012.
607. If, contrary to the foregoing, I am required to determine the Company's claim for loss of wine worth £758,458, then, doing the best I can, I consider that the same applies to this claim as applies to the claim for loss of cash in respect of Y/E 2012. According to the figures contained in Mr Pearson's table, the Company had little difficulty in buying substantial quantities of wine when no one was breathing down the directors' necks (e.g. the value of stock increased from £892,345 to £1,517,154 in the eight months between 31 December 2014 and 1 September 2015). I see no reason to doubt that the like considerations apply to selling wine, and that, even taking the most favourable view of what the shareholders might have been advised and might have decided to do, the directors could have disposed of wine worth £758,456 during the period between March 2014 and the time when they acted. That interval would be several months, allowing time for them to make contact with one another, convene a meeting, decide to seek legal advice, obtain that advice, decide whether to act on that advice, and instruct lawyers to gather evidence and apply for an injunction. This is not, as Mr Lawrence described it, a "smash and grab" theory, but simply a realistic appraisal of how those engaged in fraud are likely to act if afforded the opportunity to

so. Based on all the evidence, I do not think AdC would have been greatly concerned about preserving assets for the investors.

608. I should say that, because Crowe argues for a different “operative date” to the Company – in relation to this audit year, 31 March 2014 as opposed to the Company’s date of 1 March 2014 – all of Mr Conti’s figures differ from those of Mr Pearson. In relation to this audit year, Mr Conti’s calculations in relation to the stock of wine are based on a figure of £724,582, in comparison to Mr Pearson’s figure of £758,458. In subsequent years, the rival figures are: (i) 1 February 2015, £858,384; 28 February 2015, £867,788; (ii) 1 September 2015, £1,517,154; 30 September 2015, £1,531,641; (iii) 1 October 2016, £2,447,026; 31 October 2016, £2,469,377; (iv) 1 December 2017, £4,375,390; 31 December 2017, £4,464,749; (v) 1 September 2018, £2,209,212; 30 September 2018, £1,967,589; and (vi) 1 September 2019, £0; 30 September 2019, - £120,727.
609. It is unfortunate that the parties’ approach to this litigation generated so many issues, and that they were unable to resolve more of them by compromise. The financial value of some of these issues, including this one, appears to be small. In [5.12] of their joint statement dated 5 September 2025, Mr Pearson and Mr Conti recorded their agreement that “the difference in their assumed commencement dates is unlikely to have a material effect on the quantum of TWEISL’s losses”. In any event, in my judgment the disparity between these two sets of figures makes no difference to the analysis set out above in relation to the audit for Y/E 2012, and the same applies to all subsequent years. I therefore propose to refer to Mr Pearson’s figures and not repeat Mr Conti’s figures, not because I agree with Mr Pearson’s premise, but because the dispute is not material.
610. The other head of damage – subsequent losses – raises different issues. The hypothesis put forward on behalf of the Company, consistent with the evidence of the shareholders, is that the shareholders’ realisation that Crowe had declined to issue an auditor’s report would have led to them unearthing, if necessary following investigations, all the matters which Mr Ashley contends that a reasonably competent auditor should have been concerned about, and that they would then have placed the Company into liquidation.
611. If that is right, then I consider that, in principle, these subsequent losses were caused by the fact that Crowe issued an auditor’s report when it should have declined to do so. Moreover, I consider that if no auditor’s report had been issued, on the evidence before me (i) this would have led to concerns among at least some shareholders which they would not have ignored indefinitely, (ii) sooner or later the shareholders would have taken steps to establish the reasons for this, (iii) those steps would ultimately have led to discovery of the issues concerning Lilliput, and (iv) the shareholders would not have wished to carry on trading but would instead have placed the Company into liquidation.

612. The time frame in respect of this head of loss is different to that applicable to the claim for loss of preservable assets. According to Mr Pearson's table of losses, the shareholder funds rose from £1,864,918 as at 1 March 2014 to £2,445,381 as at 1 February 2015, and continued to rise thereafter until they reached £4,235,160 as at 1 October 2016.
613. Therefore, provided the shareholders would have taken steps to stop the Company from trading within several months of March 2014, the later sums would not have been paid into the Company, and, it follows inexorably, would not have been available to be lost.
614. However, this head of claim faces other difficulties, not least Crowe's "credit for benefits" argument. It is therefore convenient to consider that argument at this stage.

THE "CREDIT FOR BENEFITS" ISSUES

615. Ms Evans took as her starting point the decision of the Supreme Court in *Fulton Shipping Inc of Panama v Globalia Business Travel ("The New Flamenco")* [2017] 1 WLR 2581, allowing an appeal from the Court of Appeal and restoring the first instance decision of Popplewell J, who had allowed an appeal from the award of an arbitrator. At [64] of his judgment, Popplewell J distilled various principles from earlier authorities. These included the following: (i) "In order for a benefit to be taken into account in reducing the loss recoverable by the innocent party for a breach of contract, it is generally speaking a necessary condition that the benefit is caused by the breach"; (ii) "The causation test involves taking into account all the circumstances, including the nature and effects of the breach and the nature of the benefit and loss, the manner in which they occurred and any pre-existing, intervening or collateral factors which played a part in their occurrence"; and (iii) "The test is whether the breach has caused the benefit; it is not sufficient if the breach has merely provided the occasion or context for the innocent party to obtain the benefit, or merely triggered his doing so".
616. Next, Ms Evans relied on the decision of the Court of Appeal in *AssetCo* (reported at *AssetCo v Grant Thornton* [2021] PNL R 1). In that case:
 - (i) AssetCo was the holding company of a group, and its shares were listed on the Alternative Investment Market ("AIM") of the London Stock Exchange. Although AssetCo's accounts showed net assets of £113.6m, those accounts were false: among other things, the carrying values for assets were overstated by about £120m, and the group was insolvent. In fact, AssetCo's CEO and CFO had prepared the group's accounts dishonestly and made dishonest representations regarding them, including forging documents.

- (i) Grant Thornton (“GT”) had acted as auditors for AssetCo for the years 2009 and 2010, and had given unqualified audits for each year.
- (ii) The management fraud was discovered in 2011. AssetCo entered into a scheme of arrangement with its creditors and a restructuring.
- (iii) AssetCo sued GT claiming damages in respect of: (a) irrecoverable loans made to subsidiaries; (b) profits from two subsidiaries used to support other subsidiaries; (c) expenditure of \$3.53m which it would not have spent; (d) £1.5m in respect of a related party transaction; (e) dividends of \$1.65m that would not have been declared.
- (iv) GT admitted breach of duty in that it had failed to identify management fraud, particularly dishonest representations and evidence provided to it by senior management in the course of the audits. But GT challenged the counterfactual case that AssetCo alleged would have occurred if the fraud had been detected, contended that AssetCo was guilty of contributory fault, challenged remoteness, and alleged that the claimed losses were outside the scope of its duty.
- (v) Bryan J allowed all of AssetCo’s claims except the claim for dividends, and reduced AssetCo’s claim by 25% for contributory fault. He therefore awarded damages of £23.36m.
- (vi) GT appealed arguing (among other things) that Bryan J had not given credit for benefits that AssetCo had received of £16m for two share issues that occurred in 2009 and 2011 after the notional date when the management fraud and AssetCo’s insolvency should have been discovered.
- (vii) The appeal was dismissed, save to a limited extent, including a ruling by the Court of Appeal that GT was entitled to credit for the share issue in 2009.

617. Richards LJ explained AssetCo’s heads of claim at [22]:

“AssetCo claimed damages for the following losses. Firstly, a total of £23,348,675 was claimed in respect of sums provided to its loss-making subsidiaries between 31 March 2009 and 29 September 2011. These sums were provided by AssetCo from a group cash pool facility with the group’s bankers and represented loans to the subsidiaries. These loans were not repaid, and the judge found at [1239] that they were at all material times irrecoverable. The loans were in part funded out of £7.5m, plus interest of £235,089, subscribed for preference shares in AADL [a subsidiary of AssetCo] ...”

618. This makes plain that, contrary to a submission made by Mr Lawrence, the material £7.5m in *AssetCo* was not retained, but was instead paid away, as a loan to a subsidiary.
619. Having discussed *The New Flamenco* and also the decisions of the Supreme Court in *Swynson Ltd v Lowick Rose LLP* [2018] AC 313 and *Tiuta International Ltd v De Villiers Surveyors Ltd* [2017] 1 WLR 4627, Richards LJ turned to consider GT's appeal concerning the proceeds of the share issues, dealing first with the 2009 share issue.
620. At [236] he said:
- “A preliminary point should be noted. Whether the receipt by a company of the subscription monies for an issue of shares is properly analysed as a benefit for these purposes may not be a straightforward question. *AssetCo* raised this issue before the judge, submitting that it is not a benefit but a neutral transaction, consistently with (it was submitted) the decision of the High Court of Australia in *Pilmer v Duke Group Ltd* [2001] HCA 31. The judge noted that, given his findings, the point was academic and, because he did not consider it to have been fully argued before him, he preferred to express no view on it. The point has not been revived before us and the appeal has proceeded on the basis that the receipt of the proceeds of a share issue is a benefit.”
621. It can be seen from this passage that the question of whether the receipt by a company of subscription monies for an issue of shares is not a benefit but a neutral transaction did not arise for decision either at first instance or on appeal. Nevertheless, Mr Lawrence submitted that this argument is supported by the decision of the High Court of Australia in *Pilmer v Duke Group Ltd* [2001] HCA 31 (“*Pilmer*”) and has “significant merit”.
622. If those submissions were well founded, it is surprising that the point was not revived before the Court of Appeal in *AssetCo*. There was plenty at stake financially in that case, and the parties were represented by Counsel and solicitors with expertise in the field.
623. In my judgment, however, and consistently with the way in which the appeal in *AssetCo* was conducted, those submissions are not well founded.
624. The judgment of the Court in *Pilmer* is long and complicated. However, according to [2], the appeal to the High Court of Australia concerned limited aspects of complex litigation brought by a company (“Kia Ora”) against (among others) a firm of accountants and the directors of Kia Ora arising out of a successful takeover bid by Kia Ora for a company called Western United Limited (“Western United”). By its takeover offers, Kia Ora offered alternative forms of consideration to the shareholders of Western United for their shares in that company. As a result of the acceptances of

its offers, Kia Ora paid \$25.696 million and issued and allotted 67.9 million \$1 shares in Kia Ora, credited as fully paid up. According to [5] of that judgment: “The central issue in this appeal is whether Kia Ora suffered any loss by the issue and allotment of its shares to those who accepted its takeover offer for Western United”. After an extensive review of many authorities (which included at [19] an endorsement of the proposition that, once issued, a share comprises “a collection of rights and obligations relating to an interest in a company of an economic and proprietary character, but not constituting a debt”) the High Court answered that question in the negative. It stated at [63]-[65]:

“63 ...The relevant hypothesis is that the company could and would have made *no* takeover and the inquiry is about what it gave up or lost because it did.

64 The answer to that inquiry must be that Kia Ora outlaid cash and whatever may have been the administrative costs of issuing the shares. If a claim had been made, it may well be that some allowance would be made for the consequential effect on its capacity to raise other equity or debt finance. Otherwise, however, it gave up, or lost nothing by the issue of its shares.

65 It follows that in our opinion the Full Court was wrong to allow the sum which it did for the issue and allotment of Kia Ora shares in assessing the damages to be allowed for breach of contract or negligence.”

625. In my judgment, the decision in *Pilmer* does not assist the Company’s case on the issue in the present case, *viz.* whether the Company acquired a benefit by obtaining money from investors. In my view, it is obvious that it did. The fact that they made payment in exchange for acquiring an interest in the Company makes no difference. In the words of the Court in *Pilmer*, the Company gave up or lost nothing by the issue of its shares.

626. At [237]-[246], Richards LJ said:

“237 Mr Salzedo submits that, if GT is responsible for AssetCo continuing to conduct its business in a dishonest way (or, I would add, on the basis that the business was only “ostensibly sustainable” because of dishonest representations by management which GT should have reported), that too must have been a substantial cause of it raising money to spend in its continuing business. If GT’s wrong caused AssetCo to continue its loss-making activities, the same wrong caused it to raise the money to do so. It was no answer to say, as the judge did, that the proximate cause of the share issue in July 2009 was AssetCo’s need for cash, because its need for cash arose from its continued trading for which GT was, *ex hypothesi*, responsible.

238 Mr Templeman submits that it does not follow that, if GT's breach caused AssetCo's wasted expenditure on its subsidiaries, it must also have been the cause of whatever benefits it received after the breach. That must depend on the specific circumstances in which the funds were raised. So, if an asset which AssetCo owned before GT's breach were sold after the breach, the proceeds of sale could not be said to be a benefit caused by GT's breach. I pause to say that must, of course, be right. The asset could have been sold irrespective of GT's breach and its sale would have no connection with GT's breach. Moreover, it is not clear how a sale of an asset at market value could properly be called a benefit for these purposes; by selling the asset, the company would give full value for the cash price it received.

239 Specifically as regards the share issues, Mr Templeman submits that the effective cause was, as the judge found, that AssetCo needed the money. If one goes further back in the chain of causation, no doubt GT's breach is the cause of the company continuing to trade on the basis that it was ostensibly sustainable, but while that was the effective cause of the loss, the effective cause of the share issues was the need for cash.

240 I am unable to accept this distinction. The share issue in July 2009 was undertaken in the course of the continuation of AssetCo's "ostensibly sustainable" business. It was part and parcel of that business, as Phillips LJ put to Mr Templeman in the course of argument. To say that the need for cash was the effective or proximate cause of the share issue is no different from saying that the effective or proximate cause of AssetCo's loans to its subsidiaries was their need for cash. In my judgment, the legal cause of both was the audit reports on the 2009 accounts that deprived AssetCo of the opportunity, which it would have taken, of putting a stop to its "ostensibly sustainable" business. The point was well put by GT in its closing submissions, quoted by the judge at [1065], when it said (assuming against itself that its negligence was the legal cause of the losses): "The necessity of raising further funds from equity investors ... arose from AssetCo's financial model which it is common ground would have been known if the audit had been competently performed".

241 In my judgment, and accepting that the identification of the legal causation of a benefit, as much as of a loss, involves taking account of all the circumstances to form a common sense overall judgment on the causal nexus between breach and profit or loss (see *Famosa Shipping Co Ltd v Armada Bulk Carriers Ltd (The Fanis)* [1994] 1 Lloyd's Rep. 633 at 637 per Mance J), the judge's contrary view displays an error of law and inconsistency in the application of the test of legal causation, leading him to a conclusion which was not open to him on the evidence.

242 The judge also appeared to take account of (what he reasonably took to be) the proximate cause of the investors' decision to take up the shares, namely

the securing of a profitable contract by the group. That was indeed the reason given by AssetCo for the share issue, but the principal purpose was to raise funds to sustain the business by paying urgent debts. Whether the share issue constituted a benefit is determined by reference to AssetCo's purposes and uses of the funds, not the understandings or motives of the investors in taking up the shares.

243 This conclusion makes it necessary to consider AssetCo's submission that considerations of justice, fairness and public policy require that, even if legally caused by GT's negligence, credit should not be given for the proceeds of the July 2009 share issue. This was the judge's conclusion, although of course he did not rely on it as he had decided that the share issue was not legally caused by GT's negligence: see the judgment at [1086]. It is established that such considerations justify the exclusion of collateral benefits, but the effect of the reasoning in *Parry v Cleaver* on which such exceptions are based will in general be confined to the established categories of such benefits: see *Swynson* at [11] per Lord Sumption and [100] per Lord Neuberger.

244 The judge adopted the submissions made to him by AssetCo, which he summarised at [1084]–[1085]. The reasoning was: (i) the investors had no claim for their loss against GT (see *Caparo*); (ii) AssetCo had a claim for the losses caused to it; (iii) if AssetCo had to give credit for the share issue proceeds, it would not to that extent recover the losses it had suffered but nor would the investors be compensated for their loss; and (iv) it was a readily foreseeable consequence of GT's negligence that the company via dishonest management would continue to suck in capital that would be wasted. In oral argument before us, Mr Templeman summarised the judge's reasoning as being that, if AssetCo were required to give credit for the proceeds of the share issue, there would be a gap in the sums for which GT was liable.

245 The premise for this submission is not well-founded. While the investors would have no remedy against GT, they would have a remedy against AssetCo, if (as this argument assumes) they were misled into investing by fraudulent, reckless or negligent statements in, or omissions from, the share offer documents issued by AssetCo. If any such claims had been made, or (perhaps) might realistically have been made, the benefit of the proceeds of the share issue would be matched in whole or in part by a certain or contingent liability and, to that extent, would not be a benefit in the hands of AssetCo. Credit would not therefore, to that extent, be available to GT. In fact, no such claims were made and any such claim was, by the date of the trial, time-barred. In those circumstances, AssetCo received a substantial benefit from its continued trading as a result of management's dishonest representations to the auditors. I see no reason in principle why GT, whose liability is for negligence, should be denied a credit for that benefit to AssetCo.

246 For these reasons, I have reached the conclusion that the judge was wrong not to treat the share issue in July 2009 as a benefit to AssetCo, caused as a matter of law as well as fact by GT's negligence. Credit should therefore be given for AssetCo's receipt of the proceeds of £7,506,000."

627. Ms Evans submitted that, paraphrasing *AssetCo*, if Crowe's negligence was responsible for the Company continuing to conduct its business in a dishonest way, so also was it was responsible for causing the Company to raise money to spend in its continuing business. The legal cause of both was (at the present stage of the analysis in the instant case) the audit reports on the 2012 accounts that deprived the Company of the opportunity, which it would have taken, of putting a stop to its "ostensibly sustainable" business. In Ms Evans's words: "There can be no real dispute over whether the introduction of more shareholder funds was part and parcel of the fraud which TWEISL says Crowe should have stopped. It is clear from a review of the bank statements that ADC's [fraud] required further introductions of capital from shareholders to keep going". Taking account of all the circumstances, a common sense overall judgment establishes a factual and legal causal nexus between Crowe's breach and the benefit of the incoming funds.
628. In my view, Ms Evans's submissions are also supported by the judgment of the Court of Appeal in *Afan Valley Ltd & Ors v Lupton Fawcett LLP* [2026] EWCA Civ 2 (handed down following the conclusion of the trial in the present case). In that case, a number of companies which were in insolvent liquidation brought claims through their joint liquidators against a firm of solicitors alleging, in short, that the solicitors had failed to give accurate advice as to the legal effect of investment schemes promoted to the public, under which investors were offered the opportunity to buy long leasehold interests in individual rooms in hotels, care homes or student accommodation. One of the questions which arose concerning the operation of the schemes was whether they were collective investment schemes ("CISs") within the meaning of ss235 and 417(1) of the Financial Services and Markets Act 2000 ("FSMA"). The significance of this was that any scheme that was a CIS would fall within the general prohibition in s19 FSMA under which no person may carry on a regulated activity unless they are authorised or exempt. As none of the Claimant companies, nor any other entity or person involved in the schemes, was an authorised person, this would mean that if the schemes were CISs, they would attract the consequences of s26 FSMA, and would mean the investors could claim back their investments. The claim was struck out by Sheldon J, and his decision was upheld on appeal. The headline quantum of the claim was the £68m odd which the investors invested and which they could claim back under s26(2)(a) FSMA. In fact, this overstated the claim, but Nugee LJ used the figure of £68m for the purposes of discussion.
629. Nugee LJ said at [52]-[54]:

“52. Lupton Fawcett’s answer to this claim is a very simple one. I think it can be summarised as follows. It is true that if the Schemes had not proceeded, the Claimant companies would not have been exposed to £68m by way of potential s26 liabilities. But equally they would not have received the £68m which they did receive. Once one includes those in the comparison, it can be seen that the Claimants are no worse off as a result of being exposed to the potential s26 liabilities. There is therefore no loss. This is the £ in £ out argument.

53. Mr Pickering as I understood it did not dispute that one has to take into account the £68m received from investors. In any event it seems to me obvious that one has to do so. In assessing damages for the (alleged) legal wrong done to the Claimants one has to compare the position they are in fact in with the position they would have been in had the wrong not taken place. That means comparing (i) the scenario in which the Schemes proceeded, the Claimants received £68m and are exposed to a potential liability to repay the £68m (the actual position); and (ii) the position in which the Schemes did not proceed, the Claimants received nothing in and had no liability under s26 FSMA (the position that the Claimants say they would have been in had Lupton Fawcett advised that the Schemes were CISs). It therefore seems self-evident that when comparing the two one has to take into account the fact that although the Claimants are now said to be exposed to a liability to pay £68m which they would not have been, they have also had £68m in which they would not have received; and (subject to the further arguments advanced by the Claimants on this appeal) that means that the Claimants are no worse off in this respect.

54. I do not think one really needs authority to support this analysis, but if authority is needed it can be found in *Galoo Ltd v Bright Grahame Murray* [1994] 1 WLR 1360 (“*Galoo*”). Here two companies claimed damages for negligence against a firm of accountants who audited their accounts. One of the heads of claim was loss allegedly incurred by them as a result of accepting loans totalling over £30m which it was said they would not have accepted had the defendant not been negligent. This claim was rejected by the deputy judge, who said:

“I do not accept that accepting loans involving an obligation simpliciter to repay them can be described as damage. At the moment of accepting the loan, the company which accepts the loan has available that amount of money and the obligation to repay that amount of money, and I simply fail to see how that can amount to damage.”

On appeal Glidewell LJ said he entirely agreed with the deputy judge on this issue and that, like him, he did not understand how the acceptance of a loan

could, of itself, be described as a loss causing damage: see at 1369C-E. This was followed in *Saddington* where a claim was brought against a valuer for allegedly overvaluing a property with the result, again, that a loan was made which would not otherwise have been: see at 142 col 2 per Balcombe LJ. There is no relevant distinction between the case of a borrower accepting a loan (and thereby incurring an obligation to repay the money it has received from the lender) and the case of the Claimant companies here accepting an investment (and thereby incurring a potential obligation under s26 FSMA to repay the monies they have received from the investors). In each case there is no loss because the liability incurred is matched £ for £ by the monies received.”

630. I accept Ms Evans’ submissions. Subject to the next point, they have the effect that the Company’s claim for subsequent losses in respect of the 2012 audit year fails.

631. However, the Company has one further argument, namely that, in contrast to the position in *AssetCo*, (i) the investors in the present case have claims against the Company on the grounds that they were misled into investing by misrepresentations in the share offer documents issued by the Company, and (ii) the benefit of the proceeds of the shares issued to them are matched in whole or in part by a contingent liability to them and, to that extent, those proceeds are not a benefit in the hands of the Company.

632. The validity of that argument, and my ability to determine the extent to which it should be upheld, depend on a number of factors.

633. The Amended Defence pleads at [45.1]:

“It appears to be TWEISL’s own case that, as a result of the steps which Crowe allegedly ought to have taken, TWEISL would have ceased to operate and would have been wound up shortly after Crowe began its work in respect of the audit of the y/e 2012 financial statements. On that basis, TWEISL would have received no further investment and credit should be given for the investment received thereafter.”

634. This plea is answered in [33] of the Amended Reply as follows:

“As to paragraph 45.1, it is specifically denied for the avoidance of doubt that credit should be given for future investments given (i) the accounting treatment of those investments by the Claimant (ii) that an equal, alternatively substantial, liability arose to the shareholders when those future investments were made and (iii) the proceeds of the share issues were not a benefit to the Claimant, because the funds were dissipated by the miscreant directors.”

635. The plea at [33(ii)] of the Amended Reply appears to be intended as a reference to the point that is said to be supported by the decision in *Pilmer*, which I have addressed above. At all events, that plea makes no mention of a claim for misrepresentation

being available to the shareholders. Further, neither the first nor second witness statements of Mr Clark, Mr Streather and Mr Hillson make any mention of any such claim.

636. The misrepresentation argument appears to have been introduced into the case as a result of a letter from the MVL liquidators identifying the prospect of claims by investors. Thereafter, a number of investors filed proofs of debt. Only a few of these proofs were referred to during the course of the trial. Some of them give no “details of when and how the debt was incurred”, others use very brief wording (essentially tracking the words of the letter from the MVL liquidators), others adapt a wording produced by Mr Streather (for example, where the nature of the investment was the use of the proceeds of sale of existing wine, and, perhaps, there was some correspondence about this), and others use the wording that Mr Streather produced, which reads as follows:

“I invested monies in [TWEISL] on the basis of the information memorandum, namely for the purposes of investment in and trading fine wine for the purposes of receiving a return on the original investment. I was induced to make an investment on that basis alone. Had I had any idea that [TWEISL] might lend monies to or invest money with third parties especially parties resident abroad or invest in anything other than wine, I would not have made the investment. At no stage before I invested did the Company indicate that it might lend monies to third parties or invest in anything other than wine.”

637. This way of presenting the misrepresentation claim possibly understates its force, as the Company’s case as presented at trial focussed on fraud rather than unauthorised investments. Indeed, the thrust of that case was that the investments with Lilliput were not merely imprudent but were instead a fabrication. However, I was not asked to deal with the misrepresentation claim on any basis other than that set out in these proofs.
638. Although this claim is brought in the name of the Company by the CVL liquidators, Mr Hardman’s evidence is that they have made no appraisal of the strength of the investors’ claims. The CVL liquidators are therefore unable to say that they consider that these claims have merit. Nor are they able to give any indication as to whether they will accept the claims. This is in spite of the fact that the proofs of debt were lodged in or around October 2020, approximately five years ago, and that the merits of the claims will or at least may affect the extent to which individual members, for whose benefit the present case is being brought, will benefit from any recoveries that are made against Crowe. This is because any member who has lodged a proof of debt is potentially entitled to be paid out in full (as a creditor of the Company) from any assets that the CVL liquidators are able to get in, before any sums left over are distributed to the members. At that stage, if there is anything to distribute, all the members will be entitled to share *pari passu*.

639. The argument that the Company has contingent liabilities to the shareholders for misrepresentation is deployed by it as an answer, or partial answer, to Crowe's "credit for benefits" argument, viz. that, in its claim against Crowe for subsequent losses, the Company has to give credit for subsequent benefits (i.e. benefits that the Company received from investments made after the date when, on the Company's case, a competent performance of Crowe's duties would have led to the Company ceasing to take in investments). Crowe cannot claim credit for the benefit received by the Company from sums invested by shareholders before that date, as there is no causal connection between those investments and Crowe failing to act competently. Put another way, even if Crowe had identified problems as soon as it reasonably could have done, it is not suggested that the whistle should have been blown before (in the case of the audit for Y/E 2012) March 2014, and according to Mr Pearson's figures £1,864,918 had been received from shareholders as at 1 March 2014. In fact, according to my analysis, the operative, or remedial, date in respect the audit for Y/E 2012 is not March 2014, but several months later. Mr Pearson's table does not provide month by month figures for the total value of investments, although it does state that £2,445,381 had been received from shareholders as at 1 February 2015. Accordingly, the applicability of the misrepresentation point, like the "credit for benefits" argument, is limited to the £4,235,160 that was ultimately invested in total less either (i) (on the Company's case) £1,864,918 or (ii) (on my analysis) the figure between £1,864,918 and £2,445,381 that applied several months after March 2014. Not only do I have no figure for the value of the investments on that intermediate date, I also have no figures for various other sums.
640. First, Ms Evans submitted that, as she suggests Mr Pearson effectively accepted in cross-examination, there can be no liability in the CVL for (i) shareholders paid out by TWIF or TWEISL before the MVL, (ii) shareholders paid out during the MVL, and (iii) TWIF, which became a shareholder in respect of £112,000 of shares in 2016/2017 and which can have no conceivable misrepresentation claim against TWEISL.
641. Second, it is common ground that there are other shareholders who have not submitted proofs of debt. Mr Lawrence submitted that the outstanding figure due to shareholders is £3.967m, that the proofs of debt that have been received amount to £3.328m of this sum, and that 79% of the proofs of debt expressly refer to misrepresentation. Ms Evans submitted that the correct statistics for this can be found in Mr Conti's supplemental report, and that out of 146 unconnected shareholders (i.e. excluding TWIF, AdC and RB) 95 submitted proofs of debt (and three of those cannot be matched to share subscriptions in any event). Ms Evans submitted that some of these shareholders will overlap with those who have already been paid out, but nobody drew my attention to any evidence addressing the extent of this overlap. Ms Evans submitted that I "will need to reach a view about what percentage of shareholders are unlikely to submit proofs".

642. Ms Evans further submitted that some of those who have filed proofs will not have viable claims. Many of the shareholders who have put in proofs have chosen to found their claims on misrepresentation, but some of these claims will not work either because they are based on an Information Memorandum that the shareholder either did not read or (like Mr Hillson) did not take much notice of, or because their claim is defeated by a disclaimer. Ms Evans submitted that it was a matter for me to decide the extent to which the CVL liquidators should admit these proofs in the proper discharge of their duties, having regard to rule 14.7 of the Insolvency Rules, and the law as set out in:

(i) *Menastar Finance* [2003] BCC 404, Etherton J at [44]:

“The power of a liquidator is, in this respect, no different from that of the court itself, since the liquidator, in deciding whether to accept or reject a creditor’s proof in whole or in part, is acting in a quasi-judicial capacity: see *Tanning Research Laboratories Inc v O’Brien* (1990) 8 ACLC 248 at p.253, citing *Re Britton & Millard Ltd* (1957) 107 LJ 601. His statutory duty is to ensure that the company’s property is collected in and applied in satisfaction of its liabilities *pari passu* among its proper creditors.”

(ii) *Re Van Laun* [1907] 2 KB 23, Bigham J:

“The trustee’s right and duty when examining a proof for the purpose of admitting or rejecting it is to require some satisfactory evidence that the debt on which the proof is founded is a real debt. No judgment recovered against the bankrupt, no covenant given by or account stated with him can deprive the trustee of this right. He is entitled to go behind such forms to get at the truth, and the estoppel to which the bankrupt may have subjected himself will not prevail against him. In the present case the trustee desires to satisfy himself that the claims for costs represent a real indebtedness. He can only do this by seeing and examining the bills. When he sees them it may be that he thinks them fair and reasonable and, if so, he will probably admit the proof. But until Mr Chatterton furnishes him with the means of forming an opinion I think the trustee cannot do otherwise than reject the proof.”

(iii) *Lynch v Cadwallader* [2021] EWHC 328, Chief ICC Judge Briggs at [82]:

“The burden of proof falls on the creditor to make out their debt on the balance of probabilities.”

643. Finally, Ms Evans submitted there is an issue as to whether EIS tax relief is a benefit for which the shareholders will need to give credit in their claims against the Company. There are two strands to this argument, relating, first, to the facts, and, second, to the law.

644. On the facts, Ms Evans submitted that the three shareholder witnesses accepted that they claimed tax relief on the “way in”, although they made clear that they did not also do so on liquidation because they did not know whether their shares were valueless. In the light of this evidence, Crowe limited its case in closing to the contention that only the 30% tax relief on the way in should count. As to that, Ms Evans submitted that I should find that the majority of the shareholders will have claimed this type of relief, not least because it formed a core part of the marketing (e.g. in the Information Memoranda).
645. With regard to the law, Ms Evans relied on *Swynson v Lowick Rose* [2018] AC 313, Lord Sumption JSC at [11] (under the heading “*Res inter alios acta*”):

“The general rule is that loss which has been avoided is not recoverable as damages, although expense reasonably incurred in avoiding it may be recoverable as costs of mitigation. To this there is an exception for collateral payments (*res inter alios acta*), which the law treats as not making good the claimant’s loss. It is difficult to identify a single principle underlying every case. In spite of what the Latin tag might lead one to expect, the critical factor is not the source of the benefit in a third party but its character. Broadly speaking, collateral benefits are those whose receipt arose independently of the circumstances giving rise to the loss. Thus a gift received by the claimant, even if occasioned by his loss, is regarded as independent of the loss because its gratuitous character means that there is no causal relationship between them. The same is true of a benefit received by right from a third party in respect of the loss, but for which the claimant has given a consideration independent of the legal relationship with the defendant from which the loss arose. Classic cases include loss payments under an indemnity insurance: *Bradburn v Great Western Railway Co* (1874) LR 10 Ex 1. Or disability pensions under a contributory scheme: *Parry v Cleaver* [1970] AC1. In cases such as these, as between the claimant and the wrongdoer, the law treats the receipt of the benefit as tantamount to the claimant making good the loss from his own resources, because they are attributable to his premiums, his contributions or his work. The position may be different if the benefits are not collateral because they are derived from a contract (say, an insurance policy) made for the benefit of the wrongdoer: *Arab Bank plc v John D Wood Commercial Ltd* [2000] 1 WLR 857, paras 92—93 (Mance LJ). Or because the benefit is derived from steps taken by the claimant in consequence of the breach, which mitigated his loss: *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673, 689, 691 (Viscount Haldane LC). These principles represent a coherent approach to avoided loss. In *Parry v Cleaver* [1970] AC 1, 13, Lord Reid derived them from considerations of justice, reasonableness and public policy. Justice, reasonableness and public policy are, however, the basis on which the law has arrived at the relevant principles. They are not a licence for discarding those

principles and deciding each case on what may be regarded as its broader commercial merits.”

646. Ms Evans submitted that EIS tax relief was one of the aims of the investment, and that it would be wrong to treat it as a collateral (and therefore irrelevant) benefit. On the contrary, it is something for which credit should be given in a misrepresentation claim, in accordance with *Smith New Court Securities v Citibank* [1997] AC 254. Indeed, unless credit is given there is a risk of shareholders getting a windfall (unless they voluntarily decide to repay HMRC), as HMRC is out of time to pursue claims against any of the taxpayers under ss34-36 of the Taxes Management Act 1970 or s237 of the Income Tax Act 2007. In this regard, Ms Evans invited me “to reach a common-sense view about whether, across the cohort of shareholders, many of them will repay the tax relief they received to HMRC if they receive a dividend in the liquidation”.
647. Ms Evans concluded by submitting that, at this stage, it is unlikely that the Court will be able to do much more than to indicate in principle whether the arguments rehearsed above find favour, and that “the precise calculation of the reduction to any contingent liability will then need to be made on the basis of those decisions”.
648. Mr Lawrence did not address these points either at all, or in anything like the same degree of detail. However, addressing matters more generally, the Company’s written Closing Submissions ended as follows: “The Court is asked to enter judgment for TWEISL on the basis of findings as to breach and causation. It is not suggested that it will be possible for the Court to arrive at a final quantification of damages at this point, given the uncertainty of the premise on which damages will fall to be assessed.”
649. Before attempting to grapple with the above points, I remind myself of the reason why the misrepresentation issues arise. In short, they arise because the Company has wanted to keep all 7 of its causes of action alive, although (i) its best case relates to the audit for Y/E 31 December 2016, and (ii) it accepts that if it cannot succeed in respect of that year it cannot succeed in respect of any year. Neither the “credit for benefits” point nor the misrepresentation issues (which are solely germane to counteracting the “credit for benefits” point) arise in respect of the audit for Y/E 31 December 2016, because by the date of any breach of duty in respect of that year the entire £4.235m had been invested.
650. Moreover, I am being expected to deal with the misrepresentation issues when (i) there has been no pleading (or no clear pleading) setting out the existence and/or effect of the misrepresentation claims, and certainly no responsive pleading from Crowe, (ii) the persons asking me to determine the validity of the misrepresentation claims, who will ultimately have to decide whether they are well founded, acting in a quasi-judicial capacity when doing so, have not considered the merits of those claims, and are unable to assist me as to their own views on the matter, (iii) there is no witness evidence dealing with these claims, (iv) in any event, the evidence before me is incomplete, and even the materials before the Court were not fully considered during the course of the

trial (e.g. to cite only two illustrations: I am told by Mr Pearson that 79% of the proofs of debt expressly refer to misrepresentation, but I have not been addressed on whatever grounds the remaining 21% rely upon; and I have no evidence as to how many shareholders did and did not read the Information Memoranda, which seem to be at the heart of the misrepresentation case, at least as formulated by Mr Streather), (v) the trial of this case has already overrun twice (resulting in additional hearings on 10-11 November 2025 and on 15-16 December 2025), (vi) there has been no order for a split trial on liability and quantum, (vii) it appears to be accepted by both parties that I cannot finally determine the value of these claims, and (viii) a further hearing may be required to achieve that result.

651. Against this background, I am not inclined to deal with these issues. It does not appear to me to be necessary to do so. Nor is it proportionate to do so. There must be a limit to the amount of Court and judicial time that parties can expect to have expended on issues, like the merits of the shareholders' misrepresentation claims, that are complex and inessential.
652. The only point on which I consider it appropriate to express a view concerns the issue of collateral benefit. As Lord Sumption makes clear: (i) "The general rule is that loss which has been avoided is not recoverable as damages", and (ii) "Broadly speaking, collateral benefits are those whose receipt arose independently of the circumstances giving rise to the loss". In my judgment, EIS tax relief obtained by investors is, or is analogous to, "loss which has been avoided". The investors did not lose the entirety of their investments, but instead lost only that element of the same that was not subject to EIS tax relief. The loss of the EIS tax relief element was avoided by the EIS tax relief. Further, in my view, such tax relief comprises, or is analogous to, a benefit the receipt of which did not arise "independently of the circumstances giving rise to the loss". On the contrary, the receipt of that benefit was part and parcel of the circumstances giving rise to the loss. Leaving aside whether the availability of EIS tax relief was an incentive to make the investments (although it almost certainly was, even if no-one invested purely or even predominantly for the purpose of obtaining tax relief), the relief could only be claimed because the investment was made. In my view, that means that the EIS tax relief benefit was not independent of the circumstances giving rise to the loss.
653. In addition, although I naturally accept that the result cannot be decided on the basis of considerations of justice, reasonableness and public policy, I consider that the above result accords with justice, reasonableness and public policy. If the shareholders were entitled to make recoveries which ignored the benefit that they had obtained by claiming EIS tax relief, they would obtain a windfall unless they voluntarily decided to inform HMRC about the recoveries that they had made, and offered to pay HMRC the amount of the EIS tax relief that they had claimed. Even the three shareholders who were called as witnesses did not, as far as I can recall, say or suggest that they would do this, and even if they had there would be no basis for assuming that other investors would do so. I do not consider that it would be just or reasonable to require

the Company to pay £10,000 to everyone who made an investment of £10,000 that only cost them £7,000, let alone to say that the Company should be required to do this when the cost of that approach would be borne by Crowe, as the investment sums for which Crowe could claim a benefit would be reduced by the like amount. Nor, to my mind, does that accord with public policy. Even a company whose directors have behaved badly should not be robbed (and, here, Crowe, even if negligent, is also a victim of someone else's fraud).

654. In case it may be of assistance to the parties in quantifying misrepresentation claims that I consider I do not need to resolve and I am in no position to resolve, I should add that I consider it more likely than not that all, or at least the great majority, of the shareholders would have claimed EIS tax relief. The three shareholders who gave evidence before me certainly did so. However, I am not prepared to go beyond that with regard to these claims.

THE AUDITS FOR Y/E 2013 AND 2014

655. In light of my findings in relation to the audit for Y/E 2012, it is possible to deal with the audits for Y/E 2013 and Y/E 2014 much more briefly. In short, the Company's case on breach of duty stays as strong, and indeed probably gains in strength, from year to year. If, contrary to my findings above, Lilliput should not be taken to have entered the picture before Crowe completed its auditor's report for Y/E 2012 there is no doubt that it did so before Crowe completed the report for Y/E 2013. Accordingly, even if I am wrong in thinking that the issues relating to Lilliput should have been appreciated by Crowe when carrying out the audit for Y/E 2012, they should have been appreciated when carrying out the audit for Y/E 2013. The general reasoning set out above therefore applies for Y/E 2013, and all subsequent years, even if I am wrong in applying it to the audit for Y/E 2012 - although the detailed grounds of criticism may not be the same.

History of the audit - Y/E 2013

656. During the audit for Y/E 31 December 2013, the Company undoubtedly stated that its money was held with Lilliput. The audit planning work started in April 2014. Ms Clarke was assisted with the audit by Mr Michaelides. As was true of the previous year, the audit fee was modest (£7,750 plus VAT).
657. It is apparent from the documents, such as the analytical review, that Crowe was aware that the Company's cash recorded in its accounts had gone up from £189,199 to £862,570. From April onwards, Crowe requested year end bank statements for the deposit balances. Crowe chased this request in mid-July, late August, and on 2 September 2014. Accordingly, this item was still outstanding as at the latter date.
658. At some stage, after 9 September 2014, the cash lead schedule was marked up with the information that the matter had been discussed with Mr Patel. The note also set out a

discussion of balance movements and referred to a confirmation from the company holding the money. It included a reference “2 H104”, being a reference to a DTC from Lilliput dated 1 September 2014 stating that it had received a “rolling term deposit” of £723,750 as at Y/E 2013. This DTC was provided to Crowe on 9 September 2014.

659. The point was also taken up in the LOR dated 25 September 2014, where AdC represented that the “£723,750 held on deposit with Lilliput Holdings Ltd at 31 December 2013 as a rolling term deposit is cash of the company, as opposed to being cash of another entity also managed by Anpero Capital Limited”. This LOR also represented that related parties had been appropriately disclosed, although the only related party referred to in the accounts signed by RB at this stage was Anpero.
660. Crowe accepts that the DTC and LOR appear to comprise the only evidence as to recoverability of the Lilliput balance in the Y/E 2013, and Crowe further accepts (in light of [6.4.23] of Mr Main’s report) that they did not go far enough.

The auditing experts’ evidence – Y/E 2013

661. Mr Ashley deals with the audit for Y/E 2013 in [4.3.1]-[4.3.16] and [6.3.1] to [6.1.13] of his report. At [6.3.12], Mr Ashley expresses the view that a reasonably competent auditor would have started to take the steps set out in [6.2.26] to [6.2.29] of his report sometime in December 2014 or early January 2015 and that “it is reasonable to assume that shareholders would have been made aware that the auditors were not able to provide an audit opinion either through the issue of financial statements with an opinion disclaimed or more likely through a letter explaining their resignation or some other communication sometime in January or February 2015”.
662. On this basis, the Company’s claims at trial were formulated by reference to a “report date” of 1 February 2015. Crowe contended that the relevant date was 28 February 2015.
663. Mr Main deals in his report with the audits for Y/E 2013 to Y/E 2015 at [6.3.21]-[6.3.29], and with the audits for Y/E 2013 to Y/E 2018 at [6.4.19]-[6.4.40] and at [6.4.51ff]. Mr Main accepts sufficient of the Company’s criticisms of Crowe’s work, as set out in the PoC, to make it unproductive in my view, and in light of my findings with regard to the audit for Y/E 2012, to analyse the extent to which he does and does not disagree with Mr Ashley’s views. It is sufficient to note [6.5.1]-[6.5.3] of his report:

“6.5.1 In my opinion Crowe did not obtain sufficient appropriate audit evidence in respect of the Deposit Account balance included in TWEISL’s balance sheet in respect of any of the accounting years on which they provided an audit opinion on the financial statements. The work carried out by Crowe did not provide sufficient appropriate audit evidence to conclude that the balance was appropriately classified and disclosed (including whether

disclosures of related party relationships, transactions and balances were adequate to meet the requirements of accounting standard IAS 24) or that the quantum of the balance was not materially misstated.

6.5.2 I have identified audit procedures that a reasonably competent auditor would have or would have attempted to carry out, to obtain sufficient appropriate audit evidence to draw conclusions as to the existence and recoverability of the Deposit Account balance. I do not know what the results of those procedures might have been and observe that the findings might have been different for each financial year. Crowe would only have been able to issue an unqualified opinion if they had been able to obtain sufficient appropriate audit evidence relating to the existence and recoverability of the Deposit account, and then only if the asset was identified as being a debtor rather than a bank balance in accounting periods prior to 2017 and this was appropriately classified as such in the balance sheet. Crowe would also have needed to have been satisfied that if there were related party relationships, these were also disclosed (as in the 2016 financial statements) in accordance with IAS 24.

6.5.3 As indicated in this section of my report it is possible that the further procedures that I have described that Crowe should have performed or attempted to perform as a reasonably competent auditor might have resulted in:

- Crowe being unable to obtain sufficient appropriate audit evidence and either qualifying their audit opinion or disclaiming their opinion on the financial statements depending upon the quantum of the amount for which insufficient audit evidence was obtained.
- Crowe obtaining audit evidence that indicated that the financial statements were misstated, but the directors amended the financial statements to correct this, such that Crowe was able to issue an unmodified audit opinion.
- Crowe obtaining audit evidence that indicated that the financial statements were misstated, and no corrections were made. In which case Crowe would have issued a qualified audit opinion if the misstatement was material or an opinion disagreeing that the financial statements gave a true and fair view if the amount was material and pervasive.
- Crowe's enquiries indicating that the directors might have behaved fraudulently, resulting in their resignation as auditors because of the exceptional circumstances set out in paragraph 38 of ISA 240. This would have resulted in Crowe also issuing a statement of the circumstances connected with their resignation to the Company, which Crowe would have

also filed at Companies House unless the directors obtained a court order that the statement was unnecessarily defamatory.”

664. For the like reasons as apply in relation to the audit for Y/E 2012 above, I consider that the last of these points set out what should and would have happened if Crowe had acted as a reasonably competent auditor in carrying out audit work for Y/E 2013.

History of the audit – Y/E 2014

665. The audit work for Y/E 31 December 2014 started earlier in 2015. The work was carried out by Ms Clarke and Mr Michaelides, assisted by Mr Keeling. The audit fee seems to have remained at £7,750 plus VAT.
666. A large sum on deposit was apparent from the Company’s trial balance, which was sent by email to Crowe on 10 February 2015. In advance of a meeting, on 13 February 2015, Mr Michaelides asked Mr Patel for the “usual information” such as “bank statements”. A DTC from Lilliput dated 23 January 2015 was produced. This referred to a rolling term deposit of £1,198,750. At trial, Crowe was unable to identify when and how this document was received, although it was on the audit file.
667. The Lilliput balance was also dealt with in the LOR dated 18 March 2015, which was signed by ADC. The arrangement was described in this LOR as being held in a “pooled money market term deposit” – which seems to reflect the drafting from the Investec year (Y/E 2012) rather than “rolling term deposit” wording used in the Y/E 2013.
668. Crowe accepts that the DTC and LOR appear to comprise the only evidence as to recoverability of the Lilliput balance in the Y/E 2014, and they did not go far enough.

The auditing experts’ evidence – Y/E 2014

669. Mr Ashley deals with the audit for Y/E 2014 in [4.4.1]-[4.4.9] and [6.4.1] to [6.4.11] of his report. At [6.4.10], Mr Ashley expresses the view that a reasonably competent auditor would have started to take the steps set out in [6.2.26] to [6.2.29] of his report sometime in June or July 2015 and that “it is reasonable to assume that shareholders would have been made aware that the auditors were not able to provide an audit opinion either through the issue of financial statements with an opinion disclaimed or more likely through a letter explaining their resignation or some other communication sometime in August or September 2015”.
670. On this basis, the Company’s claims at trial were formulated by reference to a “report date” of 1 September 2015. Crowe argued that the relevant date was 30 September 2015.
671. The parts of Mr Main’s report that deal with the audit for Y/E 2014 are identified above.

672. As in the case of the audit for Y/E 2013, I consider that the scenario identified in the last point of [6.5.3] of Mr Main's report applies to the audit work for Y/E 2014.

Discussion and conclusions – Y/E 2013 and Y/E 2014

673. In my judgment, the like conclusions apply in respect of the Company's claims for lost cash in relation to these years as apply to the audit for Y/E 2012. Of the cash and cash equivalents of £862,570 for Y/E 2013, £723,750 was said to be held with Lilliput. Of the cash and cash equivalents of £1,252,710 for Y/E 2014, £1,198,750 was said to be held with Lilliput. Of the cash and cash equivalents of £2,262,397 for Y/E 2015, £2,259,500 was said to be held with Lilliput. The figures for Y/E 2014 and Y/E 2015 relate to 31 December 2014 and 31 December 2015 respectively, which are the dates most proximate to the operative dates discussed below when shareholders might first have had cause for concern. For the like reasons as I have given above in respect of the audit for Y/E 2012, I do not consider that there is any prospect that any of that cash would have been preserved or recovered by any steps taken by the shareholders:

- (i) Whether (for Y/E 2013) by reference to the Company's "report date" of 1 February 2015, Crowe's "report date" of 28 February 2015, or the date that I regard as the appropriate date (based on (i) a decision by Crowe not to provide an auditor's opinion when due on 30 September 2014 and (ii) Mr Clark's reaction times after 30 September 2017 in response to an absence of an auditor's report on that date) of March 2015.
- (i) Whether (for Y/E 2014) by reference to the Company's "report date" of 1 September 2015, Crowe's "report date" of 30 September 2015, or the date that I regard as the appropriate date (based on (i) a decision by Crowe not to provide an auditor's opinion when due on 30 September 2015 and (ii) Mr Clark's reaction times after 30 September 2017) of March 2016.

674. The stock of wine had a greater value at the time of the audit for Y/E 2013 than applied at the time of the audit for Y/E 2012: according to Mr Pearson's table of loss, it was worth £858,384 as at 1 February 2015, as opposed to £758,458 as at 1 March 2014. In my judgment, however, the same considerations apply to the Company's claim for loss of this asset as apply to the Company's claim for loss of wine in respect of Y/E 2012.

675. At the time of the audit for Y/E 2014, the value of the Company's stock of wine had increased further. According to Mr Pearson's table of loss, it was worth £1,517,154 as at 1 September 2015, although it had fallen in value to £1,459,735 as at 31 December 2015, which is the closest date given in his table of loss to what I regard as the appropriate "shareholder awareness date" in respect of this audit year, i.e. March 2016.

676. Doing the best I can, and assuming that the shareholders would have taken action by (in particular) obtaining an appropriate injunction with a few months of March 2016, I doubt that the directors would have disposed of all of this stock of wine by that time. In my view, however, they could readily have disposed of much of it between whichever “report date” is right and the time when the shareholders were able to do anything to prevent them, and I consider it realistic to assess that this would apply to something of the order of £1m of the stock. I consider that about 50% could have been disposed of without disrupting an ordinary pattern of trading, and that some acceleration of that rate of disposal could have been achieved without resorting to anything akin to a “fire sale”.
677. In any event, the remaining points discussed above in relation to the Company’s claim for lost wine in respect of the audit for Y/E 2012 apply to the claim for this audit year.
678. In particular, there is no purpose in determining that claim in addition to the Company’s claim in respect of the audit for Y/E 2016, as this wine was not lost until the later year, and no benefit to the Company in terms of interest arises from determining both claims.
679. The points discussed above in relation to the audit for Y/E 2012 apply in relation to the claim for subsequent losses in relation to the audits for Y/E 2013 and Y/E 2014.

THE AUDIT FOR Y/E 2015

680. Ms Evans made a number of points in support of Crowe’s case (i) that (for each of the audit years) it would have been appropriate for Crowe to have qualified its audit opinion and not to disclaim it, or resign as auditor, and (ii) that if Crowe had acted in this way, the shareholders in the Company would not have been concerned or have taken action or have placed the Company in liquidation. For the reasons given above, I do not accept the first part of that case. In light of that conclusion, the second point is moot. However, I record Ms Evans’ points for completeness, and in case this claim goes further.
681. Disclosure given in late March 2015 by the CVL liquidators shows that in October 2015, Mazars signed off the accounts of TWIFL, a related company which also had a Lilliput balance, for the Y/E 2012. Although those accounts were “clean”, on 8 December 2015 Mr Grehan of Mazars emailed Mr Patel (who was bookkeeper for TWIFL as well as TWEISL) in relation to the Y/E December 2013 referring to the need to reclassify the Lilliput balance. Crowe complains that this disclosure was late, and may be incomplete.
682. On 13 January 2016, Mr Grehan emailed Mr Patel stating that he was not sure whether the balance in the general account and with Lilliput were “short term deposits” as he did not think they were readily accessible. He stated that the related party transaction note in the accounts would need updating to account for Lilliput, and that they would

need to amend the reference to there being no concentration of credit risk. In response, Mr Patel stated that he had discussed the matter with AdC. He represented that the Lilliput monies were readily available and stated that Lilliput was not considered a related party.

683. On 14 January 2016, AdC suggested some wording for disclosures in the accounts relating to investment monies. Mazars did not accept AdC's suggested wording, and, on 22 January 2016, Mazars qualified their audit opinion concerning TWIFL.
684. The directors of TWIFL recorded in the accounts were RB, Shirley Beesley and Fabian Schonenberg of Tromino. RB signed the accounts. There is no evidence to suggest disquiet or action on the part of the directors, or on the part of Mr Patel, about the fact that the accounts were being qualified. This is in spite of the fact that RB accepted in interviews with the CVL liquidators that he knew AdC was a director and shareholder of Lilliput and was merely taking it on faith that AdC would return the money.
685. Ms Evans submitted that it is instructive that Mazars qualified their audit opinion and did not disclaim it, or resign as auditors. Further, even though TWIFL was a Bermuda company and so its accounts were not publicly available, there is no evidence to suggest any shareholder disquiet or withdrawal, and TWIFL was not put into liquidation.

The history of the audit

686. The audit of the Company was passed from Ms Clarke to Mr Malkin due to Ms Clarke's departure on maternity leave. On handover, Ms Clarke did not express any concerns to Mr Malkin about the Company or the audit. Ms Clarke told Mr Malkin that the Company held money with Lilliput.
687. In early February 2016, Mr Michaelides and Mr Patel started liaising about the audit of the Company. On 29 February 2016, Mr Patel provided the core accounting documents. A detailed meeting then took place on 1 March 2016 between Crowe, the Company and Huntsman. Mr Malkin attended that meeting, as did AdC and Mr Patel. In his witness statement, Mr Malkin states that he recollects a detailed discussion of the Company's business. Mr Malkin recalls being told that the Company held money with Lilliput in Bermuda to access better rates of interest than in the UK. Mr Malkin further states that he understood Lilliput to be a financial institution, but not a bank.
688. There is no evidence that either AdC or Mr Patel told Crowe anything about their recent interactions with Mazars over the TWIFL accounts, or about Mazars' qualified opinion. Ms Evans submitted that this was a significant failure on both of their parts, which is even harder to understand given that Mr Patel was himself a former Mazars auditor and had worked with Mr Malkin previously at that firm.

689. The note of the meeting on 1 March 2016 suggests that the Company was discussed in some detail, including as to the level of fraud risk and/or the Company’s proposals for liquidating itself in 2019. By mid-March at the latest Crowe was in possession of a balance sheet showing that cash and cash equivalents were now £2,262,398. This was attributed to an increase in share subscriptions in the year, and general fluctuations.
690. Some of the underlying audit work was performed by Ms Durrell of Crowe. On 16 March 2016, Ms Durrell emailed Mr Patel raising the issue of statements for the deposit account. The next day Ms Durrell sent Mr Patel a list of further queries. Ms Evans observed that this does not seem to have prompted Mr Patel to tell Crowe anything about what had happened with Mazars.
691. Alongside this (and not within the knowledge of Crowe), Tromino Financial Services Limited (“Tromino”) carried on providing its valuations to the Company. On 4 April 2016 Mr Schonenberg (who had recently signed off the TWIFL Accounts) set out the share subscriptions to date, referred to shareholdings missing from AdC’s figures, and told AdC by email that he was getting “slightly nervous”. Ms Evans comments that this does not paint a good picture of the “behind the scenes” dealings between Tromino and ADC, suggesting as it did that there were significant unprocessed share subscriptions.
692. At some stage the Company obtained the usual (false) DTC from Lilliput stating that it had received a “rolling term deposit” of £2,259,500 as at 31 December 2015.
693. On 9 May 2016, Mr Malkin carried out a review of the draft accounts. He marked these up with queries about Lilliput, as to whether funds were segregated, whether the entity was regulated, whether it was “really cash @ bank”, and whether Crowe had seen Lilliput’s accounts. By email dated 12 May 2016, Mr Michaelides asked Mr Patel:
- “I have reviewed the audit files and Leo has performed an initial review of the financial statements. We have a couple of questions mainly around Lilliput Holdings. This has been treated as a cash balance this year and in the past but it does not appear to be a banking institution.
- Are the funds held by Lilliput segregated for TWEISL?
 - Is this entity regulated?
 - Do you have financial statements for Lilliput?”
694. In response, Mr Patel said nothing about what had happened with Mazars. Indeed, Mr Patel failed to respond. Mr Michaelides chased for a response on 31 May 2016, and again on 21 July 2016. At that stage, AdC replied saying “... it’s my fault we haven’t replied. I’m not in the office until Monday, but will pick this up then ...”

695. At the same time, the Company appears to have been suffering significant cashflow problems. On 15 June 2016, Mr Smith of Anpero told AdC and RB that the Company needed £674,372.19. On 6 July 2016, Mr Smith told AdC and RB that £900,368 was needed. By 21 July 2016, the figure had increased to just under £1.1m.
696. On 27 July 2017 Mr Smith emailed RB and AdC raising issues of co-mingling funds across TWEISL and TWIFL funds. Mr Smith said that a particular payment using TWEISL money to pay TWIF redemptions might “indicate other problems (or maybe an opportunity) that we hadn’t spotted so far”. Mr Smith also referred to an increase in Net Asset Value of £400,000, continuing as follows: “You said that they weren’t put on deposit, so aren’t they available to help with the overall position?”
697. By 1 August 2016 Mr Grey of Anpero was being chased by Mr Graham Eastwood for money that Mr Grey had promised to transfer to a Ms Hughes in an email of 11 July 2016. Mr Grey emailed AdC stating “S**T! May have to change priorities now.... Can you think of anything to say to Graham.”
698. Crowe was not copied into, or alerted about, any of these matters.
699. On 31 August 2016, Mr Michaelides chased AdC for the outstanding audit information.
700. On 12 September 2016, there appear to have been internal discussions at Anpero, which included action points for AdC to set out the current cash position at TWEISL and Huntsman and produce a full schedule of amounts “coming off deposit”. What (if anything) AdC produced is not apparent from the evidence before the Court. However, on 26 September 2016, Mr Smith emailed stating (as regards Huntsman): “I was mildly horrified to see in Fabian’s accounts that the amount of HWEISL funds on deposit actually rose in August, even though the deposit problem was confirmed in July. Is this really right? I guess it must be as the recent subscriptions don’t seem to be available for investment. But if so.....”. Mr Smith’s internal meeting note of 5 October 2016 suggests that ADC had to provide the “cash figure for TWEISL” and both AdC/RB were “working on means to access cash deposit early - will know by 12 October latest.”
701. Again, Crowe was not made aware of any of these matters.
702. On 12 October 2016, it appears that Mr Smith met with AdC and RB (but not Crowe). The notes suggest that £60k was available to the Company for sales. So far as the deposit funds were concerned, the note reads “Negotiations ongoing about releasing cash from deposit early, but fallback position still everything available as from 1 Jan 2017.”
703. The impression given by the contemporary documents is that AdC was repeatedly delaying giving answers to enquiries as to when money could be released from deposit.

704. Meanwhile, Mr Michaelides chased for information on 10 October 2016, 29 November 2016, and 4 January 2017. The audit for the Y/E 2015 therefore stretched into 2017.
705. On 23 March 2017, Mazars signed off TWIFL's accounts for the Y/E December 2015. The audit opinion was qualified on the basis of Mazars being unable to obtain sufficient audit evidence for the carrying value of the investment with Lilliput (of £165,500). Again, nobody at the Company said anything to Crowe about this.
706. By an email dated 28 June 2017, AdC finally dealt with outstanding audit issues for the Company for the Y/E 2015. He wrote:
- “... I confirm that TWEISL continues as a going concern and that there has been no litigation since the 2015 year end. Please find attached a recent bank statement, the latest valuation (you will recall that these are prepared by the Company's Administrator, Tromino Financial Services Ltd), and a copy of Lilliput Holdings's accounts. Please let me know if you need anything else ...”
707. The Lilliput balance sheet showed net assets as at 28 February 2016, comprising capital assets of £8.67m including cash at bank of £1,137,008 and debtors of £1,609,600. Mr Lawrence submitted that, quite apart from being unaudited and unsigned, the Lilliput accounts raised more questions than they answered, not least because the cash at bank figure of £1,137,008 was far below the sum of £2,259,500 allegedly held on “rolling term deposit” as at 31 December 2015 in accordance with the DTC produced to Crowe.
708. Mr Malkin's evidence is that he recalls perceiving these materials as just extra audit evidence, and that he was comfortable with the Lilliput balance.
709. On 28 June 2017, Crowe provided the Company with the usual draft LOR. The accounts were then signed by RB on 29 June 2017, and included the usual confirmations that all relevant information had been provided to the auditors. They were accompanied by the LOR, also signed by RB, stating that the £2,259,000 that was held on deposit with Lilliput was cash of the Company as opposed to any other company; that the money had been repaid since the year end; and that related party transactions had been disclosed.
710. In sum, therefore, the DTC, LOR and Lilliput accounts served as the evidence as to recoverability of the Lilliput balance. Crowe accepts that they did not go far enough.
711. On behalf of Crowe, Ms Evans makes the points that in addition to AdC (who must have known that the DTC and Lilliput accounts were false), it appears from disclosure given by the CVL liquidators that by June 2017: (i) both RB and Mr Patel were clearly aware that Mazars were not satisfied with the evidence relating to Lilliput as regards TWIFL's financial statements; (ii) RB had been party to numerous emails making clear that the Company was short of funds and/or where ADC had failed to answer

queries about how the money could be taken off deposit; (iii) putting matters at their very lowest, RB cannot have taken proper care as to whether he could really certify the LOR or sign the directors' declarations in the accounts – in particular, it is not known how RB saw fit to sign a representation that the Lilliput money had been fully repaid since year end; and (iv) neither RB (a lawyer) nor Mr Patel (a former auditor) raised any issues with Crowe.

712. As against that, I consider that the questions asked by Mr Michaelides on 9 May 2016 were questions which could and should have been asked in previous audit years. They did not go far enough (e.g. by asking for banking documents), but they were a start.
713. In addition, it seems to me to be plain that they were not answered by the Company at any time. The Company did not purport to answer them until AdC's email of 28 June 2017. That long delay in answering was remarkable. That alone, in my view, ought to have prompted concern. The failure to answer was blatant, but was not picked up. Mr Malkin should not, in my opinion, have been "comfortable with the Lilliput balance."

The auditing experts' evidence – Y/E 2015

714. Mr Ashley deals with the audit for Y/E 2015 in [4.5.1]-[4.5.34] and [6.5.1] to [6.5.12] of his report. At [6.5.11], Mr Ashley expresses the view that a reasonably competent auditor would have started to take the steps set out in [6.2.26] to [6.2.29] of his report sometime in July or August 2016 and that "it is reasonable to assume that shareholders would have been made aware that the auditors were not able to provide an audit opinion either through the issue of financial statements with an opinion disclaimed or more likely through a letter explaining their resignation or some other communication sometime in September or early October 2016."
715. On this basis, the Company's claims at trial were formulated by reference to a "report date" of 1 October 2016. Crowe argued that the relevant date was 31 October 2016.
716. The parts of Mr Main's report that deal with the audit for Y/E 2015 are identified above.
717. As in the case of the audits for previous years, I consider that the scenario identified in the last point of [6.5.3] of Mr Main's report applies to the audit work for Y/E 2015.

Discussion and conclusions – Y/E 2015

718. In my judgment, the like conclusions apply in respect of this year as apply to the audits for the previous years. Of the cash and cash equivalents of £2,262,397 for Y/E 2015, £2,259,500 was said to be held with Lilliput. Of the cash and cash equivalents of £1,721,089 for Y/E 2016, £1,714,450 was said to be held with Lilliput. The latter figures relate to 31 December 2016, which is the date most proximate to the "report dates" discussed below for which I have figures. For the like reasons as I have given above in respect of the previous audit years, I do not consider that there is any

prospect that any of that cash would have been preserved or recovered by any steps taken by the shareholders, whether by reference to the Company's "report date" of 1 October 2016, Crowe's "report date" of 31 October 2016, or the date that I regard as the appropriate date (for the reasons explained above in relation to earlier audit years) of March 2017.

719. In fact, in this instance, it may well be that, adopting the approach that I consider correct, the appropriate "report date" should be later than March 2017. If any shareholder (such as Mr Clark) had asked about the overdue filing of the Company's accounts in relation to Y/E 31 December 2015, AdC could have answered truthfully that Crowe had not yet finished carrying out its audit work. Whether or not that would have prompted searching enquiries as to why that was so is uncertain. If not, the "reaction date" for this year would be put back until the enquiring shareholder(s) became vexed, which might be some time after the date of March 2017 that I have otherwise adopted as operable.
720. The stock of wine had a greater value at the time of the audit for Y/E 2015 than applied at the time of the audits for the previous years. According to Mr Pearson's table of loss, it was worth £2,447,026 as at 1 October 2016, and £2,893,591 as at 31 December 2016, and it increased further in value to a figure of £4,375,390 as at 1 December 2017.
721. In my judgment, the same considerations apply to the Company's claim for loss of this asset as apply to the Company's claim for loss of wine in respect of Y/E 2014. In other words, put shortly, I consider that the directors would have been able to dispose of £1m of this stock of wine (and, for the avoidance of doubt, dispose also of the proceeds of sale of that wine) between the date when the shareholders started to address the need to take action and the time when the shareholders were able to do anything to prevent them, but the claim for loss of the remainder is subsumed into the claim for Y/E 2016.
722. The points discussed above in relation to the audits for the earlier years apply in relation to the claim for subsequent losses in relation to the audit for Y/E 2015.

THE AUDIT FOR Y/E 2016

The history of the audit

723. The audit work for the Y/E December 2016 started not long after the Y/E 2015 accounts were signed off. Again, the partner in charge was Mr Malkin.
724. Documents provided by the Company to Crowe in July 2017 revealed a large fall in cash/cash equivalents to £1.721m. An agenda for the "key points to discuss" meeting recorded the core fluctuations in figures. An annotated version of the note explains that the Company was now closed to new subscriptions and refers to the related parties

being the same as the previous year. The critical review also considered the changes in trading, which were attributed to an expected uplift in value of fine wine. In short, the picture painted was of increased wine buying depleting the money held on deposit.

725. On 27 July 2017, Mr O’Connell of Crowe raised queries about Lilliput. In particular he asked for confirmation of terms around the deposit account - for example, whether there were restrictions on money being withdrawn. Mr Patel emailed AdC referring to the moneys being “on call” and asking if there were restrictions on it. AdC’s answer was “No”, and that answer was copied to Mr O’Connell. Later that day Crowe informed the Company that the audit work was largely done save for some queries, including documentation for interest accrual and supporting documents for the deposit accounts.
726. Crowe accepts that, by around this time, it had identified that Lilliput was a related party, although Mr Malkin’s evidence was that he could not recall how the issue came to light. As an overseas entity Lilliput was not listed in the document where Crowe had summarised information from Companies House about other entities of which AdC and RB were directors. Mr Malkin’s evidence was that he could not recall having particular concerns about the discovery that Lilliput was a related party at the time, and that the directors did not seem to want to withhold the information from the accounts.
727. Mr Lawrence submitted that the connection between the Company and Lilliput, through having AdC in common as a director, was a matter of significance, in particular as it had not been revealed in previous LORs signed by the directors. He suggested that Crowe may have known of the connection from the time when it prepared an early draft of the Information Memorandum that the Company used to raise money in 2011-201, as AdC was identified as a director of Lilliput in that document. However, this could not be explored at trial, as Crowe called no witness with knowledge of that period.
728. In any event, Mr Lawrence argued that it was odd that neither the audit files disclosed by Crowe nor the evidence of Mr Malkin explained how the connection was discovered.
729. The related parties work (carried out by Mr O’Connell) on the audit file on 28 July 2017 records that “Investment with Lilliput Investment Holdings in Bermuda is not disclosed as a related party. Both entities have deposits with the Lilliput Investment Holdings, of which Andrew della Cassa is a director” and “Undisclosed related parties - The large bank deposits are in Lilliput Investment Holdings which is a Bermuda based company of which Andrew della Cassa is a director.” The fact that Lilliput had not been disclosed as a related party was also recorded in the related party spreadsheet dated 31 July 2017. This refers to obtaining management’s calculation, and appears to refer to an internet link to a Bermuda government website evidencing AdC’s directorship of Lilliput.

730. On 14 August 2017 ADC provided the usual DTC from Lilliput, certifying that it was holding £1,714,450 as at 31 December 2016.
731. On 5 September 2017, Mr O’Connell emailed AdC and Mr Patel stating: “Please disclose the balance with Lilliput Holdings for both 2016 and 2015 in the related party note since the companies have a common director”. By late September 2017 the draft accounts for the Company included reference to Lilliput as a related party, as follows: “The Company has £1,714,450 (2015: £2,259,500) held on deposit with Lilliput Holdings Limited, a company in which Andrew della Casa is a director.”
732. The LOR for the Y/E 2016 was signed by AdC on 28 September 2017. This made no reference to Lilliput, although it contained the usual confirmation that related parties had been disclosed. The accounts were then signed off on the same day, containing the related parties disclosure referred to above. Again, RB certified the adequacy of the information provided to Crowe.
733. On 23 January 2018, Mr Michaelides reviewed the related parties work. He signed it off with the risk based comment: “Lilliput shown as a related party so no issues”. The related parties completion notes recorded that “There was the balance held by Lilliput which had not been included in the initial draft financial statements as an RPT. This was discussed with the directors and confirmed it was and therefore disclosed in the final accounts”. As far as the evidence before the Court discloses, none of the shareholders reacted to the related parties note or the revelation that AdC was a director of Lilliput.
734. The DTC, LOR (and Lilliput accounts seen in June 2017 for the period to 28 February 2016, in the context of the prior year’s audit) seem to have been the only evidence produced as to recoverability of the Lilliput balance. It is accepted by Crowe that those documents did not go far enough to provided proper audit evidence of that matter.
735. Mr Lawrence submitted that the problems concerning the audit work for Y/E 2016 were even greater than those concerning Y/E 2015, which in turn had more problems than the previous audit years. Among many other things, he submitted that the DTCs and Lilliput balance sheets, which were unsatisfactory in any event in light of issues about the dating of the DTCs and because the figures in the balance sheets did not seem to support the sums allegedly held on deposit with Lilliput, were of even less evidential value than might previously have been thought once Lilliput had been identified as a related party.
736. I do not consider it necessary to rehearse Mr Lawrence’s criticisms in detail, however, as I have taken the view that even quite simple and basic enquiries, which I consider Crowe should have raised, would have exposed the Lilliput fiction and, thus, fraud.

The auditing experts’ evidence – Y/E 2016

737. Mr Ashley deals with the audit for Y/E 2016 in [4.6.1]-[4.6.9] and [6.6.1] to [6.6.10] of his report. At [6.6.9], Mr Ashley expresses the view that a reasonably competent auditor would have started to take the steps set out in [6.2.26] to [6.2.29] of his report sometime in September or October 2017 and that “it is reasonable to assume that shareholders would have been made aware that the auditors were not able to provide an audit opinion either through the issue of financial statements with an opinion disclaimed or more likely through a letter explaining their resignation or some other communication sometime in November or early December 2017.”
738. On this basis, the Company’s claims at trial were formulated by reference to a “report date” of 1 December 2017. Crowe argued that the relevant date was 31 December 2017.
739. The parts of Mr Main’s report that deal with the audit for Y/E 2016 are [6.3.30]-[6.3.35] and otherwise are as identified above.
740. As in the case of the audit for previous years, I consider that the scenario identified in the last point of [6.5.3] of Mr Main’s report applies to the audit work for Y/E 2016. With regard to the draft Information Memorandum mentioned by Mr Lawrence, in which AdC was said to be a director of Lilliput, Mr Main says that he understands that this was provided by AdC to Crowe on or about 23 November 2011, but that members of the audit team were not copied into correspondence attaching this document, and “If this was disclosed as described, I consider that it was not Crowe’s duty to review draft documentation provided for a different purpose rather than for the purpose of the audit.”

Discussion and conclusions – Y/E 2016

741. In my judgment, the like conclusions apply in respect of this year as apply to the audits for the previous years. Of the cash and cash equivalents of £1,721,089 for Y/E 2016, £1,714,450 was said to be held with Lilliput. In fact, the financial statements for Y/E 2017, dated 28 February 2019, include the Lilliput balance in the sum of £384,025 under trade and other receivables. Those financial statements relate to 31 December 2017, which is close to the following “report dates”. For the like reasons as I have given above in respect of the previous audit years, I do not consider that there is any prospect that any of that cash would have been preserved or recovered by any steps taken by the shareholders, whether by reference to the Company’s “report date” of 1 December 2017, Crowe’s “report date” of 31 December 2017, or the date that I regard as the appropriate date (for the reasons explained above in relation to earlier audit years) of March 2018.
742. So far as concerns the stock of wine, according to Mr Pearson’s table of loss, this was worth £4,375,390 as at 1 December 2017, and £4,464,749 as at 31 December 2017. According to the same table, by 1 September 2018 it had fallen in value to £2,209,212, by 31 December 2018 it had fallen to £1,535,625, and by 1 September 2019 it was £0.

743. In this instance, therefore, the timings are important. If, as the Company contends, through Crowe acting competently the shareholders should have been put on notice of Crowe's concerns on 1 December 2017, and if, as the Company further contends, the shareholders would then have taken steps rapidly and effectively to gain control of the Company and its assets and/or to obtain an appropriate injunction, they could potentially have preserved wine worth £4.375m. In fact, on the figures contained in Mr Pearson's table, if the Company's case to that effect is right, save that Crowe's "report date" of 31 December 2017 is to be preferred, the shareholders could potentially have preserved wine having a higher value of £4.465m. On the other hand, if I am right in holding that the shareholders are limited to a case based on the proposition that if Crowe had acted competently it would not have provided an unqualified audit report for the Y/E 31 December 2016, and that this would have been spotted and only led to the shareholders initiating action in March 2018 and obtaining some form of protection several months later, the value of the wine that could potentially have been saved would be lower.
744. In my judgment, a convenient starting point is [6.6.10] of Mr Ashley's report, in which he sets out "key considerations" that he believes a reasonably competent auditor would identify when seeking legal advice as leading them to believe that they should resign:
- “o They knew that the funds of TWEISL had been comingled with a related party also advised/managed by the Scheme Manager in that purported bank deposits as well as some purchases and sales of wine had been routed through TWIF.
 - o An amount represented to them in the draft financial statements as a cash and cash equivalent as at 31st December 2016 and in earlier years was in fact an amount purportedly due from Lilliput.
 - o They did not have sufficient appropriate audit evidence as to its recoverability or as to whether Lilliput in fact owed the money given that all payments had been routed through TWIF and they had received no satisfactory explanation as to why that had been the case. They also had no evidence that the purported deposit met the definition of cash and cash equivalents under IFRS.
 - o Lilliput, TWIF and TWIFL had not been identified by the directors as related parties.
 - o There did not seem to be any controls operated by either the directors or Scheme Manager to prevent future comingling of TWEISL's funds with those of other funds managed/advised by the Scheme Manager. Indeed the arrangements with TWIF were seemingly designed explicitly to facilitate this.

- o The Scheme Manager's own accounts showed that it had a significant net liability position and was supported in the past by loans from the directors (RB and AdC) and by borrowings from one of the wine funds that it advised/managed. Specifically Anpero's accounts for the year ended 31st December 2016, which were filed on 30th September 2017 showed that it made a loss of over £450,000, but at the same time showed no amounts owed effectively to RB and AdC implying other funding from undisclosed sources of over £3.2 million.
 - o As a consequence of the above they had grounds for serious concern about the integrity of the directors and that TWEISL's cash funds may have been and may in future be diverted for the benefit of the directors and/or Anpero in a manner that may constitute fraud."
745. I consider it reasonable to infer that if Crowe, acting competently, had then decided to resign, these sorts of considerations would have constituted its reasons for doing so.
746. For the reasons given above, in the event that Crowe took the view that it should resign, I do not consider that Crowe would have been advised to communicate, or that Crowe would have been under a duty to communicate, directly with shareholders, let alone (due to POCA) in terms which reflected concerns about integrity of the directors/fraud.
747. In my view, as soon as Crowe had any such concerns, Crowe would be obliged to file a Suspicious Activity Report, and Crowe would then find itself in a very difficult position, as a result of which, on my findings, all shareholders would know is that Crowe had not completed an auditor's report by the due date (in this instance) of 30 September 2017.
748. For the purpose of analysis, however, it is possible to assume that the fact that Crowe had concerns along the lines discussed by Mr Ashley would come to the attention of the shareholders, as Mr Lawrence said during the course of argument "one way or another".
749. The first question is: what would the shareholders do then? In his first witness statement, Mr Clark said that had he received notification of (in brief) the fact that Crowe had not undertaken proper investigations and satisfied itself as to the position regarding Lilliput and deposits with Lilliput, then (among other things) he would have contacted AdC "to discuss the situation and ask questions". Then, depending on AdC's response to his request for a shareholders' meeting, he "would have taken independent steps to contact the shareholders' group". In his second witness statement, Mr Clark identifies "first-tier concerns" which broadly mirror Mr Ashley's "key considerations", and Mr Clark says that these would be "very significant red flags requiring immediate action". In both his first and second witness statements, Mr Streather lists contacting the directors of the Company among the initial steps that he would have taken to

discuss matters identified by Crowe, even if he had “immediately suspected that a fraud was being committed” and this had prompted him “to take immediate action”. In his first witness statement, Mr Hillson also lists “contacting AdC to demand answers” as one of the steps that he would take, although in his second witness statement he says that if the concerns notified to him included a concern as to the integrity of the directors, then he “would have taken the view that there would be little, if any, benefit in contacting [AdC] or [RB].”

750. In any event, it seems to me clear that the directors would have been informed of Crowe’s concerns by other shareholders (who may perhaps have been more in thrall to the directors than the three shareholders who gave evidence before me). In addition, if and when the shareholders sought legal advice, I consider it highly unlikely that they would be advised to take remedial steps without first ascertaining the directors’ stance.
751. At that stage, it seems to me, the directors would have been able to put forward an ostensibly convincing rebuttal to allay whatever concerns the shareholders expressed.
752. In brief, by this time (i.e. the beginning or end of December 2017 on the resignation scenario case theory, or March 2018 on the basis of my analysis) all the concerns relating to co-mingling of funds, Lilliput balances, related parties, and the financial affairs of Anpero, were, in substance, a matter of history. A total of £4.235m had been invested by the members, and the Company had (i) (genuinely) a stock of wine worth more than that (i.e. £4.375m or £4.465m), and (ii) (supposedly) a relatively modest sum of £384,025 on deposit with Lilliput. The wine stock could have been verified quite easily to the satisfaction of the shareholders using data provided by Tromino, and I have little doubt that, if this was necessary to placate shareholder concerns, the alleged deposit with Lilliput could have been replaced by a deposit with Hoare & Co. With regard to the latter point, it is necessary to bear in mind that AdC was able to inject large sums into the Company when it suited him – e.g. increasing the wine stock from a value of £2,893,591 as at 31 December 2016 to a value of £4,375,390 as at 1 December 2017 – albeit that, as the shareholders could not hope to discover, an analysis of the TWIF bank statements shows that these monies came, at least immediately, from other companies.
753. The decline in the value of the wine stock between 31 December 2017 and 1 September 2018 occurred in the absence of either (i) a resignation by Crowe detailing Crowe’s concerns (which is the Company’s case as to what should have happened), or (ii) the shareholders beginning to show signs of concern for any other reason. If AdC had known that he needed to address such matters, he might have acted in a number of ways. He might have sought to answer any issues raised by the shareholders by (among other things) pointing to the high value of stock as at December 2017, and not trouble to preserve that value to meet the concerns; or he might have preserved that value while concerns continued to be expressed (which would enhance the strength of his grounds of rebuttal); or he might have attempted to accelerate the rate of disposal (on the basis that the directors were running out of road, and the more rapidly the wine

was sold the greater the prospect that they could profit from operating the fraudulent scheme). My reasoning above is based on the foundation that the first of these options would apply.

754. Indeed, there was speculation during the course of the trial as to why the decision was taken to build up the Company's wines stocks so extensively between 31 December 2015, when they were worth £1,459,735, and 31 December 2017, when they were worth £4,464,749. One possibility that was discussed is that this was in order to meet any concerns that might be pressed as to the way in which the Company was operated. It will be recalled that, on 12 May 2016, Crowe asked the key questions (i) "Are the funds held by Lilliput segregated for TWEISL?" (ii) "Is this entity regulated?" and (iii) "Do you have financial statements for Lilliput?". It will further be recalled that no answer was provided until 28 June 2017, when AdC did no more than produce (i) a bank statement and a Tromino wine stock valuation to evidence that the Company was continuing "as a going concern" and (ii) and a copy of Lilliput's accounts. It may be that AdC could hardly believe his luck that he had got away with this degree of delay and this little by way of responsive documentation; that he was concerned that his luck might not last, and that he could not hope to rely on the Lilliput fiction if he was pressed more effectively and therefore needed to build up stocks to avoid being accused of misappropriation; but that later, after December 2017, he realised that he need have no grounds for concern. All that fits in with the pattern of buying and selling that occurred.
755. In addition to the above fundamental points, AdC and RB could (i) point to their good reputation and historic track record, which had induced a number of shareholders to invest in the Company to begin with, (ii) assert that the Lilliput lending had resulted in payments of interest at levels which had been of benefit to the Company, (iii) argue that the misgivings about Anpero were without foundation (and I doubt that the shareholders would have been able to work out the contrary), and (iv) say that Crowe's concerns were peculiar, unreliable, and contradicted by the previous 4 years' audits, which Crowe had carried out without raising any concerns although nothing of significance had changed.
756. It is hard to know where Crowe would stand in all of this. The shareholders' witness statements mention turning to Crowe as a first, or early, port of call in the context of seeking further information, but I do not believe that Mr Lawrence contended that I should conclude that this would have yielded much. The prospect that a shareholders' meeting would be attended by Crowe was also not pressed. Crowe would have been in a very difficult position for a number of reasons (e.g. POCA, and difficulty in explaining why it had not acted sooner) and would, I suspect, not wish to be drawn into the fray.
757. Pulling all these strands together, I have grave doubts about whether the shareholders, as a group, would even have gone so far as to obtain legal advice, let alone about what they would have been advised to do, and whether they would have followed that

advice if it involved incurring significant expenditure on legal costs. The overall sum at stake was considerable – well over £4m – but equally, in my view, they may well have had great uncertainty about whether their investments were at risk. The situation in late 2017/early 2018 was very different from that which pertained after the CVL liquidators were appointed, by which time the Company’s assets seemed to have been spirited away. Nevertheless, the entirety of the sums invested in the Company was at stake at that later time as well, and there is no escaping the fact that, in accordance with Mr Hardman’s evidence, when the shareholders’ willingness to spend money was actually put to the test they were reluctant to run up costs on a recovery exercise. Mr Hardman explained that when his firm was first instructed “nobody was being paid for advisory work”; one group of shareholders parted company with another firm because that firm did not know how it was going to be paid; and I have quoted his evidence about there being no money for injunctions and *Norwich Pharmacal* orders and being “on a very tight budget”.

758. Even on the basis that the “key considerations” identified by Mr Ashley, or the gist of the same, would have come to the attention of shareholders “one way or another”, I am not persuaded, on the balance of probabilities, that they would have taken action (by which I mean, got as far as taking steps to preserve the assets of the Company).
759. If that is wrong, I nevertheless do not consider that they would have taken action speedily. The process of making contact with one another, convening a meeting, deciding to seek legal advice, obtaining that advice, and deciding whether to act on that advice, would all be complicated, at this time, by the considerations discussed above, not least (i) the directors were known to a number of shareholders, whereas Crowe was not, (ii) the directors could point to the existence of a stock of wine that no one has suggested was incompatible with the objectives of the Company as explained to shareholders in the Information Memoranda, and (iii) Crowe’s decision to “blow the whistle” in 2017 was anomalous in light of the fact that nothing material (in particular concerning Lilliput) had changed in comparison to previous years, when Crowe had provided unqualified audit reports. I omit from this synopsis the need to obtain an injunction, as it seems to me that in circumstances where the directors might have difficulty in dissipating the Company’s main asset the shareholders might be advised that it would be sufficient to replace the directors. Nevertheless, even if the debate resulted in a decision to take action, I have little doubt that it would not be one sided.
760. In fact, in accordance with my analysis, and the case that I consider is open to the Company on the PoC, the shareholders would not have been told of the above “key considerations”. On the contrary, all that they would have to go on was a failure by Crowe to provide an auditor’s report by (in this instance) the due date of 30 September 2017. In these circumstances, the probability that they would take action, let alone speedily, would be significantly smaller. If someone like Mr Clark pressed AdC about the absence of financial statements and, building on that, expressed concerns about the Company’s operation, I consider that showing that the Company had a stock of wine

valued at £4.375m or £4.465m would be far more likely than not to allay those concerns.

761. If, contrary to Mr Lawrence's submissions, but as Ms Evans submits and as I consider is probably correct, the balance of probabilities approach is wrong and the correct approach is that of loss of a chance, I would hold that there was a 30% prospect that the shareholders would have taken action to preserve the assets of the Company. At this stage, the tangible assets available to be preserved had a far higher value than in previous years, and that would have militated in favour of taking action. At the same time, for the reasons set out above, I consider the need to take action was far less obvious at this time than it would have appeared at times when the wine stock was far lower and the balance allegedly held with Lilliput was far higher. Bearing in mind that it is accepted that there are many imponderables, and that the evidence of the shareholders does not, and could not, say what would have happened, that is the best appraisal I can make. That appraisal is made on the basis that the applicable scenario is that envisaged by Mr Ashley. I consider that the prospect that the shareholders would have taken action solely on the basis that the Company's financial statements had not been filed by 30 September 2017 is only 10%, although it is possible that this prospect would increase over time.
762. The next question involves determining what any action by the shareholders would have achieved. It was common ground that this requires a loss of a chance assessment. In embarking on this analysis, I gloss over a number of potential problems with the Company's case, concerning the procedural route by which the shareholders could have sought to protect the assets of the Company. If replacement of the directors was not sufficient to provide protection, it would be necessary to resort to the kind of procedures that the Company identified in the draft RAPoC, and during the course of submissions Mr Lawrence suggested, at least at times, that the logical sequence of events would be to appoint a liquidator and not only for legal advice to be sought by the liquidator but also for any proceedings that might be necessary to be conducted by the liquidator.
763. As a matter of fact, based on the figures contained in Mr Pearson's table of losses, the Company's stock of wine fell in value from £4,464,749 as at 31 December 2017, to £2,209,212 as at 1 September 2018, and to £1,535,625 by 31 December 2018. During all that time, the directors were under no pressure, whether from Crowe or the shareholders or at all. I therefore consider that it is reasonable to regard this rate of disposal as one that the directors were able to carry out in the ordinary course of business. I note in passing that the disposals of wine worth over £2.2m in the eight months from January to August 2018 and worth almost £700,000 in the four months from September to December 2018 are in keeping with my reasoning in respect of the Company's claims for loss of wine in relation to the audits for Y/E 2012-2015.

764. In addition, I consider that, without engaging in anything like a “fire sale”, the directors could have achieved some measure of acceleration if they believed “the game was up”.
765. On the premise, that I believe to be right, that it would take at least three months for the shareholders to progress from the time when they began to initiate action to the time when they were able to put a stop to the directors’ wrongful activities and/or preserve the assets of the Company, the date from which the stock of wine could be preserved would be (i) 1 February 2018 on the Company’s case, (ii) 28 February 2018 on Crowe’s case, and (iii) 1 June 2018 in accordance with my analysis. If one assumes a straight line rate of sale of the wine that was in fact sold during the first eight months of 2018, that produces sales of almost exactly £282,000 per month. Accordingly, based on the approach that I consider to be correct, at least £1,410,000 worth of wine would have been disposed of before the shareholders obtained protection. As the three month period represents, in my view, a minimum period, and as I also consider it right to make some allowance for the fact that the directors could have liquidated stock more rapidly once they felt that their time was up, I would propose to increase that figure by around 15%. Deducting that total figure from £4,464,749 produces an available recovery of £2.85m.
766. If, contrary to the above, I should have taken one or other of the dates that I have rejected, the figure of £2.85m would need to be adjusted accordingly. If (which I cannot accept is right), the operative date is the same as the date when the shareholders would have been alerted to Crowe “blowing the whistle”, and not some time after that date, which I consider to be at least three months, the figure would need to be adjusted again.
767. I prefer to approach the loss of a chance analysis on the basis set out above. It equates to a 64% prospect that the wine worth £4,464,749 would have been preserved. As (on the approach to the first stage of the analysis that is advocated by Ms Evans and that most favours the Company) I consider that there was only at best a 30% chance that protective action would have been taken, the claim under this head is worth no more than £855,000. On the basis of the case pleaded in the PoC, which I consider applies, I am of the opinion that the chance that the shareholders would have taken protective action is no higher than 10%. On that basis, the claim under this head is worth £285,000.
768. These figures may be subject to deductions for cost of sales, which I consider below.

THE AUDIT FOR Y/E 2017

The history of the audit

769. On 11 January 2018 Mr Grey of Anpero emailed AdC referring to Mr Patel having reconciled the Company’s accounts “showing a bank balance of £419,632.07 yet the

current a/c only shows 18k". Mr Grey asked "can we not access the other 400K- presumably from deposit... We don't want the rumours to start going round the trade again that we can't pay our bills". There is no evidence that Crowe knew of this.

- 770. The audit planning work started in April 2018, with the usual suite of planning and business understanding documents. It was apparent early on that the Company's accounts showed that the wine stock had increased to over £4.11m while the bank deposit had decreased to around £380,000 or £390,000.
- 771. On 1 June 2018 Mr Gelderd of Crowe sought information Mr Patel about the Lilliput deposit. He chased this later that month. On 9 August 2018 Mr Gelderd told Mr Patel that Crowe was still awaiting confirmation from Lilliput as to the deposit. On 6 September 2018 Mr Gelderd chased the Company. AdC said the delay was his fault.
- 772. On 11 September 2018, Mr Patel sent Crowe a DTC stating that there was a "rolling term deposit" of £384,025 held with Lilliput as at 31 December 2017.
- 773. On 19 September 2018, Mr Michaelides emailed Mr Patel saying "The only further comment Leo has is what evidence is there that the amount due from Lilliput is recoverable? It would be good to get something on our audit file to support the recoverability."
- 774. Mr Patel emailed ADC on 20 September 2018 asking "How can we show this".
- 775. Mr Michaelides chased Mr Patel between 25 and 28 September 2018. No reply was received and Mr Michaelides chased again on 6 December 2018, asking "Are we going to be able to get the accounts finalised before the end of the year?"
- 776. On 14 January 2019, AdC sent Mr Michaelides the abbreviated accounts of Lilliput for the year ended 28 February 2018. The accounts stated that Lilliput had capital assets of £9,125,893, cash at bank of £324,167 and debtors of £1,610,988.
- 777. On the same day Mr Michaelides queried where the balances held for the Company and for Huntsman was shown on the accounts. On 11 February 2019, AdC stated "The £908k TWEISL and HWEISL balances are covered in the Lilliput accounts by cash at bank and debtors (being interest and rent receivable)". Mr Malkin believed that this email prompted a discussion of the treatment of the Lilliput balance in the accounts.
- 778. On 22 February 2019, Mr Michaelides emailed AdC stating that he and Mr Malkin suggested that the balances be reclassified as debtor balances "given the balances are not shown in cash at bank within Lilliput's accounts. This would mean also restating the prior year Lilliput balances to also show them in debtors with a small narrative note explaining the restatement".
- 779. Mr Malkin explained that, as this change took place during the audit year, the testing of the Lilliput balance remained in the cash testing section of the audit.

780. On 28 February 2019, RB signed the LOR stating that “We have considered the change relating to the cash position to amounts due from Lilliput Holdings Limited of £384,025 (2016: £1,714,450). We have sought and received confirmations that the amount is accounted for separately solely for the purpose of this entity.” The LOR also made the usual statements about related parties being disclosed.
781. The accounts are dated 28 February 2019. They included the Lilliput balance under trade and other receivables. Note 6 made clear that this included “other debtors”. It was also disclosed that Lilliput was a related party, as follows: “Included in Other debtors is an amount of £384,025 (2016: £1,714,450) held on deposit with Lilliput Holdings Limited, a company in which Andrew della Casa is a director”. Accordingly, by this stage Crowe had both disclosed the related party connection and reclassified the balance as a debtor balance. RB certified the completeness of the information provided to the auditors.
782. No shareholders seem to have reacted to the reclassification of the debt, or the related party disclosure relating to Lilliput.
783. Crowe accepts (i) that the DTC, LOR, and Lilliput accounts seem to have been the only evidence as to recoverability of the Lilliput balance, and (ii) that those documents did not go far enough (see Mr Main’s report at [6.4.23]).
784. Mr Lawrence’s point that the DTCs and Lilliput balance sheets, which were unsatisfactory in any event for reasons given above, were of even less ostensible evidential value once Lilliput had been identified as a related party applies here as well.
785. In my view, however, the most striking single feature about the audit work in this year concerns the question asked about evidence that the amount due from Lilliput is recoverable. The recoverability of that balance was always a serious issue. It is remarkable (and surprising) that the point had not been raised before by Crowe. When it was raised on this occasion it seems to have been raised in slightly token terms (“It would be good to get something on our audit file to support the recoverability.”).
786. But even more remarkable is the fact that, in my view, this question was never properly answered. It took AdC three months, until January 2019, to provide any response, and then all that was provided was the abbreviated accounts of Lilliput for the year ended 28 February 2018. That did not amount to appropriate audit evidence of recoverability. Moreover, if it had been thought by Crowe that this did amount to proper audit evidence of recoverability, it is surprising that the request was framed as it was – because AdC had been providing “evidence” in this form for years, and therefore it might be thought that what would be sought is simply something like “the usual Lilliput accounts”.

787. Mr Ashley deals with the audit for Y/E 2017 in [4.7.1]-[4.7.18] and [6.7.1] to [6.7.10] of his report. At [6.7.9], Mr Ashley expresses the view that a reasonably competent auditor would have started to take the steps set out in [6.2.26] to [6.2.29] of his report sometime in June or July 2018 and that “it is reasonable to assume that shareholders would have been made aware that the auditors were not able to provide an audit opinion either through the issue of financial statements with an opinion disclaimed or more likely through a letter explaining their resignation or some other communication sometime in August or September 2018.”
788. On this basis, the Company’s claims at trial were formulated by reference to a “report date” of 1 September 2018. Crowe argued that the relevant date was 30 September 2018.
789. The parts of Mr Main’s report that deal with the audit for Y/E 2016 are [6.3.36]-[6.3.43] and otherwise are as identified above.
790. As in the case of the audits for previous years, I consider that the scenario identified in the last point of [6.5.3] of Mr Main’s report applies to the audit work for Y/E 2017.

Discussion and conclusions – Y/E 2017

791. In my judgment, the like conclusions apply to the Company’s claim for lost cash in respect of this year as apply to the audits for the previous years. Of the trade and other receivables of £491,552 for Y/E 2017, £384,025 was said to be held with Lilliput. Of the trade and other receivables of £3,044,496 for Y/E 2018, £2,995,201 was said to be held with Lilliput. The latter figures relate to 31 December 2018, which is the date most proximate to the “report dates” discussed below for which I have figures. For the like reasons as I have given above in respect of the audits for the previous years, I do not consider that there is any prospect that any of that cash would have been preserved or recovered by any steps taken by the shareholders, whether by reference to the Company’s “report date” of 1 September 2018, Crowe’s “report date” of 30 September 2018, or the date that I regard as the appropriate date (for the reasons explained above in relation to earlier audit years, on the basis of the case in the PoC) of March 2019.
792. According to Mr Pearson’s table of loss, the Company’s stock of wine was worth £2,209,212 as at 1 September 2018, and £1,535,625 as at 31 December 2018, and by 1 September 2019 it had been reduced to £0. That represents sales of almost £674,000 in the four months from September to December 2018 (an average of £168,500 per month) and sales of just over £1.5m within at most the first eight months of 2019 (an average of almost £192,000 per month). It is unclear why these rates of sale were lower than the average rate of sales of £282,000 per month in the first eight months of 2017. The explanation may lie in the impulses of the directors, or in market conditions, or possibly in the attractiveness of the stock that was left after initial large sales in 2017/2018.

793. In my judgment, the like considerations apply to the Company's claim for loss of this asset as apply to the Company's claim for loss of wine in respect of Y/E 2016.
794. According to my analysis, the appropriate start date in this instance is March 2019. By that date, on the figures given above, the stock of wine would have been reduced from £1,535,625 as at 31 December 2018 to about £960,000 by sales carried out without any awareness of potential issues with Crowe or actions by the shareholders. In the minimum period of three months that I consider it would have taken the shareholders (if minded to do so) to put protective measures in place, I consider that the directors would have been able to reduce the remaining stock considerably. They would quite likely have disposed of it completely, but, adopting the approach most favourable to the Company, I will assume that disposal would have carried on at much the same rate as before the shareholders raised their heads above the parapet. That means that the stock would have fallen by about £580,000 during that time, yielding a net value of £380,000. Using the percentages discussed above, the Company's claim in respect of the loss of this wine is therefore worth £38,000, or, if the resignation scenario is right, £114,000. Again, these figures may be subject to cost of sales reductions, as considered below.
795. If, contrary to the above, I should have taken one or other of the dates that I have rejected, the correct starting figure would be either £2,209,212 (on the Company's case that the operative date is 1 September 2018) or around £2,041,000 (on Crowe's case that the operative date is 30 September 2018), from which the sales of wines that would have occurred in the following three months would need to be deducted.
796. If (which I reject) the operative date is the same as the date when the shareholders would have been alerted to Crowe "blowing the whistle", and not some time after that date, which I consider to be at least three months, the figure would need to be adjusted again.

THE AUDIT FOR Y/E 2018

The history of the audit

797. For some time, Crowe had understood that the Company intended to sell off its stock and enter liquidation in 2019. Mr Malkin describes the Company in this period as "gearing up for an exit". Mr Malkin recalls discussing with AdC the fact that the funds held with Lilliput would need to be repaid. Mr Malkin's evidence is that AdC always gave him assurances about this. In fact, the documents show that there were issues with co-mingling and about a lack of cash coming in. Crowe was not told about these issues.
798. In May 2019, the Company provided Crowe with documents such as its trial balance. These showed that the Lilliput balance had increased considerably. This was expected, as wine needed to be sold before the anticipated liquidation.

799. On 26 July 2019, Mr Sprei of Crowe made a series of requests of Mr Patel, including (i) confirmation letters for the Lilliput balance for both the Company and Huntsman, (ii) confirmation about how long the money was tied in for and when the companies expected the money back, and (iii) Lilliput's accounts. On 1 August 2019, Mr Patel emailed AdC asking him to deal with the questions relating to Lilliput.
800. Crowe chased NP for answers on 5 August 2019, 8 August 2019 and 12 August 2019. On 27 August 2019 (i) Mr Patel sent Crowe answers to some of its questions but did not deal with Lilliput, and (ii) in a further email, stated that AdC would deal with Lilliput.
801. In an internal Crowe email dated 5 September 2019, Mr Sprei informed Mr Gelderd that he was "Awaiting Lilliput accounts to assess recoverability."
802. On 5 September 2019, AdC provided Crowe with a DTC stating that there had been a rolling term deposit at Lilliput of £2,995,150 as at 31 December 2018. In the covering email, AdC stated "The balances are payable on demand".
803. On receipt of the email, Crowe sought Lilliput's latest accounts. On 6 September 2019, AdC sent them. These accounts stated that as at 28 February 2019, Lilliput had capital assets of £9.51m, cash at bank of £247,935, and debtors amounting to £3,465,991.
804. Mr Malkin's evidence is that at this stage there was discussion in the team about whether the Lilliput balance should be included as an "emphasis of matter" in the audit. The audit team was not concerned about recoverability of the balance, but they were conscious of the significant increase and the upcoming exit plan.
805. Crowe therefore produced draft wording, which it sent to AdC on 30 September 2019. This said: "In forming our opinion on the financial statements we would like to draw attention to the balance included in other debtors of £2,995,150 (2017: £384,025) held on deposit with Lilliput Holdings Limited as disclosed in Note 1.6 and 13. The directors have emphasised the steps they have undertaken in order to assess the recoverability of this balance. The directors have not recognised any provision on this balance. Our opinion is not modified in respect of this matter." Mr Malkin's evidence is that he cannot now recall what the directors said that these steps were.
806. The Company raised no objection to this wording. It was included in the audit opinion in the accounts filed at Companies House on 30 September 2019. On the same day, AdC confirmed that the Company was a going concern. RB signed the directors' statement in the accounts, certifying that complete information had been provided to the auditors.
807. The shareholders in the Company did not manifest any negative reaction to the accounts in the period between their publication and the MVL investigations starting in 2020.

808. Among a large number of criticisms of Crowe’s work in this audit year that are made by Mr Ashley in his report, it is sufficient to mention only the following two.
809. First, so far as concern assessing recoverability of the Lilliput deposits, (and as was also true in 2017) by this time Crowe knew that AdC was a director of Lilliput. This reinforced the fact that Mr Ashley considers to have been applicable in any event that these accounts had no evidential value beyond being essentially a representation by AdC, which Crowe should not have regarded as reliable without further verification.
810. Second, even taking the Lilliput balance sheet at face value, Mr Ashley states:
- “... even a cursory review would have revealed even more concerning features as follows:
- The creditor shown in Lilliput’s accounts of £3,713,721 is essentially the sum of the balances held by TWEISL (£2,995,150) and Huntsman (£718,570), but as at 31 December 2018 not 28 February 2019 by which date the balances had changed to £3,295,985 ... and £716,095 respectively. This total of £4,012,080 is therefore significantly higher than the corresponding creditor shown by Lilliput purportedly at the same date.
 - Despite the considerable increase in deposits purportedly made by TWEISL and Huntsman, the cash at bank recorded by Lilliput had declined since 28 February 2018 and was now less than 7% of the combined purported deposits. Debtors in contrast had more than doubled and net current assets of nearly £400,000 had been virtually eliminated.”

The auditing experts’ evidence – Y/E 2018

811. Mr Ashley deals with the audit for Y/E 2018 in [4.8.1]-[4.8.20] and [6.8.1] to [6.8.10] of his report. At [6.8.9], Mr Ashley expresses the view that a reasonably competent auditor would have started to take the steps set out in [6.2.26] to [6.2.29] of his report sometime in July 2019 and that “it is reasonable to assume that shareholders would have been made aware that the auditors were not able to provide an audit opinion either through the issue of financial statements with an opinion disclaimed or more likely through a letter explaining their resignation or some other communication sometime in late August or September 2019.”
812. On this basis, the Company’s claims at trial were formulated by reference to a “report date” of 1 September 2019. Crowe argued that the relevant date was 30 September 2019.
813. The parts of Mr Main’s report that deal with the audit for Y/E 2016 are [6.3.44]-[6.3.49] and otherwise are as identified above.

814. As in the case of the audits for previous years, I consider that the scenario identified in the last point of [6.5.3] of Mr Main's report applies to the audit work for Y/E 2018.

Discussion and conclusions – Y/E 2018

815. In my judgment, the like conclusions apply to the Company's claim for lost cash in respect of this year as apply to the audits for the previous years. Of the trade and other receivables of £3,044,496 for Y/E 2018, £2,995,201 was said to be held with Lilliput. These figures relate to 31 December 2018, although as at 28 February 2019, according to the Lilliput balance sheet, Lilliput had cash at bank of only £247,935. This alone shows that the notion that anything like £2,995,201 was held with Lilliput was a mirage. For the like reasons as I have given above in respect of the previous audit years, I do not consider that there is any prospect that any of that cash would have been preserved or recovered by any steps taken by the shareholders, whether by reference to the Company's "report date" of 1 September 2019, Crowe's "report date" of 30 September 2019, or the date that I regard as the appropriate date (for the reasons explained above in relation to earlier audit years, on the basis of the case in the PoC) of March 2020.
816. According to Mr Pearson's table of loss, the Company's stock of wine was worth £2,209,212 as at 1 September 2018, and £1,535,625 as at 31 December 2018, and by 1 September 2019 it had been reduced to £0. On this footing, there was no wine available to be saved even if the shareholders had been given chapter and verse about the grounds of concern that Crowe ought to have had, and this had happened on the earliest date put forward by Mr Ashley, and the shareholders had taken immediate effective action.

COSTS OF SALE OF WINE

817. It was common ground that, in principle, the value of the stock of wine that might have been preserved by action instigated by the shareholders at any date falls to be reduced by sale costs. The Company argued for a reduction of 0.65%, based on an analysis by Mr Pearson of the historic cost of sales effected by the Company while it was operating. Crowe argued for a reduction of 5% on the basis that (i) the CVL liquidators have no expertise in selling wine, (ii) accordingly, they would probably have to sell wine by other means, such as at auction, (iii) auction fees are of the order of 10%, and (iv) estimated selling costs of 5% are therefore modest, and should be adopted as a minimum. In light of Mr Hardman's evidence in cross-examination that the CVL liquidators would need to take expert advice with regard to sales, Crowe argued that the costs of this advice, and the liquidators' time in obtaining it, should also be factored in.
818. It is sufficient to quote the following extract from the joint statement of Mr Pearson and Mr Conti to illustrate the nature of the differences between them, as well as the fact that, in my view, they have no particular expertise to offer in this area, and are

each, in essence, advancing forensic points in support of the cases of their respective clients:

“Mr Pearson has calculated selling costs to have been on average, 0.65% of sales historically. Mr Pearson has assumed that such levels of costs would be applied to the market value of stock sold on liquidation at each of the Relevant Dates, for the reasons set out above, thereby deriving the NRV of stock.

It is unclear what proportion of the 5% discount applied by Mr Conti to stock represents selling costs or a bulk discount, however Mr Pearson considers any amounts materially in excess of 0.65% in respect of selling costs is unsupported based upon historical costs incurred by TWEISL.

Mr Pearson notes Mr Conti’s consideration “...that an opportunistic buyer might very well require such a discount...”, and acknowledges that in some circumstances a bulk buyer may require such a discount. However, Mr Pearson considers that the fact that the market value was based upon current market pricing and actual transactions, indicates that there was ready demand for the stock held by TWEISL at market value, without the need to apply a discount.

Similarly, unless it is considered that TWEISL held such large volumes of the available stock of any given line item that in selling all of TWEISL’s stock, it would cause a surplus in the market and cause a decrease in selling prices, there is no apparent reason to assume that the stock held by TWEISL would sell for anything substantially less than the values per the Tromino Spreadsheets (with the exception of a deduction of reasonable selling costs).”

819. By email dated 20 October 2025, Fieldfisher made the following pragmatic proposal:

“Mr Conti says that any liquidator of TWEISL in a hypothetical earlier liquidation would have selling costs of 5%; Mr Pearson says 0.65% (in line with TWEISL’s historic sales costs). In order to get to agreement, and without prejudice to our ability to argue for the lower percentage if this is not accepted, we would be prepared to agree 2.5% sales costs. Please confirm this is now agreed and the Judge does not have to decide this matter.”

820. That met with the following response from Clyde, in a letter dated 4 November 2025:

“We consider that Mr Conti’s selling costs are conservative, not least in view of discussion at trial surrounding likely auction costs in the region of 10+%. We do not therefore accept the compromise of 2.5% proposed.”

821. In fact Mr Conti’s evidence on this in cross-examination was as follows:

“... I am not a wine expert. The 5% is my assumption. But obviously, as you would expect, I did conduct some internet research, and I looked at the cost

that you might get from the various options, Christies, Bonhams, you know, the 10% commission they might charge, the 10% commission that a broker might charge. But recognising that my research might not be complete, I opted for a lesser value of 5%. I did not see that Mr. Pearson's 0.65% was in my view, not an expert view, it did not seem to be a credible number for the sale by a liquidator of a large volume of stock. But it is just an assumption."

822. Much of my reasoning above is based on the premise that it would not have been difficult for the directors to sell off wine, even if they were seeking to accelerate sales as they attempted to strip the Company of assets before their dishonesty came to light. Liquidators would be in a different position, as they would not know much about the market, and they might be concerned that the longer the sales process lasted the greater their costs associated with sales might become, and also about the possibility that word would get round that the stock was being sold in distressed circumstances. I therefore consider that Mr Pearson's approach based on historic sales costs is unduly optimistic. At the same time, Mr Conti's approach is not based on any true material expertise. Further, I am not persuaded that, even if the liquidators had to turn to others for help, they would be driven to selling at auction or through a broker. Doing the best I can, and taking into account the fact that there would be some costs associated in getting help, I consider the 2.5% offered by Fieldfisher is right, and that is what I propose to order.

LIQUIDATION AND LEGAL COSTS

823. This is a substantial head of claim. It turns on a comparison between (i) the costs that would have been incurred on a liquidation arising in consequence of Crowe having acted competently and (ii) the costs that have been incurred in the events which happened.

The evidence of the experts

824. Mr Pearson explains his approach at [8.50]-[8.52] of his report:

"8.50 As discussed at paragraph 8.10, I consider that had a hypothetical liquidator been appointed at the Relevant Dates, cost savings would likely have been achieved compared to the £626k actually incurred.

8.51 This is because, had the alleged fraud been flagged sooner, there would have been fewer years of wrongdoing and transactions to work through and therefore fewer hours would likely have been incurred.

8.52 I have consulted with colleagues in the Quantuma Advisory Limited Restructuring and Insolvency team, and have been advised that, in 2012 based on the size of the company and the duration with which it had been trading, likely liquidation fees would have been around £125k. For each of the Relevant Dates from 31 December 2012 to 1

September 2019, I increase this on a linear basis, rising from £125k to the £626k actual costs incurred by the Joint Liquidators, to calculate the hypothetical liquidators' costs had the auditors notified the shareholders/resigned as auditor at each of the Relevant Dates."

825. The substance of Mr Conti's approach is apparent from [8.5.1] to [8.5.3] of his report:

"8.5.1 It will be apparent from the analysis set out above that estimating the But For costs of liquidation requires a subjective counter-factual analysis, taking into account many factors relating to the Company's financial position as at the date of the assumed liquidation, including:

- the number, nature and value of the Company's assets;
- the number, nature and value of the Company's liabilities;
- the actions that the Directors might have taken to frustrate the liquidation process; and the value of the Lilliput account and the reasonable approach to investigating it and its recoverability.

8.5.2 Given this subjectivity, I have sought to simplify my assessment (which is, in any event, outside my area of expertise) by taking the Actual costs of the liquidation of £986,198 and "scaling" them to each assumed But For date by applying an appropriate metric.

8.5.3 In choosing such a metric, I consider it reasonable to assume that:

- the greater the number and value of the assets to be realised, the greater the overall cost of the liquidation;
- the greater the number and value of the liabilities to be paid, the greater the overall cost of the liquidation;
- the greater the value of the Lilliput balance, the greater the cost that could reasonably be justified in investigating its dissipation and recoverability."

826. The difference between the figure of £626k mentioned in Mr Pearson's report and the figure of £986,198 mentioned by Mr Conti is that the latter figure includes legal costs. Although £626k is claimed in the PoC, the liquidators' time costs record costs of £619,073. At one time Fieldfisher's costs were said to be £322,473, but the schedule of loss produced by Mr Pearson that I have been working off puts legal fees at £367,125.

827. In fact, because the 31 December 2012 cost of £125,000 mentioned by Mr Pearson is merely a benchmark figure, his lowest comparable liquidation cost figure is not that

figure but is instead the £212,444 applicable as at 1 March 2014 on his linear approach.

The parties' submissions

828. Both the level of costs claimed and the validity of Mr Pearson's approach were disputed.
829. So far as reasonableness is concerned, Crowe accepted that the CVL liquidators needed to spend time working out what had happened at TWEISL and whether there were likely to be recoverable assets. Ms Evans submitted, however, that it is plain that they have spent far too much time on this in circumstances where recoveries have been so minimal. The liquidators' revised fee estimate dated 14 October 2025 was for £1,299,522 (net of lawyers' fees). Lawyers' fees and disbursements up to January 2025 totalled £1,842,239.31. However, as at January 2025 the liquidators had only managed to recover net assets of £64,125.47. Ms Evans highlighted that the liquidation costs alone (exclusive of legal fees) have outstripped the recoveries by twenty times.
830. A large proportion of these costs relates to claims or potential claims against the directors and associates. By reference to the CVL liquidators' and Fieldfisher's combined time records, it appears that TWEISL has incurred a total of £511,390 on this line of work, as follows: (i) £91,249 incurred in connection with communications with the directors and associates; (ii) £334,715 incurred in connection with claims against the directors and associates; and (iii) £85,426 incurred in connection with Without Prejudice communications with the directors and associates. Ms Evans submitted that this sum is unjustifiable given that, according to Mr Hardman, no letters of claim were in fact sent out, and AdC appears to have strung the CVL liquidators along with implausible promises of a settlement. In this regard, Mr Hardman said in evidence:

“In terms of that meeting on 13th November 2020, he started talking about a contract with Ali Baba in terms of a wine bond, giving the impression that it was close to fruition, that it was almost there. I never really got any feeling that that was a reality. It was just conversation.

... what we were doing at the same time as we were listening to conversations about shipping contracts, which were very opaque, albeit we did get assurances from Gowlings that the contracts did exist, or at least they could provide it, was putting leverage on him with regard to what we could do. Admittedly, we did not tell him, we could not because of lack of funds, in terms of enforcement action over his wife, his sister and himself.”

831. TWEISL also claims costs incurred by Fieldfisher in connection with obtaining the release and removal of the MVL Liquidators totalling £23,475 and £30,880

respectively. Ms Evans submitted that this is not something for which fault is attributable to Crowe.

832. Ms Evans accepted that where legal costs are claimed as damages, they are approached on the indemnity and not standard basis (*Hermann v Withers* [2012] PNLR 28). Nevertheless the Court still cannot allow actual costs which have been unreasonably incurred or are unreasonable in amount. The costs here need to be dramatically trimmed.
833. Turning to Mr Pearson's approach, Ms Evans submitted that this assumes that the complexity of the liquidation would have risen steadily year by year. However, whenever TWEISL had gone into liquidation, the liquidators would have had to investigate its assets, including the issues of co-mingling that have arisen, which Ms Evans submitted would have been more costly if there had been stock or money in place. Crowe contends that any earlier liquidation would not in fact have been considerably cheaper, and certainly not on the scale suggested by TWEISL.
834. Ms Evans submitted that Crowe's approach is borne out by the following:
- (i) Mr Hardman acknowledged in evidence the difficulties in determining the costs of a hypothetical liquidation and said that "It is difficult to establish whether the costs of liquidation would have been less or more or the same".
 - (i) Mr Hardman agreed that in an earlier liquidation, it would always have been necessary to investigate claims against TWEISL's directors and associates.
 - (i) Mr Pearson acknowledged that it would have been necessary in any liquidation to carry out some form of investigation of TWEISL's balances, including working out whether the Lilliput balance existed.
 - (i) Mr Hardman made clear that the CVL liquidators encountered significant difficulties obtaining answers and access to relevant information from the directors. AdC in particular was prepared to string matters out, either giving opaque details about TWEISL's operation, dangling promises of settlement or stalling production of bank statements. Mr Hardman agreed that there was no reason to think that AdC would not also have been "obstructive" at an earlier stage.
 - (i) Mr Pearson also "totally agree[d]" that whoever was dealing with an earlier liquidation would have been dealing with prevaricating directors.
 - (i) In the event of TWEISL actually having stock at the date of an Earlier Liquidation, it is likely that there would have been claims to that stock by other AdC-related entities. Even if TWEISL is correct that such claims

could not be made out, this does not mean that nobody would have tried them. Mr Pearson agreed the image of a “messy picture” in an earlier liquidation.

835. Mr Lawrence submitted that (i) there is no reason to discount the CVL liquidators’ fees of dealing with what on any view was a particularly complex potential tracing exercise and set of claims, (ii) they got close to a settlement agreement with AdC and the related parties which would have been very beneficial to the estate, and (iii) in any event, Mr Pearson’s approach is much the more satisfactory and common sense approach to liquidation fees and the discount that would have been obtained by an earlier liquidation: “It is necessarily broad brush but no other method of assessment is available”.

836. This reference to the prospects of a settlement is to Mr Hardman’s evidence:

“So the tracing we are able to do, given the restriction on funds we had, and through reverse tracing, i.e. through the bank statements we received eventually regarding Anpero, and Mr della Casa’s personal bank statements, is we identified transactions going to mortgage companies. And on enquiring, it was established that those were mortgage payments regarding a number of properties which were owned by connected parties, so specifically Leonie, his wife, and Alex Maxwell, his sister. In doing that tracing exercise, we established what the properties were, and we tried to understand what equity there might be available in those properties, which might come back to the estate of the liquidators, given that we traced it and whether there was any proprietary claims over them. So we entered into discussions with Mr della Casa, with his lawyers, in terms of entering into a settlement agreement with him to get some value back from those.

... we were very, very close, and it would have been a substantial sum, which would have made a huge difference in terms of the monies owed to the shareholders. It could have quite changed the strategy of the liquidation if that had come to pass. Now that we had signed that, we were on the edge of doing that. We literally had a compromise agreement in agreed form. We are very conscious of time as well, because there was concern that the likes of Huntsman could go into liquidation and there might be competing claims for those same assets. So we were very keen to get that contract over the line and literally what we assumed was on the agreed form for this settlement agreement -- there was an additional requirement made by Mr della Casa with regards to the terms, which meant we could not signed it. So it was incredibly disappointing, that. That would have meant funds coming through to the liquidation estate over -- I think I recall there was a phased arrangement where monies, and precisely significant monies, would have come into the estate over [2023/2024]. By early [2024] those monies would have come in.”

Later, when asked “All of the properties he had an interest in turned out to be mortgaged to the hilt, did they not?”, Mr Hardman replied:

“We did not get full details, because we were not provided with all the information from, for instance, Standard Chartered, which was the mortgagee on three of the companies. So we could not get full clarity on what equity was in the properties, reliance unfortunately on Mr della Casa, and Alex Maxwell and Leonie, his wife.”

837. Mr Lawrence submitted that Mr Conti’s approach was inherently flawed, and that this is apparent from the fact that, applying his assumptions, he reached the conclusion that the liquidation costs would actually have been higher from Y/E 2015 onwards. Mr Conti refuted this criticism, on the basis that, in his view, it is not “inconceivable” that the earlier costs would have been greater, as the number and value of the assets and the liabilities that the liquidators had to deal with would have been greater in earlier years.
838. Mr Lawrence accepted that the £23,475 cost of obtaining the suspension of the release of the MVL Liquidators (which relates solely to the ability to continue to be able to sue them) should be removed from the Company’s claim against Crowe, but maintained that the £30,880 cost of removal of the MVL liquidators was recoverable from Crowe.

Discussion and conclusions

839. As set out above, the Company’s highest claim for damages arises from Crowe’s breaches of duty relating to the audit for Y/E 31 December 2016. It makes no sense to assess the head of claim relating to liquidators’ costs and legal fees by reference to any other year. In particular, to award the Company damages on the basis of what would have been recoverable if the Company had been placed into liquidation no earlier than 1 December 2017, but then award damages under this head of claim on the basis of what the costs of liquidation would have been at some earlier date (such as March 2014, the date that produces the highest level of recovery for the Company under this head of claim) is to give the Company the best of both worlds: a substantive award calibrated by reference what would have been recoverable when there were plenty of assets around, and a costs of recovery award calibrated by reference to when there were not.
840. Even on Mr Pearson’s approach, that has the effect of substantially reducing the headline level of this claim. Mr Pearson’s hypothetical liquidators’ fees are £494,530 as at 1 December 2017, £500,072 as at 31 December 2017, and £550,905 as at 1 September 2018. For reasons explained above, the date that I consider to be relevant is no earlier than 1 June 2018. On his approach, the fees would be around £530,000 on that date. This produces a claim for liquidators’ fees of around £100,000 and not some higher sum.

841. However, I do not consider that Mr Pearson's approach is sound. In my judgment, rather than adopting a linear approach, the correct approach is to compare the complexity of the task that the CVL liquidators and Fieldfisher would have faced if the Company had been placed into liquidation when, on the Company's case, it ought to have been, and the complexity of that task in the events which happened, starting around 2020.
842. Further, I am not persuaded that there is any material difference between those two positions. As a matter of logic, Mr Pearson is right in saying that the fewer the years of wrongdoing and the lower the number of transactions to work through, the lower the number of hours that would be likely to have been required. However, I do not consider that the difference for these purposes between a liquidation in 2018 and one in 2020 would be great. At the same time, it is equally logical, as Mr Conti contends, that (i) the greater the number and value of the assets to be realised, the greater the overall cost of the liquidation; (ii) the greater the number and value of the liabilities to be paid, the greater the overall cost of the liquidation; and (iii) the greater the value of the Lilliput balance, the greater the cost that could reasonably be justified in investigating its dissipation and recoverability. Included within (i) is the cost of dealing with wine stock, which would have arisen on an earlier liquidation in 2018, but which did not arise by the time the CVL liquidators were appointed. This would not have been insignificant. Large parts of the costs seem to me likely to have been of the same order of magnitude on either date, such as those incurred in connection with (a) communications with the directors and associates, (b) claims against the directors and associates, and (c) Without Prejudice communications with the directors and associates, said to amount to £511,390.
843. In fact, (although I do not by any means accept all of his methodology either) as Mr Conti says, it is not inconceivable that the costs in earlier years would have been greater.
844. I also consider that there is substance in the points made by Ms Evans about the level of costs claimed. It is obviously simplistic, and wrong, to say that the costs are unreasonable because the recoveries that have been made are meagre. However, the disparity between the two is striking. It may be that a lot of effort has been put in, but in terms of value for money the bills that have been run up seem surprising, and I agree that the Court should not allow those bills to be passed on to Crowe without a filter.
845. Finally, the claim for £23,475 of legal fees is no longer pursued, and I am not persuaded that the £30,880 cost of removal of the MVL liquidators is recoverable from Crowe.
846. For all these reasons, I propose to make no award under this head. Unhappy though the entire saga of the current liquidation may be, the Company has not satisfied me that it would have cost it any less in terms of liquidators' costs and legal fees if it had

been placed into liquidation in 2017/8 than it has cost it as a result of the current liquidation.

847. I cannot leave this part of the discussion without commenting that, in my view, it lends support to the conclusions that I have reached about the prospects that the shareholders would have taken steps to preserve or recover assets in the event of an earlier liquidation.
848. Whatever the strength of their initial anger and hope may have been, once they were quoted prospective costs at anything like the scale that even Mr Pearson's linear analysis produces, I consider they would have thought long and hard before risking throwing good money after bad. That would have been eminently sensible from an objective perspective, but, subjectively speaking, it also accords with their own later conduct.

CREDIT FOR PAYMENTS RECEIVED DURING THE MVL

849. Crowe contended that TWEISL must give additional credit in respect of any benefits received during the MVL. These benefits fall into the following two categories.

MVL Settlement Sum of £150,000 (paid by Price Bailey)

850. Crowe's argument proceeded as follows: (i) the legal costs of the claim against the MVL liquidators have been included within the costs of the liquidation claimed against Crowe (see TWEISL's schedule showing Fieldfisher's costs of obtaining the release and removal of the MVL liquidators totalling £23,475 and £30,880 respectively); (ii) these same costs seem to have been claimed (whether in full or in part) as part of the claim against the MVL liquidators; (iii) TWEISL received a payment of £150,000 in full and final settlement of that claim in February 2023; (iv) TWEISL must therefore give credit in respect of any sums for which it made a recovery and which overlap with the damages now sought against Crowe; (v) Mr Conti allows for this in his report and in his loss tables; (vi) conversely, Mr Pearson does not allow for this in his report and his tables.
851. The claim for £23,475 is no longer pursued, and I have rejected the claim for £30,880. In these circumstances, I hope that I am right in saying that this point no longer arises.

Other payments received during the MVL

852. Mr Conti has identified that TWEISL received two types of payment from the TWIF General Account during the MVL liquidation for which Crowe says credit must be given (i) "Interest Payments" from the TWIF General account, totalling £33,944; and (ii) a payment via the TWIF General account, funded by AdC, for £40,000.
853. Mr Lawrence submitted that Mr Pearson's evidence could be summarised as follows:

- (j) The sum of £33,944 is made up of two separate “interest payments”: £5,753 paid on 31 March 2020 which appears to have been funded by AdC; and £28,191 paid on 28 February 2020 which appears to be part funded by a variety of sources (including Huntsman).
- (k) The sum of £40,000 was made from TWIF to TWEISL on 15 May 2020, and appears to have been mainly funded by AdC and Huntsman.
- (l) If the monies were repaid from AdC’s personal monies or represent TWEISL’s own monies being returned then a deduction should be made.
- (m) If the monies belong to TWIF or a third party, then no deduction should be made because they are subject to potential recovery actions by TWIF or third parties subject to the conditions in which the funds were received.

854. Mr Lawrence submitted that it is unclear in which category these payments sit, but (i) given the date on which these payments were made (after January 2020) it is likely to be in category (4) above, because the monies are most likely to originate from Huntsman at this stage; and (ii) therefore no deduction should be made.

855. Ms Evans submitted that (i) Mr Pearson accepted in evidence that deduction should be made, save insofar as these monies were funded via TWIF with funds from other third parties, and (ii) this caveat should be rejected as Crowe is not aware of any claims by third parties having been made (or threatened) against TWEISL to recover these amounts, so it is unlikely that TWEISL will have to account to anyone else for the same.

856. By email dated 20 October 2025, Fieldfisher offered that if the Company was successful on the “wine stock title” argument, it would be prepared to split the difference between the £40,000 of payments made by AdC and/or others and the interest payment of £39,000 (sic) after the date of the MVL and thus “would be prepared to credit £39,500 for these payments”.

857. By letter dated 4 November 2025, Clyde replied:

“Mr Pearson accepts that it is ‘conceptually reasonable’ for a deduction to be made on account of these payments insofar as funded by ADC rather than other wine funds. Mr Pearson also accepted that sums should be deducted if this is an amount from which the Company ultimately benefitted, which we understand to be the case ... as far as we are aware, (a) these amounts were received by TWEISL; and (b) there have in fact been no claims in respect of them. We do not therefore agree that there is any basis on which to “split the difference”.”

858. I commend Fieldfisher for trying to narrow the issues in this way. As that effort failed, however, the matter falls for determination by me. In my judgment, Crowe has the

better part of the argument on this issue. I therefore order that the Company must give credit to Crowe for the total sum of £73,944. I observe that this accords with the approach that I have taken to Crowe's "wine stock title" argument. I held that argument was not available to Crowe on the pleadings, but I also said that I regarded it as having little value to Crowe in light of the improbability of claims being made by (e.g.) Huntsman.

FURTHER CREDITS

859. Mr Pearson quantified ongoing losses by reference only to shareholder funds that came into TWEISL after each remedial action date. Mr Conti's approach calculated the monies said to have been lost by the Company into the Lilliput deposit account as a result of continuing to trade, including shareholder funds received.
860. However, Mr Conti also took into account the actual trading of the Company including trading costs and profits. According to his analysis, as a result of continuing to trade, the Company generated some net profits. Those net profits were subsequently "paid" to Lilliput and thus serve to inflate the Lilliput deposit balance on his loss calculations. He makes an adjustment in respect of net profits generated after each remedial date, resulting in a corresponding reduction to the amounts "lost" into the deposit account.
861. Mr Pearson considers that such profits should not be deducted from the cash outflows in respect of the Lilliput Balance, as such profits would have partly funded the outflows to the Lilliput Balance which left TWEISL with £6.50. As such, Mr Pearson considers that it does not appear to be the case that TWEISL obtained any benefit from such profits, but rather that such profits were also dissipated by way of the Lilliput Balance.
862. The same point arises in respect of interest payments received by TWEISL from the TWIF General Account (and notionally from Lilliput) throughout the period, which Crowe contends likewise represented a benefit to TWEISL of carrying on trading.
863. Mr Pearson agreed that credit should be given in respect of this amount if TWEISL indeed ultimately benefitted "rather than that money being lost". Crowe contends that this latter caveat is however hard to understand. Ms Evans submitted: "the money was indeed "lost" but it had the effect of inflating the alleged Lilliput balance by sums that would not have been received if TWEISL had stopped trading".
864. In my view, one difficulty in attempting to apply Mr Conti's kind of analysis to the facts of the present case is that the Company was being run as a form of "Ponzi" scheme. Whatever the Company's documents may have purported to show, there was, in truth, no Lilliput balance, because the entire story of payments being made to Lilliput was a fiction. Similarly, there were, in truth, no interest payments received by the Company from Lilliput, because it never held the Company's funds and nor did it

earn any money on those funds out of which it could fund payments of interest, or, as far as can be gleaned from the papers before the Court, have any other means of funding those payments. In addition, if there were truly any trading profits or payments of interest (as opposed to a fraction of the monies extracted from the Company being returned to the Company as “trading profits” or “receipts of interest” to assuage concerns about the extraction of the monies, as is typical in “Ponzi” type schemes), as far as one can tell from the papers before the Court, they were used entirely or in large part to fund the large purchases of wine that took place, peaking in December 2017, and all those monies were then lost, and, moreover, were lost in large part due to Crowe’s breach(es) of duty.

865. That said, I agree with Crowe that if and to the extent that the Company acquired a benefit which was factually and legally caused by Crowe’s breach(es) of duty, then the Company would have to give credit for that benefit. If, in truth, profits were generated or interest was earned after the date when the Company would have ceased trading had it not been for those material breach(es) of duty, that principle would apply to the same.
866. Crowe’s problem, as I see it, is that the material date, on my analysis, is no sooner than 1 June 2018, and it has not sought to identify, or put a figure on, any material receipts after that date. Accordingly, in my view, this element of Crowe’s case is not made out.

MATTERS THAT ARE AGREED

867. There was a dispute about the extent of recoverability of trade debtors. Mr Pearson suggested 100% recovery, Mr Conti 80%, and the parties compromised on 85%.
868. Further, part of the dispute as to what cash/assets could have been “got in” at an earlier liquidation concerned an issue about net “VAT receivable” recovery. Mr Pearson suggested 100% recovery, Mr Conti 80%, and the parties compromised on 90%.
869. At one stage, Crowe was running arguments to the effect that the Company had failed to take steps to mitigate its loss, but from the evidence that emerged at trial it appeared that further recoveries were probably unachievable. Crowe therefore gave up this point.

CONTRIBUTORY FAULT

870. Section 1(1) of the Law Reform (Contributory Negligence) Act 1945 provides:

“Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to

such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage".

Crowe's submissions

871. Ms Evans submitted that any damages awarded to the Company should be reduced to reflect (i) the conduct of the directors and (ii) the conduct of Mr Patel (whose relationship with the Company was, she submitted, akin to employment: see *Barclays Bank plc v Various Claimants* [2020] AC 973), for the following principal reasons.
872. With regard to the directors, AdC was engaged in a wide ranging fraud, which involved deceiving TWEISL's shareholders, the shareholders of other entities such as Huntsman or TWIFL, and Crowe (among others). Although RB's position is less obvious, it is TWEISL's case that he was involved in the fraud, and at best it appears that he was turning a blind eye to what was going on, and was in those circumstances dishonest.
873. As appears from *Barings PLC (In liquidation) v Coopers & Lybrand (A Firm)* [2003] PNLR 34 ("*Barings (No 7)*"), where a company is vicariously liable for a director's fraudulent wrongdoing, that is treated as applicable fault on the part of the company. Evans-Lombe J referred to *Dairy Containers* but concluded at [962]-[963] that "Thomas J's view that fraud which amounts to "bilking the company" is not attributable to the company as contributory fault does not ... represent English law" and that "Leeson's fault is to be attributed to BFS for the purposes of apportionment under the 1945 Act".
874. The approach taken by Evans-Lombe J was explained by Rose J in *Singularis Holdings v Daiwa Capital Markets* [2017] Bus LR 1386 ("*Singularis*") at [247] as follows:
- "The judge in *Barings* made graded deductions of different amounts over different periods. Broadly speaking, for the period when the element of contributory negligence on the part of the bank comprised the fraudulent conduct, the deduction was 50%. The judge said that although Mr Leeson's fraudulent unauthorised trading was overwhelmingly the most important cause of Baring's loss, in common sense terms, he had to recognise the auditors' fault in failing to detect that fraud and therefore could not attribute to it the overwhelming causative influence which it would otherwise have. Over later periods when the contributory negligence also comprised additional failures of management to exercise proper control and supervision over Mr Leeson, the deduction rose to 80%."
875. The same approach was explained and applied in *Singularis*. In that case, the claimant company had one shareholder, a Mr Al Sanea ("S"), who was also one of its directors. S was the only person involved in giving instructions to a stockbroker to direct

payments out of a designated account to a third party, and he was treated as the sole directing mind of the company. For its part, the stockbroker owed a “*Quincecare*” duty not to execute a transaction if it had reasonable grounds to suspect fraud. Rose J held that S’s fraudulent knowledge should not be attributed to the company for the purposes of defeating the claim entirely, as that would denude the *Quincecare* duty of any function. However, as “fault” can include intentional acts as well as negligence (see *Reeves v Metropolitan Police Commissioner* [2000] 1 AC 360), Rose J reasoned that S’s fraud was to be treated as contributory negligence by the claimant (for which it was vicariously liable) and that a deduction of 25% for contributory negligence should be made in light of (i) S’s conduct and (ii) the other directors’ failures. This approach struck a balance between the effect of the fraud and directors’ failures on the one hand and the importance of the bank complying with its *Quincecare* duty on the other hand.

876. The decision of Rose J was upheld on appeal (see [2018] 1 WLR 2777). There was no criticism in the judgment of the Court of Appeal of the approach in *Barings No (7)*, which was mentioned at [30ii], [31] and [92ff]. Sir Geoffrey Vos, C said at [94]-[95]:

“94. Paragraphs 243, 246 and 251 of the judge’s judgment make clear that she correctly took into account, in this context, Singularis’s vicarious liability for Mr Al Sanea’s fraud, alongside Mr Wetherall’s involvement as part and parcel of that fraud. She also considered (in that latter paragraph) the other directors’ failure properly to supervise Mr Al Sanea. I have already mentioned her findings on the flagrant nature of Daiwa’s breach, against which these factors were balanced.

95. In my judgment, Mr McCaughran’s arguments do not get off the ground because he has failed to show either that the judge made any error of principle in her approach to contributory negligence, or that her assessment fell outside the range of reasonable possibilities. The judge took into account all the appropriate factors as elements of contributory negligence, namely the supine nature of the other directors, their failure to control Mr Al Sanea, and Singularis’s vicarious liability for his actions, and concluded that the damages should be reduced by 25%.”

877. Thereafter, in *AssetCo* at first instance, Bryan J took the same approach to the availability of a contributory negligence defence - expressly applying both *Barings (No 7)* and *Singularis*. Bryan J’s discussion of contributory fault starts at [1091]. At [1105], Bryan J said: “on the current state of English law, the dishonesty of management is attributed to the company for the purpose of contributory fault”.

878. In *AssetCo*, the entire senior management team (comprising the CEO/CFO and Financial Controller) were said to be engaged in dishonest behaviour (see [6], [1123], and [1188]). This included making dishonest statements to Grant Thornton (“GT”),

fabricating and massaging evidence and profits, dishonestly “overfunding” assets (i.e. misleading banks as to what loans were required), embezzling money, under-reporting tax liabilities to HMRC, concluding fraudulent related party transactions, and forging or backdating documents. Bryan J made different percentage deductions in respect of different heads of loss. As to this, Ms Evans submitted that: (i) many of the most serious allegations of wrongdoing against AssetCo’s senior management fell to one side in that they were not related to matters in respect of which AssetCo sued GT and (ii) the allegations of contributory negligence were therefore confined to other heads of loss.

879. At [1189], Bryan J said:

“But, and it is a *very* big but in the context of contributory negligence, GT’s (admitted) failings, as identified above, were very serious, indeed flagrant, breaches of duty and importantly they went to the “very thing” it was responsible for as auditor. Those breaches of duty included a failure to exercise proper scepticism which would have led to the detection of dishonesty and prevention of fraud including representations and assumptions made by Management during the course of the Audit. These were the very matters that were allowing AssetCo to continue to trade in a dishonest manner. In such circumstances I consider and find that (leaving aside dividends which are in a category of their own) GT’s breaches were of very high relative causal potency in relation to the losses and they also bear the lion’s share of relative blameworthiness.”

880. At [1190], Bryan J turned to apportionment in respect of particular losses, and:

- (i) The claims for wasted expenditure on subsidiaries were generally reduced by 25% ([1190(1)]).
- (i) Damages in relation to “PSA Monies” were reduced by 35% ([1155] and [1190(3)]). These monies were subject to restrictions on their use, and both GT and management should have been aware of this. Nothing extra was added for the failure of the non-executive directors ([1174]). A decision was deferred on the “Jaras Payment” made out of these monies ([1190(2)]).
- (i) Damages in relation to wrongfully awarded dividends were reduced by 100% because senior management had decided to declare them in circumstances where the cash flow of the company did not warrant that ([1160]-[1162], and [1190(4)]).

881. In deciding what percentage deduction to allow, Bryan J took into account GT’s “very serious, indeed flagrant, breaches of duty”. Further, at [1185], Bryan J described a “catalogue of failures” that went to the very heart of an auditor’s function, and pointed

out that GT had been fined and sanctioned and that the audit partner, Mr Napper, had been struck off as a result of the audit work.

882. Ms Evans submitted that “Even taking the least charitable possible view of Crowe’s audit mistakes, there is nothing remotely comparable here”.
883. Ms Evans further submitted that the closest case in terms of the facts is *Barings No (7)*. The mistakes in Crowe’s audit work were nowhere near the magnitude of what went wrong in *AssetCo*. In the present case, it is necessary to give appropriate weight to the fact that directors have the primary responsibility to run a company and protect it from fraud: see *Jackson & Powell on Professional Liability*, 9th edn, [17.092] and ISA 240.
884. The core facts relating to AdC and RB’s contributory fault consist of a mixture of misleading Crowe and broader conduct:
- (i) So far as concerns misleading Crowe, AdC took the lead on providing the false DTCs every year as to the alleged Lilliput balance. He also provided the dishonest Lilliput accounts, signed various LORs, and was involved in dishonestly answering queries from Crowe about the Lilliput balance.
 - (i) RB signed various LORs including the one in the Y/E 2015 which falsely represented that the Lilliput balance had been “fully repaid since the year end”. He also tended to sign off the accounts. He was a director of TWIFL and did not take steps to inform Crowe that TWIFL’s accounts had been qualified as regards the Lilliput balance. It is (at best) very hard to see how RB can have signed off the documents that he did. It is plain that he was party to considerable correspondence in 2016 in particular as to why funds could not in fact be taken off deposit to meet cashflow needs and about use of co-mingled funds. All this suggests that, at best, RB was turning a blind eye to what was going on (which is dishonest – see, e.g., *Singularis* at [146]).
 - (i) So far as the fraud more generally is concerned, it is plain that TWEISL was being run in a thoroughly dishonest way over the whole of its existence. AdC concealed the “Ponzi” nature of its operation, that the Lilliput account did not exist, that Lilliput was a related party, and that his sister was a director of Lilliput. Mr Hardman said that even when the CVL liquidators interviewed AdC he was “not being... full with the truth”.
 - (i) If RB was to be believed when he was interviewed, he stood apart from the operation of TWEISL, took AdC on trust, and had nothing to do with the bank accounts. However, RB acknowledged in interview that he was aware that some monies were going to Lilliput to “get a better interest” and he knew the matters referred to at (2) above. Further, RB’s depiction

of his role was at odds with what AdC said in interview on 20 November 2020, namely that RB was aware that money was going to the TWIF General Account.

885. In addition, it is plain that the CVL liquidators contemplated claims against AdC and RB and got to the stage of drafting letters of claim (although these have never been disclosed, despite Clyde pressing for material of this nature). Having accused AdC and RB of being involved in a fraud in their pleaded case, the CVL liquidators cannot back away from the consequences of that stance for the purposes of a contributory fault deduction, particularly now that it is clear that the fraud was of the “Ponzi” variety.
886. All of the wrongdoings or failings described above go right to the heart of stealing the money and/or concealing the non-existence of the Lilliput balance by the persons with primary responsibility under the CA 2006 for running the company and protecting it from fraud. This is not a case where the allegations of contributory fault go to peripheral matters. At the very least they should give rise to a 50% deduction to overall damages by analogy to the approach taken in *Barings (No 7)* to Mr Leeson’s fraud.
887. Finally, Mr Patel was the bookkeeper, for whom Crowe contends that TWEISL was vicariously liable (see *Barclays Bank* above). It is clear from his interview with the CVL liquidators that he was embedded over a number of AdC-related companies and for a long period. AdC described him in interview as running and maintaining TWEISL’s books. Mr Patel admitted in interview that he had access to the bank statement reader. Although the CVL liquidators focused on the acts and omissions of AdC and RB, it does not appear that they had spent much time considering Mr Patel’s role.
888. The fact that TWEISL’s liability for Mr Patel’s negligence arises as a matter of vicarious liability is an answer to TWEISL’s pleading objection to it being relied on. At [43.4] of the Amended Defence, Crowe pleaded that the loss had been caused or contributed to by “TWEISL, its directors or members”. Mr Patel comes under the rubric of “TWEISL” here. Indeed this pleading point was absent from TWEISL’s Opening Skeleton, which appeared to accept that the plea of contributory negligence encompassed both the fault of the directors and “the failure of other relevant people to act with reasonable care”.
889. Ms Evans submitted that although Mr Patel’s acts and omissions are of less causative relevance than the directors’ faults, nevertheless (i) he came from an audit background, (ii) he acted as a passive conduit for audit enquiries about the Lilliput balance, and (iii) he admitted to the CVL liquidators that he had access to the bank statements. An additional percentage deduction should therefore be made in respect of Mr Patel as well.

The Company’s submissions

890. Mr Lawrence was initially disposed to argue that it was not open to Crowe to assert contributory fault in the present case, on the basis that Evans-Lombe J and Bryan J (and, I would add, the courts at every level in *Singularis*) were wrong to say that English law has the effect that the dishonesty of management is attributed to the company for the purpose of contributory fault. By the end of the trial, however, Mr Lawrence accepted that he could not sustain that argument before me, while reserving it for use on appeal.

891. Mr Lawrence submitted that both *Barings (No 7)* and *AssetCo* were far removed on the facts from the present case. In *Barings (No 7)* the fraud was egregious, and there were, in addition, very serious deficiencies in the group's management and internal controls. In *AssetCo* there was fault on the part of the claimant which was separate to the fraud itself. Mr Lawrence highlighted [1177] and [1181] of the judgment of Bryan J:

“1117. GT alleges that the activities of the Group were controlled and directed by Messrs Shannon and Flynn with little or no regard for corporate governance. The NEDs were aware that Messrs Shannon and Flynn were secretive about the company's affairs, and routinely ignored the requests of the independent board members for financial information. They were aware that Mr Shannon's personal financial position was not good, and that he had used shares in AssetCo plc as security for loans he had taken. Moreover, they were specifically warned by GT that too much was being asked of Mr Boyle, who was under great pressure from Mr Flynn. All such matters were indeed known to the NEDs. It is alleged that they took no, or no adequate, steps to change this, nor to ensure that the position was reported to shareholders ...

1181. I have borne in mind the failings of the NEDs and the board as part of the lack of management control when balanced against GT's serious breaches of duty and the “very thing” principle.”

892. Mr Lawrence submitted that, in spite of these failings, Bryan J took into account that GT had been guilty of “negligent conduct of the highest order” (see [1116]), and that the “very thing” principle weighed heavily when apportioning fault. Mr Lawrence said that the key considerations were identified in [1187] and [1188] of the judgment:

“1187. I have considered and addressed all the allegations of contributory fault and made findings in relation to them. The most important (and most relevant) are those that relate to the dishonesty of directors, the lack of management control and the matters addressed above in relation to representations and assumptions made by Management during the course of the Audit including (but not limited to) the represented increase in unitary payment, capitalisation of bid costs, and treatment of cash in transit and the associated matters alleged by AssetCo itself

(and in many respects admitted by GT itself as part of its admitted failings), that Messrs Shannon, Flynn and Boyle deliberately overstated profits and debtors in the respects alleged, made inappropriate assumptions and used an inappropriate model and forecasts in conducting an impairment review, did not conduct a reasonable assessment of AssetCo's ability to continue as a going concern, reached an inappropriate conclusion as to going concern and prepared and approved accounts that did not disclose material uncertainties of which Messrs Shannon, Boyle and Flynn were aware, falsely and dishonestly and/or unreasonably recognised costs as intangible assets, so as to inflate the company's asset position and profits and falsely stated to GT that it was "virtually certain" that certain contracts would be extended, justifying the capitalisation of costs associated with winning those contracts as well as aspects of the other wrongdoing by Messrs Shannon, Flynn and Boyle (including the involving fabrication of evidence) (sic), coupled with the failings of the NEDs/the board (to the extent identified above) including a failure to hold such individuals to account and exercise proper management and control.

1118. Senior management in the form of the CEO, CFO and Financial Controller were dishonest. Their dishonesty is to be attributed to AssetCo, which I take into account. There was a failure of AssetCo to look after its own interests, and in accordance with the standards to be expected of management and directors of a listed company, and there were also failings on the part of the NEDs, who could fairly be described as supine. I also bear in mind the other matters alleged to amount to contributory fault that I have identified and addressed above including AssetCo's own identification of its failings in correspondence in 2011 and 2012. I consider and find that such matters did amount to contributory fault on AssetCo's part which had causative potency in allowing AssetCo to continue trade in a dishonest manner contributing causally to the loss claimed and giving rise to blameworthiness on AssetCo's part in relation to particular losses claimed."

893. Mr Lawrence identified the following differences between *Barings (No 7)* and *AssetCo* on the one hand, and the present case on the other hand: (i) in those cases, the frauds were massive, (ii) the claimant companies or groups of companies in those cases were of a different order of magnitude to TWEISL, which comprised an investment fund of modest size with two directors and (although I consider that this is incorrect) no employees, and (iii) in those cases there were failings of corporate governance and internal controls which (as Mr Lawrence submitted) are absent in the present case.

894. Mr Lawrence’s primary submission was that in the present case it would not be just and equitable to make any deduction at all for contributory fault: “The shareholders have been defrauded by directors whose fraud should have been identified by [Crowe] [whose] failings persisted over many years and were extremely serious... The shareholders were blameless. The action is brought, as a matter of economic reality, for their benefit. There is no sense and no justice in making any deduction ...”

895. The following further points were include in the Company’s Closing Submissions:

- (i) The fraud of AdC and RB (who, among other things, signed LORs that he either knew contained lies, or was entirely reckless as to whether they were accurate) was such that it ought to have been discovered very early on by Crowe if it had exercised any reasonable auditing practice. The fact that this relatively obvious fraud went undetected for so many years points to the conclusion that the fault was directly that of Crowe rather than of TWEISL.
- (i) There is no pleaded case which identifies Mr Patel as someone whose fault is to be attributed to TWEISL for the purposes of assessing contributory negligence, and the trial has proceeded on that footing.
- (i) In any event, there is no basis for Crowe to assert that Mr Patel’s conduct should be taken into account in this context – he was an independently employed book-keeper (not performing an audit role, whatever his background), and he was plainly mechanically writing up records and passing on information provided to him, as was Mr Ashley’s impression, which was not seriously challenged.
- (i) The cases of *Barings (No 7)* and *AssetCo* are far removed from the present case – they each involved very substantial companies, with independent directors who were not involved in the relevant fraud who failed to do their jobs properly. The Court in neither case apportioned the percentage deduction for the relevant fraudulent actions, as opposed to failings of management/internal controls.
- (i) TWEISL was a company with two fraudulent directors and no other management or employees, and Crowe entirely and completely failed to perform the very thing that it was employed to do, which was to make sure that those two directors were not defrauding the entirely innocent shareholders in TWEISL.
- (i) Crowe did not produce any evidence from its audit team in respect of the audit years to 2015, and Mr Malkin’s evidence was deeply unsatisfactory.
- (i) The auditing experts were both clear that the audits were deeply unsatisfactory in each and every year. There could not be a starker

example for the purposes of a contributory fault analysis, and there would be no sense or justice in making any deduction in this case for contributory fault.

- (i) As mentioned in Salzedo & Singla ([14.22]) “it would be far more straightforward to say that in light of the “very thing” principle the wrongdoer’s conduct is not to be attributed to the company for this purpose”. That would plainly lead to the correct result in this case, and the Court should exercise its discretion to reach that result.

Discussion and conclusion

896. I agree that there is a high degree of culpability on the part of Crowe in the present case. As discussed above, I consider that quite limited and basic enquiries would, or should, have revealed that the arrangement with Lilliput was a fabrication, and that the DTCs and Lilliput balance sheets were not worth the paper that they were written on. Further, it is hard to see how that would not lead, even in the teeth of any efforts at prevarication by AdC, to the discovery of AdC’s dishonesty and of fraud or the likelihood of fraud. I also agree that Crowe’s breaches of duty were repeated, sustained, and engaged the “very thing” principle in light of Crowe’s responsibilities as auditor. At the same time, I consider that Crowe’s breaches are of an entirely different order to the breaches of GT in *AssetCo*. In particular, although the breaches were lamentable, I would not describe them as “flagrant”, as Bryan J described the breaches of GT in *AssetCo*. Further, and in my view tellingly when comparing the facts of the present case with those of *AssetCo*, it has not been suggested, and it could not be suggested, that Crowe deserved to be fined or sanctioned, or that Mr Malkin (or any other individual) should be struck off as a result of the audit work in the present case, as happened to GT and the partner in *AssetCo*.
897. Turning from the position of Crowe to the position of the Company, I do not accept that in either *Barings (No 7)* or *AssetCo* the Court apportioned responsibility for failings of management and internal controls as opposed to the dishonesty of directors. If the fraud of directors was not a relevant factor, the debate about whether their dishonesty should be attributed to a company for the purposes of contributory fault would be sterile and pointless. Yet the Court considered that issue in depth, and applied the answer that it held to be correct in accordance with English law, not only in *Barings No (7)* and *AssetCo* but also in *Singularis*. Moreover, it is clear that the dishonesty of directors is a very important factor. See, for example, [1187] in *AssetCo*, where Bryan J begins his discussion of the allegations of contributory fault in that case by saying: “The most important (and most relevant) are those that relate to the dishonesty of directors ...”.
898. In the present case, the fraud of the directors could hardly be more stark, pervasive, or far-reaching. Mr Lawrence’s submissions about what occurred in each audit year were replete with allegations that lies were told, documents were fabricated, and there was

fundamental and pervasive fraud, in particular on the part of AdC but also on the part of RB. Indeed, this is the nature of a “Ponzi” scheme, which is what the CVL liquidators alleged the Company’s operation involved. As Ms Evans submitted, having accused AdC and RB of being involved in a fraud in their pleaded case (and, I would add, for the purposes of arguing that the “very thing” principle is engaged), they are fixed with the consequences of that stance when it comes to determining contributory fault.

899. The only reason why the damage in the present case can be said to be partly the Company’s own fault is that the dishonesty of the directors is attributed to the Company for the purposes of contributory fault. However, once that attribution is made, it is pervasive: the Company’s operation was not just tainted by dishonesty, it was, as presented to the Court for the purposes of the claim against Crowe, an entirely dishonest operation. Crowe failed to detect that dishonesty because it was perpetrated with sufficient skill and guile to deceive Crowe, just as others were deceived, such as investors, and, it would seem, financial journalists. To that extent, Crowe was also a victim of the fraud. As a starting point, therefore, I would be strongly inclined to say that as between the Company and Crowe, the Company bears far more responsibility for the damage, and that it is just and equitable to reduce its recovery accordingly. In short, when weighing culpability for dishonesty against culpability for negligence, I would be inclined to weigh dishonesty more heavily in the scales, and no less so where the negligence of one party arises, in substance, in light of the dishonesty of the other.
900. In aiming for the, perhaps ambitious, target in the present case that there should be no deduction for the Company’s contributory fault, Mr Lawrence made a number of points. None of them cut much ice with me, for the following principal reasons:
- (i) First, the facts that in *Barings No (7)* and *AssetCo* the frauds were massive, and the claimant companies or groups of companies in those cases were of a different order of magnitude to the Company, seem to me immaterial.
 - (i) Second, as to the suggestion that were failings of corporate governance and internal controls in those cases, whereas that is not true of the present case, in my view the situation in the present case was worse. I cannot see how a company that is run by two men in a thoroughly dishonest fashion, not establishing corporate governance and management controls or else evading the same by their own dominant dishonesty, is less at fault than a company that has such governance and controls in place but they are not effective.
 - (i) Third, the fact that Crowe did not produce any evidence from its audit team in respect of the audit years to 2015, and that Mr Malkin’s evidence was given in the terms that it was do not affect the apportionment of fault. Those factors have not impeded my determination of the responsibility of

Crowe and the Company respectively for the damage that the Company sustained. Indeed, I have made findings in favour of the Company which are at the upper end of the Company's case on liability. In particular, I have found in favour of the Company in respect of the audit for Y/E 2012, including on the basis that the "Lilliput factors" applied to that audit, although the Company did not argue that Lilliput was relevant in that year, and in spite of the fact that, on one view, it may have abandoned the claim for that year.

- (o) The suggestion in Salzedo & Singla that English law would be more satisfactory if the "very thing" principle meant that the wrongdoer's conduct is not to be attributed to the company for the purpose of the contributory fault analysis cannot be prayed in aid by the Company. That approach does not accord with English law, and it is impermissible to introduce it by the back door, and hold, as Mr Lawrence invited me to do, that the Court should exercise its discretion so as to reach that result, even though it is not the law.
- (o) The consideration that, in reality, the present claim is brought for the benefit of the shareholders does not compel the result that it would not be just and equitable to make any reduction for contributory fault. The claim is not the shareholders' claim, but is instead a claim brought by the Company. Further, the apportionment that is contemplated by statute is between (i) "the person bringing the claim" and (ii) any other person or persons who is or are responsible for the damage suffered by the person bringing the claim; and the reduction for contributory fault that is contemplated by statute is a reduction by reason of "the fault of the person suffering the damage", and which has regard "to the claimant's share in the responsibility for the damage". The "person bringing the claim", the "person suffering the damage", and "the claimant" are not different persons, but are instead the same person. Accordingly, it is the Company's fault that is of relevance, and not the fault (or otherwise) of the shareholders. In fact, the extent to which the shareholders were in any way "responsible for the damage" was not explored in evidence, but, while, as I said more than once in the course of the trial, I have considerable sympathy for them, it seems clear that they were as effectively deceived as Crowe was; and they did not react when the auditor's reports named Lilliput as a recipient of large sums, even when it was identified as a related party, and nor did they react when financial statements were not filed on time (save as identified in this judgment).

901. I do, however, agree with Mr Lawrence that the case that the involvement and failures of Mr Patel should be taken into account for the purpose of increasing the extent to which it is just and equitable to reduce the damages recoverable by the Company (i) is

not sufficiently pleaded to be available to Crowe and (ii) would not warrant a further reduction even if it was available. Assuming without deciding that Mr Patel is properly to be regarded as an employee of the Company, it seems plain that, in essence, he merely carried out a book-keeping function, and acted on the instructions that he received.

902. I consider that the approach of Rose J in *Singularis* is instructive. After referring to *Barings No (7)* in [247], which I have quoted above, Rose J said at [248]-[251]:

“248. In these proceedings, the parties were far apart on the size of any deduction I should make. Singularis argued by analogy with what the judge said in *Barings*, that it would be wrong to make a deduction of more than 50% since Singularis’s contributory negligence only ever comprised the basic fact of Mr Al Sanea’s fraud. However, they argue that no deduction is appropriate in the circumstances of this case or, if I did not agree with that, then a small deduction of no more than 20% should be made. This is because of the difference in the nature of the duty owed in the *Barings* case and the present case. The duty of auditors is not just to identify fraud but to carry out the very complex task of ensuring, apart from any fraud or misconduct, that the accounts give a fair view. Here, the whole focus of the duty of care which Daiwa breached is to identify fraudulent instructions to pay out the customer’s money. Singularis rely on the case of *Reeves v Comr of Police of the Metropolis* [2000] 1 AC 360 where the issue of the contributory negligence of a prisoner who had committed suicide had to be assessed in a claim against the police for negligently failing to prevent the prisoner from harming himself. The prisoner’s contribution was assessed at 50% because although his action was, of course, a substantial cause of his death, the police were in breach of a duty imposed by law to guard against that very act ...

249. Daiwa argued that the 50% contribution should be exceeded here because since Singularis was a one-man company, Mr Al Sanea’s fraudulent conduct should be attributed to it on company law grounds as well as by the application of the principles of vicarious liability. I have already explained why I have rejected that argument in other contexts. Daiwa also argue that Singularis’s contributory negligence did not only comprise Mr Al Sanea’s conduct but also the apparent failure of the board of directors to pay attention to what was happening and the conduct of Mr Wetherall should be taken into account even though he worked for SFS just as the conduct of BSL was taken into account in assessing the extent of Baring’s negligence.

250. My conclusion on this point is that the deduction made for Singularis’s contributory negligence should be 25%. I accept the point made by

Singularis that the duty owed by Daiwa here is different from the duty owed by the auditors to Barings because the very thing that Daiwa were supposed to protect Singularis from was the deliberate wrongdoing of Mr Al Sanea. The situation here is less extreme than the situation in Reeves's case where a deduction of 50% was made.

251. I consider that the failure of Singularis's board of directors does weigh in the balance too ... They seem to have made no attempt to contact Daiwa independently either before or after the relationship between Daiwa and Singularis was closed down to find out what was happening. As regards Mr Wetherall's involvement, I do not regard it as fair to treat that as something separate from and additional to Mr Al Sanea's conduct."

903. I extract the following from the judgments in *Barings (No 7)* and *Singularis*: (i) confirmation of my own starting point in the present case that the directors' fraud and dishonesty was overwhelmingly the most important cause of the Company's loss; (ii) recognition that nevertheless the Court has to mark Crowe's fault in failing to detect that fraud, and therefore the Court cannot attribute to that fraud and dishonesty the overwhelming causative influence which it would otherwise have; (iii) recognition also that because the duty of auditors extends more widely than a *Quincecare* duty, the limitation on the level of deduction that was appropriate in *Singularis* does not apply in the present case, and indeed the higher level of deductions that were held appropriate in *Barings No (7)* were cited without any apparent disapproval; (iv) recognition that, where other persons such as additional "innocent" directors exist, failures of others who are not implicated in the fraud or dishonesty may weigh in the balance as well; (v) however, the extent to which that factor played a part in the figure of 25% arrived at by Rose J in *Singularis* is not explained in her judgment, and in *Barings (No 7)* that factor had the effect of increasing the deduction from 50% to 80% for some periods; and (vi) support for my view that it would not be fair to treat Mr Patel's involvement as a separate one.

904. I agree with Ms Evans that *Barings (No 7)* offers the closest analogy on the facts to the present case. In my view, there is a powerful argument that where a company is set up without corporate governance and internal controls that are separate from the dominance of its directors, both of whom are dishonest, that cannot place the company in a better position for purposes of assessing the company's contributory fault than if it had been set up with independent corporate governance and management controls which failed to detect or prevent the fraud or dishonesty of the guilty directors. On that footing, a deduction of more than 50% might well be justified in the present case. However, I am mindful of the need to take account of the extent of Crowe's fault. In addition, I did not understand Ms Evans to advance any serious argument for a deduction of more than 50%. I find that the deduction for the Company's contributory fault should be 50%.

INTEREST

905. The two core issues concerning interest are (i) applicable rate, and (ii) applicable period.
906. As to rate, the Company argued for either 8% above the Bank of England (“BoE”) base rate or 3.5% above BoE base rate. Crowe argued for either the available bank interest rate on a current account (at a bank such as Hoare & Co) or 2.5% above BoE base rate.
907. By email dated 20 October 2025, Fieldfisher offered to agree 3% over BoE base rate as applicable throughout. By letter dated 4 November 2025, Clyde rejected that proposal.
908. Mr Lawrence accepted that ultimately the appropriate rate of interest is a matter for the Court. Nevertheless, he submitted that:
- (i) Mr Pearson’s evidence adopts a measured and documented approach to interest. His report is backed up by factual analysis and relevant documentary materials identifying suitable interest rates for SMEs and explaining his approach to the rate at which he considers (conservatively) TWEISL might have been able to borrow.
 - (i) Mr Conti was instructed to take two different rates, which he did without referring to any external sources which might confirm that such instruction was the right way to go about calculating interest. In cross-examination, he accepted that at least one of the rates that he was instructed to use was “imperfect”, and, further, that he did not know what premium should be charged for a company such as TWEISL on the basis of a lender’s perception of the riskiness of TWEISL’s business.
 - (i) In the joint statement of Mr Pearson and Mr Conti, Mr Pearson supports the 8% over BoE base rate on the basis that it represents the returns that might have been expected by a company such as TWEISL had its funds remained available to invest in core business activities of wine investing. He provides further analysis based on the average cost of equity for European investment and asset management companies in the years 2013 to 2024 (backed up by academic sources), and by comparison to baseline returns that an investor in the UK might have sought on an investment (backed up by reference to a low cost tracker fund). Mr Pearson says that 8% might be overly prudent because investing in wine had higher levels of risk. He makes the point that persons investing in specific companies or schemes do so to achieve above average rates of return than what can be achieved on the market generally.

- (j) As to Mr Conti's 2.5% over BoE base rate, Mr Pearson accepts that this is broadly in line with Mr Conti's research, but it omits any specific premium for a company such as TWEISL which might be charged as a result of perceived risk that lenders might consider applied to a business that invested in wine rather than more stable businesses. Mr Pearson considers that Mr Conti's "current account" analysis is conceptually wrong – it uses household rates and not commercial bank rates, which are inappropriate, and it assumes that TWEISL would have left cash sitting in a bank account – which was not what it was set up to do, which was to invest in wine for higher returns.
- (k) As the TWEISL fund was being marketed on the basis of average annual returns on Liv-Ex 100 since 2001 of 11.4%, and on the basis of TWIFL's net returns of 14.7% annualised since 2003, the 8% above BoE base rate figure provided by Mr Pearson seems very reasonable and justified.
- (l) Further or alternatively, as set out above, Mr Pearson's 3.5% over BoE base rate is backed up by analysis of applicable rates for SMEs, plus a premium for the risks of companies like TWEISL specialising in a fast moving and volatile investment product and is compelling. It was not seriously contested by Mr Conti, whose own figure of 2.5% over BoE base rate was not so backed up – he was merely instructed to use that figure.

909. Mr Lawrence referred to *Carrasco v Johnson* [2018] EWCA Civ 87 for the appropriate guidelines, in particular at [17(3)]:

“In relation to commercial claimants the general presumption will be that they would have borrowed less and so the court will have regard to the rate at which persons with the general attributes of the claimant could have borrowed. This is likely to be a percentage over base rate and may be higher for small businesses than for first class borrowers.”

910. Mr Lawrence also referred to *Perry v Rayleys* [2017] EWCA Civ 314, where he submitted that 8% was ordered. I note, however, that (i) this was not 8% over base rate and (ii) the reasons for the award that was made were explained by Gloster LJ at [68]:

“In my judgment, I consider that it is wholly appropriate to adopt the judgment debt rate in the present case. That is not just because the judgment debt rate more adequately compensates Mr Perry for the fact that he has been kept out of his money for so long, but also because the conduct of Rayleys (or their insurers), in their long drawn-out defence of this claim, deserves appropriate sanction. ... If that is the manner in which Rayleys, and/or their insurers, propose to conduct what Mr Quiney referred to as “many similar claims”, then they should be under no illusion that, at least in my judgment, a

fair and just result justifies interest being awarded on the judgment debt basis.”

911. Finally, Mr Lawrence referred to *Challinor v Juliet Bellis and another* [2013] EWHC 620, where 3% over base rate was ordered. Hildyard J reviewed the authorities at [21]:

“(1) The purpose of an award of interest is to achieve *restitutio in integrum*. The enquiry does not focus on assessing the profit to the defendant of the use of the money. It is directed to an estimation of the cost to the claimant of being deprived of the money which he should have had (*per* Steyn J in *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd & Others* [Transcript 11 December 1987]).

(2) However, the Court adopts a broad brush. For practical reasons it will not make an enquiry into the claimant’s actual loss; nor will it enquire or speculate as to what the claimant would have done with the money had he not been deprived of it. The Court almost invariably adopts as its measure what it would have cost a person in broadly the same position as the claimant to borrow the money of which he was deprived. Thus, to quote Steyn J in *Banque Keyser Ullman* again, the aim is to establish the rate(s) at which "a person in the position of the claimant would have had to pay to borrow the money" over the period for which interest is awarded.

(3) The way this is applied was explained in more detail in an oft-quoted and applied approach of Forbes J in *Tate & Lyle Food and Distribution Ltd v Greater London Council* [1982] 1 WLR 149 at 154:

“I feel satisfied that in commercial cases the interest is intended to reflect the rate at which the plaintiff would have had to borrow money to supply the place of that which was withheld. I am also satisfied that one should not look at any special position in which the plaintiff may have been; one should disregard, for instance, the fact that a particular plaintiff, because of his personal situation, could only borrow money at a very high rate or, on the other hand, was able to borrow at specially favourable rates. The correct thing to do is to take the rate at which plaintiffs in general could borrow money. This does not, however, to my mind, mean that you exclude entirely all attributes of the plaintiff other than that he is a plaintiff. There is evidence here that large public companies of the size and prestige of these plaintiffs could expect to borrow at 1% over MLR [*minimum lending rate*], while for smaller and less prestigious concerns the rate might be as high as 3% over MLR. I think it would always be right to look at the rate at which plaintiffs with the general attributes of the actual plaintiff in the case (though not, of course, with any special or peculiar attribute) could borrow money as a guide to the appropriate interest rate.”

(4) Thus, the parties may demonstrate that an entity with the claimant's general attributes, following "categorisation of the plaintiff in an objective sense" (Steyn J in *Banque Keyser Ullman*), could at the relevant time borrow on the markets at a particular rate. Specific features of the claimant (for example in relation to personal creditworthiness) will be disregarded in order to save time and money at trial, and so there is no need to seek to measure the "actual loss" of the actual claimants (Steyn J in *Banque Keyser Ullman*).

(5) Until recently, the presumption in the Commercial Court, often adopted in business disputes, was that the rate of interest should be 1% above base rate. However, in the present financial circumstances, where the spread between base rate and the actual cost of borrowing is much greater than in the past, that presumption has largely fallen away: and the latest Commercial Court Guide indicates that there is no longer such a presumption; and see *Sycamore Bidco Ltd v Breslin* [2013] EWHC 174 (Ch) *per* Mann J at para 51.

(6) Moreover, there is also a consistent line of authority supporting rates above the Commercial Court rate where the claimant is a small business or (as in this case) a group of individuals. Thus:

(a) In *Jaura v Ahmed* [2002] EWCA Civ 210, the "real costs of borrowing incurred by... small businessmen" were fixed at 3% over base, Rix LJ observing (at paragraph 26) that "The law should be prepared to recognise, as I suspect evidence might well reveal, that the borrowing costs generally incurred by them are well removed from the conventional rate of 1% above base (and sometimes even less) available to first class borrowers". Rix LJ strongly suspected that this did insufficient justice and that a higher rate of 4.5% above base rate might well be more typical of the rates available to small businessmen (paragraph 25), but did not think that the Court in that case had sufficient evidence of that to impose the higher rate.

(b) In *Lindsay v O'Loughnane* [2010] EWHC 529 (QB), Flaux J had no specific evidence and awarded an individual base rate plus 2%, observing (at paragraph 143) that he accepted

"the general proposition that the rate at which individuals can borrow money has been rather higher than base plus 1% in the last few years. In the absence of specific evidence I am not prepared to go as high as 4% over base which was Mr Maclean's upper limit, being the rate imposed by FX on its customers for late payment under clause 5.8 of the Terms and Conditions. However, I will award interest at 2% over base rate."

(c) In *Attrill v Dresdner Kleinwort* [2012] EWHC 1468 (QB), Owen J awarded individuals interest at 5% over base rate for the period January 2009

to the date of payment as a reasonable rate to reflect the cost of unsecured borrowing to an individual (paragraph 3). Evidence was led of Bank of England tables showing the interest rates on secured and unsecured loans (see paragraph 3).

(d) The authorities were recently summarised by Mann J in *Sycamore Bidco Ltd v Breslin* [2013] EWHC 174 (Ch) at paras 44 to 57. There the judge awarded a newco set up to acquire a business base rate plus 3%, stepping down to base rate plus 2.5% in light of slightly less restrictive credit conditions than those prevailing in the immediate aftermath of the “credit crunch”.

912. Ms Evans submitted as follows:

- (i) The core points to be derived from the authorities is that interest falls to be decided by reference to an entity with the claimant’s general attributes and that it is there to compensate a claimant for being kept out of money. On TWEISL’s case, it would have gone into liquidation earlier. Its loss should therefore be assessed by reference to bank interest that it would have earned if it had had stock or money. Factors such as notional borrowing costs are not relevant, still less an 8% interest rate justified on the basis that TWEISL was set up to earn profits.
- (ii) Mr Pearson’s attempts to justify the interest rates that he put forward were unpersuasive.
- (iii) The choice of rate is important. Taking Mr Pearson’s calculations for the Y/E 2013 by way of example, the total loss including interest at 3.5% is £6.168m. The equivalent figure with interest at 8% is £7.257m.
- (iv) Interest claims cannot be sustained on certain heads of loss (or will require cutting down). The starkest example concerns interest on the CVL liquidators’ costs/legal fees. According to the calculations at line “Q”, calculated at 3.5%, these together amount to £146,747. However Mr Hardman’s evidence was that the CVL liquidators did not in fact charge interest and he was unaware of any terms in Fieldfisher’s retainer allowing them to do this. It is concerning that a claim run by professional liquidators includes a head to which the claimant is not entitled.
- (v) If other losses are cut down (e.g. share subscriptions, recoverable money or stock) any interest calculations will need to be adjusted accordingly.
- (vi) Finally, TWEISL is not entitled to interest over the full period claimed:
 - (i) Mr Pearson acknowledged that his calculations do not account for any time lag between the Remedial Action Date and date on which the

Company would have entered liquidation and taken steps thereafter to preserve assets.

- () Considerable delays were caused by Price Bailey, as Mr Pearson conceded. Crowe cannot possibly be responsible for this period of delay between January 2020 and October 2020.
- () TWEISL's claim against Crowe has been pursued too slowly. It took two years from October 2020 for a letter of claim to be issued to Crowe - even though the analysis of the fraud in that letter was founded on the first meeting with AdC in November 2020. Thereafter the same approach was taken in the PoC. In other words, the time between November 2020 and October 2022 cannot be explained by a process of getting to the bottom of what had gone on. The shortcomings of the claim have been extensively debated at trial, but in the context of interest they are relevant because there was no need for a claim developed in so cursory a fashion to take so long.

913. In my judgment, the purpose of an award of interest in a case like the present is to compensate the claimant for the cost of being deprived of the money which it should have had. It is not, as Mr Pearson suggests, to compensate the Company for the returns that it might have been expected to obtain had its funds remained available to invest in the core business activities of wine investing. This is particularly so as the entire basis of the Company's claim against Crowe is not that, if Crowe had acted competently, the Company would have carried on trading, but is instead that it would have gone into liquidation and distributed its monies as expeditiously as it could to the shareholders. Further, the returns promised to investors by TWEISL are of no assistance. It is ironic that Mr Pearson should refer to them as the real "returns" here were of substantial losses.
914. The only case cited by Mr Lawrence in support of an 8% rate of interest of any form is one that quite plainly involved entirely different considerations to the present case.
915. Equally, the rate which an individual would get on deposit with a bank is not relevant.
916. Accordingly, in my judgment, the relevant question is to determine what rate an entity like the Company would have had to pay to borrow money "to supply the place of that which was withheld". As Hildyard J observed: "The Court almost invariably adopts as its measure what it would have cost a person in broadly the same position as the claimant to borrow the money of which he was deprived". Further, small businesses typically have to pay more than the conventional rate of 1% above base or thereabouts available to first class borrowers, and probably less than the cost of unsecured borrowing to an individual. In the present case, I consider that the appropriate rate is 3% over BoE base rate, as offered by Fieldfisher, and awarded by Mann J in *Sycamore Bidco* to a Newco.

917. The need to carve out the heads of loss identified by Ms Evans from the sums that attract an award of interest does not arise, as I have made no award in respect of those items.
918. The award that I consider appropriate in respect of the year in which the Company has the highest level of claim is £285,000, as set out in [767] above. That sum falls to be reduced by 2.5% in respect of cost of sales as set out in [822] above. That produces a net figure of £277,875.90. It is common ground that the sum of £73,944 mentioned in [858] above falls to be deducted from this figure, which reduces it to £203,931.90. Reduced further by 50% (see [904] above), that produces a net figure of £101,965.95.
919. The sales of wine worth £2.85m on which that sum is based would have been effected from June 2018 onwards. At a rate of £282,000 per month which I have assumed for the first eight months of 2018 (see [765] above), it would have taken approximately 10 months to sell that wine. The mid-period of those sales is November 2018. I think it is appropriate to take that date as the starting date from which interest should run, on the basis that interest will then be applied to the proceeds of all that was sold over that time.
920. I also consider that there is some substance in the points made by Ms Evans about delay.
921. I therefore propose to order that interest should run at the rate of 3% above BoE base rate on the damages not from November 2018 but instead from 1 December 2019.
922. There may be, and indeed there probably are, adjustments that need to be made to take account of other issues, such as the matters that were agreed, in respect of which I am unable to produce final figures at the present time. The above points are subject to that.

CONCLUSION

923. For all these reasons, I award the Company damages as set out in [918] above. I also award interest on that sum at 3% above BoE base rate from 1 December 2019.
924. I ask Counsel to endeavour to agree an Order which reflects the above rulings. I will hear submissions on any points which remain in dispute as to the form of the Order, and on any other issues such as costs and permission to appeal, either when judgment is handed down, or else on an adjourned hearing on some other convenient date.