Neutral Citation Number: [2023] EWHC 3195 (Ch)

Case No: CR-2019-008490

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**INSOLVENCY AND COMPANIES LIST (ChD)**
**IN THE MATTER OF TIUTA INTERNATIONAL LIMITED (IN CREDITORS' VOLUNTARY LIQUIDATION) (Company number 05826007)**
**AND IN THE MATTER OF THE INSOLVENCY ACT 1986**

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

Date: 13/12/2023

**Before** :

**Before**: **Charles Morrison**
**(Sitting as a Deputy Judge of the High Court)**

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**Between :**

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| **(1) GEOFFREY WAYNE BOUCHIER**<br>**(2) PAUL DAVID WILLIAMS**<br>**(in their capacity as Joint Liquidators of Tiuta International Limited)** | **Applicants** |
| **- and -** | |
| **(1) GARY BOOTH**<br><br>**(2) STEVEN NICHOLAS** | **Respondents** |

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**Niall McCulloch and Mairi Innes** (instructed by **Gateley Plc** Solicitors) for the **Claimants**
**Angus R Gloag** (instructed by **Direct Access)** for the **First Respondent**
**Martin Young** (directly instructed) for the **Second Respondent**

Hearing dates: 16 February – 3 March 2023, 3–8 July 2023 & 14-15 September 2023

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# Approved Judgment

This judgment was handed down remotely at 10.30am on Wednesday 13 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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**Charles Morrison**
**(Sitting as a Deputy Judge of the High Court)**

## Charles Morrison (sitting as a Deputy Judge of the High Court):

*Introduction*

1. This is a matter which came before me for trial. It is an action by joint-Liquidators (the **JLs**) against two directors of a group of bridge finance lending companies, which, it is claimed, fell into difficulty during the period following the financial crisis of 2007-2008. It is said that the financial problems of the companies were exacerbated by a series of poor loan-making decisions; the JLs go a great deal further and say that a particular set of loans were arranged by the directors fraudulently, and in breach of duties they owed as directors of the company the JLs now have an interest in.

2. The trial turned on the affairs of two companies: Tiuta PLC (**TPLC**) and Tiuta International Limited (**TIL**). The directors of both TIL and TPLC during the periods material to this judgement, were the Respondents, Gary Booth (**GB**) and Stephen Nicholas (**SN**), although it should be noted that GB stood down from his position at the end of 2009, remaining as a consultant until 2010. SN remained a director until 2012.

3. The JLs invite the court to make findings of breach of duty and fraudulent trading, and in consequence, find GB and SN liable to make such contributions to TIL's assets by way of equitable compensation or otherwise as the court thinks proper. The amounts claimed are calculated either as a result of increases in the net deficiency in the assets of TIL, or from losses suffered by that company as a result of the impugned behaviour of GB and SN.

4. The allegations of the JLs are rejected in their entirety by GB and SN. It was their case before me that they always did their best for TIL. Anything that they did, was not only done with the knowledge and approval of those who later became the largest creditor of TIL, but in the honest and genuine belief that it was in the best interests of TIL. It was also a constant thread running through their case, that the business of TIL only failed to prosper, as a direct result of the poor decision-making and deficiencies of those who took the management decisions, after they had given up the reins, in GB's case, through ill-health.

*What happened to TIL?*

5. TIL was incorporated on 23 May 2006, and commenced trading on 20 May 2008. It was in the business of providing short-term bridging loans secured by legal charges over property. It was part of a group of companies operating under the "Tiuta" name, the parent being TPLC, whose wholly-owned subsidiary it remained from incorporation. TPLC owned other Tiuta-branded subsidiaries, but they are not strictly relevant to the judgment that I propose to deliver.

6. Whilst the loans made by TPLC and its subsidiaries were funded in part by the funds of each company, the typical model was to receive facilities from bank lenders including Bank of Scotland, Allied Irish Bank, Clydesdale Bank Limited and Bank of Ireland plc. Despite the problems that afflicted TPLC, and with one exception, all sums due from the subsidiaries and TPLC to the bank lenders, were repaid in full.

7. TIL received its funding a different way. Its funding came from an Investment Fund (the **Fund**), established especially for the purpose of providing liquidity to TIL. The

Fund, which was set up with the keen involvement of the Respondents, was intended to work closely with TIL, which would bring expertise in short-term or bridge financing, and also investment proposals.

8. Administrators were appointed to TIL on 5 July 2012; a creditors' voluntary liquidation followed on 19 December 2013. Upon its demise, TIL owed approximately £109.7 million to the Fund, with an estimated net deficiency of £72.7 million.

*The role of the Respondents?*

9. GB was appointed a director of TIL on 23 May 2006; he resigned on or around the third of December 2009; he had also been a director of TPLC. As one of three directors of TIL, GB's responsibility, on his case at any rate, was for the sales side of the business: the JLs contended that his responsibilities were very much broader.

10. SN also became a Director on 23 May 2006, though he remained in office until 12 June 2012. On his case, he acted solely as the head of TIL's legal department, without wider responsibility for, or involvement in, its general affairs; he was also a director of PLC with, on his case, the same restricted function.

*What went wrong?*

11. The Fund was marketed to investors, typically by Independent Financial Advisers, on the basis of the Fund's Investment Memorandum (the **FIM**). The FIM explained the nature of the investment to potential investors. The Fund provided financing to TIL on a deal by deal basis, enabling TIL to provide short-term or "bridge" facilities to third party borrowers. The lending by TIL was to be secured by a first ranking security in favour of TIL, whilst the Fund would benefit from a sub-charge in its favour.

12. TPLC and its subsidiaries had for some time been in the habit of lending substantial sums to a property developer by the name of Demi Ramadan (**Mr Ramadan**). Transactions were also entered into with acquaintances of Mr Ramadan. A number of these loans, which I will refer to as the **Ramadan Loans**, were not repaid as had been expected, and in due course, between September 2008 and November 2009, TIL used monies drawn down from the Fund to refinance a number of these Ramadan Loans.

13. It was the JLs' case before me that TIL's business was unviable and inherently unprofitable from the commencement of trading. It was argued that the Respondents knew that the business that TIL was undertaking was not only fraught with risk, risk that they well appreciated, but that the business of the company simply could not succeed given the lending that it had entered into.

14. It was said that the Respondents procured TIL to make loans to Mr Ramadan and his associates not for any true commercial purpose benefitting TIL, but in order to preserve the liquidity of TPLC and its subsidiaries, and to relieve financial strain on the group of companies generally. The JLs went further and specifically alleged that the Respondents had it mind to raise cash through lending from the Fund, so as to permit the discharge of the outstandings to bank lenders to TPLC and its subsidiaries, thereby

preserving the availability of facilities granted by those banks and the general financial health of TPLC.

15. By the device of refinancing the Ramadan Loans, which had been non-performing in the books of TPLC and its subsidiaries, those entities could continue trading and no longer needed to recognise those loans as bad debts. These facts were the foundation for another allegation made by the JLs at the trial. It was their case that the Ramadan Loans were obviously non-performing, and that in consequence, the TIL accounts for the years ending 2009 and 2010, should have made due provision for them; had they done so, the accounts would have revealed both a loss, and the fact that TIL was insolvent. As it was, those accounts failed to provide a true and fair view of TIL. The accounts were signed by GB in 2009, and by SN in 2009 and 2010.

*The problem loans.*

16. It was accepted before me, that with the benefit of financing from the Fund, TIL advanced loans to Mr Ramadan or to associates of his, in the following instances:

a) £410,054 together with development funds of £170,000, to Mr Karashialis in respect of 45-47 Black Bull Road, Folkestone in September 2008;

b) £435,460 to Ms Brinson and Mr Green in respect of 19 Sweyn Road, Margate in October 2008;

c) £321,840 to Ms Brinson in respect of 17 Harold Road, Margate in October 2008;

d) £1,990,655 to Mr Green in in respect of Parkmount, Fairview Close, Margate in December 2008;

e) £958,966 to ALDL in respect of 7-8 Woodbridge Road, Ipswich in December 2008;

f) £432,000 to Mr Vucaj (formerly in the name of Ms Brinson) in respect of Seaside, Eastbourne in December 2008;

g) £1,800,000 to Ms Brinson in respect of York Street, Leicester in January 2009;

h) £960,969 to Ms Brinson in respect of Dover Street, Leicester in January 2009;

i) £790,958 to Ms Brinson and Mr Green in respect of 77-79 Norfolk Road, Margate in February 2009;

j) £1,376,250 to Mr Ramadan in respect of 96-99 Harbour Parade, Ramsgate in March 2009;

k) £1,023,750 to Mr Ramadan in respect of Northside, 5 High Sreet, South Ockenden in March 2009;

l) £1,078,062 to Mr Ramadan in respect of Station Road, Birchington, Thanet in May 2009;

m) £1,768,000 to Mr Ramadan in respect of 151-153, Folkestone Road, Dover in July 2009;

n) £337,500 to Mr Ramadan in respect of 3 Thanet Road, Margate in September 2009; and

o) £858,750 to Mr Ramadan in respect of 14-20 St Michael's Road, Northampton in November 2009.

17. What is said by the JLs is that each of these loans was the refinancing of a non-performing loan previously advanced by TPLC or one of its subsidiaries, to Mr Ramadan or his associates. The Respondents accepted that the new loans were arranged in favour of the borrowers that I have listed, and that this was done as part of a restructuring of the lending to Mr Ramadan. The renewal or refinancing of the lending in this way, was given the label the "Demi Restructure" by GB. I will refer to these loans in their new re-financed form, as the **Restructured Ramadan Loans**. It was alleged by the JLs that the Restructured Ramadan Loans were in fact "bad loans", not in the best interests of TIL or its creditors, and at the same time inconsistent with the lending criteria of the Fund and the express representations made to prospective investors by the FIM.

18. It was the JLs case that the exercise to re-finance or restructure the original non-performing loans which had been in the books of TPLC and its subsidiaries, was based on inflated property valuations, with excessive loan to value ratios and obviously unacceptable borrower risk profiles.

*The evidence*

19. During the trial I heard evidence from GB and SN, who were both cross-examined on behalf of the JLs: I also had witness statements from each of them. I heard from Mr Bouchier, one of the JLs, and then from three expert witnesses:

a) Mr Woodward, an accountant who, *inter alia*, gave evidence in regard to the calculation of the loss to TIL, and the deficiency in the accounts at the date of insolvency;

b) Mr Griffiths, a property finance banker, who gave evidence touching upon what I will describe as the bankability of the Restructured Ramadan Loans; and

c) Mr Manley, a general practice Surveyor, whose evidence looked at the valuations provided for each of the properties underlying the Restructured Ramadan Loans.

20. Prior to the commencement of the trial, I had the enormous benefit of reading skeleton arguments from counsel for each of the parties, from whom I also received detailed and helpful written Closing Submissions.

*The Legal Framework - Fraudulent Trading*

21. It is necessary for me to set out the relevant legal principles that bear upon the case, the scheme of which I have just related in broad outline. Save for the application of the

statutory duty relied upon by the JLs, there was a broad measure of agreement between counsel as to the law that I must apply.

22. I will turn first to Fraudulent Trading. Section 213 of the Insolvency Act 1986, provides as follows:

a) "(1) [Application] If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, the following has effect.

b) (2) [Court may hold persons liable] The court, on the application of the liquidator may declare that any persons who were knowingly parties to the carrying on of the business in the manner above-mentioned are to be liable to make such contributions (if any) to the company's assets as the court thinks proper."

23. My attention was invited by Mr McCulloch, appearing on behalf of the JLs, to the decision of Patten J (as he then was) in *Morris v Bank of India [2005] EWHC 1868 (Ch)*, wherein the learned judge described the cause of action as having three elements (at [11]):

a) the business of the company in liquidation has been carried on with intent to defraud the creditors of the company or of any other person or for any other fraudulent purpose;

b) the defendant sought to be made liable, participated in the carrying on of the business of the company in that manner; and

c) the defendant did so knowingly, i.e. with knowledge that the transactions they were participating in were intended to defraud the creditors of the company or were in some other way fraudulent.

24. It was not challenged before me that the approach of Maugham J in *Re Patrick & Lyon Ltd [1933] Ch 786 at 790*, as to the meaning of the terms defraud and fraudulent purpose, remained good law. The learned judge explained his view in this way:

> "I will express the opinion that the words 'defraud' and 'fraudulent purpose,' ... are words which connote actual dishonesty involving, according to current notions of fair trading among commercial men, real moral blame."

25. I agree with Mr McCulloch that it is right to point to both the subjective and the objective elements when assessing the intent to defraud. Thus, the decision of the Lord Chief Justice in *R v Grantham [1984] 1 QB 675*, is important, as an intent to defraud was there said to arise when a trader "knows he is stepping beyond the bounds of what ordinary decent people engaged in business would regard as honest."

26. As to carrying on business with intent to defraud, I was told that there is no relevant statutory definition, however it was submitted, and I agree with this approach, that where a person intends by deceit to induce a course of conduct which puts another's economic interests in jeopardy, that person is guilty of fraud even though it is not

intended that actual loss should ultimately be suffered by that other (see *R v Allsop (1977) 64 Cr App R 29*, a case where submitting false particulars in an application form led to the recipient talking a greater risk than would ordinarily have been the case, even though loss was not intended nor immediately caused).

27. I also accept the submission that carrying on business "for any fraudulent purpose", as set out in section 213, should not be construed in any limiting way: see *Re Cyona Distributors Ltd [1967] Ch. 889, 902* where Lord Denning MR, commenting upon the predecessor section (s.332, Companies Act 1948), said,

> "In my judgment, that section is deliberately framed in wide terms so as to enable the court to bring fraudulent persons to book. If a man has carried on the business of a company fraudulently, the court can make an order against him for the payment of a fixed sum: see *In re William C. Leitch Bros. Ltd.* [39] An order can be made either at the suit of the liquidator, etc., or of *a creditor*."

28. It seems to me that it must also be right that the wording is wide enough to catch frauds committed against potential creditors, being as it is, directed at fraudulent trading generally.

29. It was not in issue before me that "any persons who were knowingly parties" may be found liable for the fraudulent trading in which they participated; nor was it doubted that a director can fall within that category; it was also accepted that "knowing parties" was not restricted to those exercising management or control over the relevant company, but that some positive action was required to meet the standard of participation. Important guidance on the approach to the application of section 213 can be found in the judgment of Lewison LJ, in *Bilta (UK) Ltd v Tradition Financial Services Ltd [2023] EWCA Civ 112*. The ratio of that decision was that a "party to" a company's fraudulent trading under the Insolvency Act 1986 section 213 was not restricted to a person with a controlling or managerial function within the company. The judgment set out a detailed analysis of how the courts have viewed the boundaries of section 213, Lewison LJ holding at [114]:

> "It is, in my judgment, more consonant with the purpose of section 213 to interpret that phrase in the wider rather than the narrower sense. It is also more consistent with the line of authority to which I have referred".

30. In citing other authority, the learned judge picked up on dictum of Templeman J, that "a man who warms himself with the fire of fraud cannot complain if he is singed . .". This in my judgment points to the essence of the wider, if indeed protean, approach to section 213 that the court in *Bilta* confirmed at [118],

> "All that we are asked to decide is whether a person cannot fall within the scope of section 213 unless he has a controlling or managerial function within the company. Whether an outsider can be said to be party to the carrying on by a company of a fraudulent business may well be a question of fact and degree which requires careful analysis"

31. In deciding this case, I must be careful to direct myself that that not every fraud or fraudulent misrepresentation perpetrated by a company amounts to fraudulent trading. The decision of the Court of Appeal in *Morphitis v Bernasconi* [2003] EWCA Civ 289

is helpful guidance in this respect. In that case, the Liquidator sought such contributions to the company's assets as the court thought fit and also that the Respondents be ordered to pay a punitive element by way of contribution in addition to a payment in to court made by co-respondents. The Company was in financial distress caused by onerous rental obligations. A scheme was devised with the help of lawyers whereby the Respondents would carry on business through a new company with the same name. It was envisaged that the original business would go into liquidation after a 12 month period, so avoiding the statutory restriction to the use of the old name. During the course of the 12 months prior to liquidation, in order to avoid a winding up petition within that crucial period, the Respondents made certain payments on account but failed to make a particular payment promised. The judge found that the Company had been trading fraudulently under section 213 of the 1986 Act in relation to the promised payment, because at the time the Respondents agreed to make it, they knew or intended that no monies would be paid in respect of it. Chadwick LJ, held that in the light of his findings of fact, the judge had been wrong to hold that the Respondents had been knowingly party to the carrying on of the business with the intent to defraud creditors or for any other fraudulent purpose. At [43] the learned judge said this:

> "Miss Hoffmann, who appeared for Mr Monti and Mr Bernasconi on this appeal as she did in the court below, pointed out, correctly, that not every fraud or fraudulent misrepresentation perpetrated by a company amounts to fraudulent trading under section 213 of the 1986 Act. That was made clear by the observations of Mr Justice Oliver in *In re Murray−Watson Ltd* (unreported; 6 April 1977) which are cited and explained by Mr Justice Templeman in *In re Gerald Cooper Chemicals Ltd* [1978] Ch 262, 267. In the former case Mr Justice Oliver had said this, of what was then section 332 of the Companies Act 1948 (the statutory predecessor of section 213 of the 1986 Act): [The section] is aimed at the carrying on of a business . . . and not at the execution of individual transactions in the course of carrying on that business. I do not think that the words 'carried on' can be treated as synonymous with 'carried out', nor can I read the words 'any business' as synonymous with 'any transaction or dealing'. The director of a company dealing in second−hand motor cars who wilfully misrepresents the age and capabilities of a vehicle is, no doubt, a fraudulent rascal, but I do not think he can be said to be carrying on the company's business for a fraudulent purpose, although no doubt he carries out a particular business transaction in a fraudulent manner." In Cooper Chemicals , Mr Justice Templeman accepted that analysis. He said this (ibid, 267g −h ): In the example given by Oliver J [in Murray−Watson ] the dealer was carrying on the business of selling motor cars. He did not carry on that business with intent to defraud creditors if he told lies every time he sold a motor car to a customer or only told one lie when he sold one motor car to one single customer. When the dealer told a lie, he perpetrated a fraud on the customer, but he did not intend to defraud a creditor. It is true that the defrauded customer had a right to sue the dealer for damages, and to the extent of the damages was a contingent creditor, but the dealer did nothing to make it impossible for the customer, once he had become a creditor, to recover the sum due to him as a creditor.
>
> For my part, I would accept that a business may be found to have been carried on with intent to defraud creditors notwithstanding that only one creditor is shown to have been defrauded, and by a single transaction. The Cooper Chemicals case is an example of such a case. But, if (which I doubt) Mr Justice Templeman intended to

suggest that, whenever a fraud on a creditor is perpetrated in the course of carrying on business, it must necessarily follow that the business is being carried on with intent to defraud creditors, I think he went too far. It is important to keep in mind that the pre−condition for the exercise of the court's powers under section 332(1) of the 1948 Act − as under section 213 of the 1986 Act - is that it should appear to the court "that any business of the company has been carried on with intent to defraud creditors of the company". Parliament did not provide that the powers under those sections might be exercisable whenever it appeared to the court "that any creditor of the company has been defrauded in the course of carrying on the business of the company." And, to my mind, there are good reasons why it did not enact the sections in those terms"

32. And at [47]:

> "Section 213 of the 1986 Act is not engaged in every case where an individual creditor has been defrauded. The section is engaged only where the business of the company has been carried on with intent to defraud."

33. I now must turn to the question of knowledge, for the purposes of establishing liability under section 213. In setting out the test for liability in his decision in *Morris v Bank of India [2004] EWHC 528 (Ch)*, Mr Justice Patten (as he then was ) explained the test of knowledge for the purposes of section 213 as I have set out below. The passage is of particular importance, not only because it goes on to deal with the important principle of so-called "blind-eye" knowledge or as it was in the past more colourfully cited, the Nelsonian eye. Patten J said this at [13]:

> "The liquidators have to show that BOI (through its relevant officers and employees) knew that the six transactions (or one or more of them) were being entered into either to defraud the creditors of BCCI or for a fraudulent purpose. They did not have to know every detail of the fraud or the precise mechanics of how it would be carried out, but clearly they did have to know, either from their own observation of what was being done or from what they were told, that BCCI was intent on a fraud. Knowledge, for this purpose, means what it says. There must have been an actual realisation on the part of BOI that BCCI would, or was likely to, engage in false accounting. A failure to recognise the truth of what was going on is not enough, however obvious that may now seem to have been. The relevant knowledge also has to be contemporaneous with the assistance that was given at the time by entering into the various transactions. Subsequent knowledge based on hindsight is not enough, nor is negligence the test of liability. Mr Hirst QC emphasised in his closing submissions that it is irrelevant whether BOI is open to criticism for slackness or negligence, however gross. The only issue is whether it knew at the time that it was participating in a fraud. I agree with that. But both sides accept that knowledge, for these purposes, includes so-called blind-eye knowledge, which exists when the party in question shuts its eyes to the obvious because of a conscious fear that to enquire further will confirm a suspicion of wrongdoing which already exists. Knowledge of this kind is part of the claimants' case, and I dealt with the same point in para. 11 of my judgment in Morris v State Bank of India , where I said this:
>
>> "Knowledge includes deliberately shutting one's eyes to the obvious, provided that the fraudulent nature of the transactions did in fact appear

obvious to those who dealt with these matters at SBI at the relevant time. It is well established that it is no defence to say that one declined to ask questions, when the only reason for not doing so was an actual appreciation that the answers to those questions would be likely to disclose the existence of a fraud. But liability in such cases depends upon that stage of consciousness having been reached. His submission, which I accept, is that one needs to be careful to draw a distinction between a conscious appreciation of the true nature of the business being carried on and a failure, however negligent, to appreciate that fraud was being perpetrated. The case for SBI is that at no time during the course of these transactions did it in fact suspect that anything untoward was going on. The essentials of what is required in order to establish so-called blind-eye knowledge are set out in the speech of Lord Scott of Foscote in the recent decision of the House of Lords in Manifest Shipping Co Ltd v Uni-Polaris Co Ltd [2003] 1 AC 469 , where Lord Scott at para.116 says this:

> 'In summary, blind-eye knowledge requires, in my opinion, a suspicion that the relevant facts do exist and a deliberate decision to avoid confirming that they exist. But a warning should be sounded. Suspicion is a word that can be used to describe a state-of-mind that may, at one extreme, be no more than a vague feeling of unease and, at the other extreme, reflect a firm belief in the existence of the relevant facts. In my opinion, in order for there to be blind-eye knowledge, the suspicion must be firmly grounded and targeted on specific facts. The deliberate decision must be a decision to avoid obtaining confirmation of facts in whose existence the individual has good reason to believe. To allow blind-eye knowledge to be constituted by a decision not to enquire into an untargeted or speculative suspicion would be to allow negligence, albeit gross, to be the basis of a finding of privity.'"

34. When considering the notion of blind-eye knowledge, it is in my judgment helpful to have in mind the dissenting speech of Lord Millet in the seminal decision in ***Twinsectra Ltd v Yardley*** *[2002] UKHL, 12* at [112],

> “There was a gloss on this. It is dishonest for a man deliberately to shut his eyes to facts which he would prefer not to know. If he does so, he is taken to have actual knowledge of the facts to which he shut his eyes. Such knowledge has been described as "Nelsonian knowledge", meaning knowledge which is attributed to a person as a consequence of his "wilful blindness" or (as American lawyers describe it) "contrived ignorance". But a person's failure through negligence to make inquiry

is insufficient to enable knowledge to be attributed to him: see *Agip (Africa) Ltd v Jackson* [1990] Ch 265, 293."

35. In a further passage of his *Morris* judgment, a decision I referred to when I embarked upon this review of the relevant law, at [15], Patten J held that:

> "Dishonesty as such is not in terms a condition of liability under section 213. But if knowledge of the fraud in either of the senses indicated above is established, Mr Hirst accepts that it must follow that BOI was dishonest."

36. It is founded on this approach that Mr McCulloch submits that in the present case, if knowledge of the relevant facts is established, it must follow that GB and SN were acting dishonestly.

37. I am prepared to accept that for the JLs to succeed on the section 213 part of their case, the Respondent must have known of the fraud, but need not have known every detail or the precise mechanics of it; I accept that knowledge includes blind-eye or Nelsonian knowledge, that is to say wilful blindness arising out of the deliberate shutting of eyes because of a desire not to know or because of a conscious fear that to enquire will confirm suspicion of wrongdoing; I also accept that untargeted, speculative suspicion will not be sufficient.

38. Given what I have said earlier in this judgment in regard to fraudulent purpose and knowledge, relevant to section 213 of the Insolvency Act 1986, it is plainly important that I deal with what in law amounts to dishonesty. The law is not what it was. In *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords Club) [2017] UKSC 67*, Lord Hughes JSC said at [74]:

> "These several considerations provide convincing grounds for holding that the second leg of the test propounded in *R v Ghosh [1982] QB 1053* does not correctly represent the law and that directions based upon it ought no longer to be given. The test of dishonesty is as set out by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 AC 378* and by Lord Hoffmann in *Barlow Clowes International Ltd v Eurotrust International Ltd [2006] 1 WLR 1476*, para 10: see para 62 above. When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

39. In light of the position taken by the Court of Appeal in *Group Seven Ltd and another v Nasir and others [2020] EWCA Civ 614, [2020] Ch 129* , I have no difficulty in holding that it is the *Ivey* test that I must apply in seeking to establish dishonesty in the context of a section 213 fraud claim. I agree with Mr McCulloch that the decision confirmed that the honesty of a person's conduct falls to be considered objectively in the light of all relevant material including their state of mind. It is not necessary for me to narrate

the convoluted route taken by the law as to the relationship between the subjective and objective elements of the test since the decisions in *Royal Brunei v Tan, R v Ghosh*, and *Twinsectra*; it is sufficient for me to say that the law binding upon me, is as set out by Lord Hughes in *Ivey*. Thus, the principle I have just recited as to the objective assessment, taking into account the state of mind of the person whose conduct is being assessed, is where the answer is to be found to the question, posed by the court in *Ghosh*, and recounted by Lord Hughes at [60]:

> "…of a man who comes from a country where public transport is free, and on his first day here travels on a bus without paying, at para 60: The answer to the court's question is that dishonestly, where it appears [in the Theft Act 1968], is indeed intended to characterise what the defendant did, but in characterising it one must first ascertain his actual state of mind as to the facts in which he did it. It was not correct to postulate that the conventional objective test of dishonesty involves judging only the actions and not the state of knowledge or belief as to the facts in which they were performed. What is objectively judged is the standard of behaviour, given any known actual state of mind of the actor as to the facts."

40. Turning now to questions of causation, there was no attempt made before me to challenge the proposition that principles of causation play no part in determining the compensatory relief that may be granted under section 213; nor was it challenged that the decision to order wrongdoers to contribute to the assets of a company is a matter entirely at the discretion of the court. My attention was invited to a procedural decision of this court (*Re Mavisat Ltd [2018] B.C.C. 173*), which itself placed reliance upon obiter guidance given by Chadwick LJ in *Morphitis* at [53]. I can well understand why the learned Registrar in *Mavisat*, saw fit to turn to *obiter* comments of Chadwick LJ, in these terms:

> "The power under section 213(2) is to order that persons knowingly party to the carrying on of the company's business with intent to defraud make 'such contributions (if any) to the company's assets' as the court thinks proper. There must, as it seems to me, be some nexus between (i) the loss which has been caused to the company's creditors generally by the carrying on of the business in the manner which gives rise to the exercise of the power and (ii) the contribution which those knowingly party to the carrying on of the business in that manner should be ordered to make to the assets in which the company's creditors will share in the liquidation. An obvious case for contribution would be where the carrying on of the business with fraudulent intent had led to the misapplication, or misappropriation, of the company's assets. In such a case the appropriate order might be that those knowingly party to such misapplication or misappropriation contribute an amount equal to the value of assets misapplied or misappropriated. Another obvious case would be where the carrying on of the business with fraudulent intent had led to claims against the company by those defrauded. In such a case the appropriate order might be that those knowingly party to the conduct which had given rise to those claims in the liquidation contribute an amount equal to the amount by which the existence of those claims would otherwise diminish the assets available for distribution to creditors generally; that is to say an amount equal

to the amount which has to be applied out of the assets available for distribution to satisfy those claims."

41. The Registrar carried on with his reference to *Morphitis*:

> "At [55] of his judgment, Chadwick LJ added (again on an obiter basis) that he was not persuaded that there was power to include a "punitive element" in the amount of any contribution ordered under section 213 . He continued:
>
> > "As I have said, I think that the principle on which that power should be exercised is that the contribution to the assets in which the company's creditors will share in the liquidation should reflect (and compensate for) the loss which has been caused to those creditors by the carrying on of the business in a manner which gives rise to the exercise of the power."

42. I propose to approach this case in a manner consistent with the guidance offered by Chadwick LJ. Following the reasoning of Roth J, In *Re Overnight Ltd (No.2) [2010] EWHC 613 (Ch); [2010] B.C.C. 796*, I too will assess the liability of each Respondent separately, and hold that it is open to me to declare that liability should be joint and several. I note here that it is the JLs' case that the Respondents are equally culpable and ought to be liable accordingly.

*Breach of Duty*

43. I must now turn to the law in regard to another of the claims made by the JL's, this time under s.212 of the Insolvency Act 1986. This section provides the route to liability for misfeasance or breach of duty. The analysis then shifts to each separate duty to establish what is required of a director, the relevant standard and the knowledge that must be present.

44. The section provides:

> "(1) This section applies if in the course of the winding up of a company it appears that a person who—
>
> (a) is or has been an officer of the company, ….has misapplied or retained, or become accountable for, any money or other property of the company, or been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company. […]
>
> (3) The court may, on the application of the official receiver or the liquidator, or of any creditor or contributory, examine into the conduct of the person falling within subsection (1) and compel him— (a) to repay, restore or account for the money or property or any part of it, with interest at such rate as the court thinks just, or (b)

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

45. The relevant duties owed by a director, for the breach of which a remedy may be pursued by a liquidator through the "gateway" of s.212, were helpfully outlined by the Chief Judge of this court in *Re Glam and Tan Ltd [2022] EWHC 855 (Ch)* at [**14**]:

> "The Companies Act 2006 codifies the duties of a modern-day director in Chapter 2 of Part 10. The duties include a duty to exercise their powers for the purpose for which they are conferred (s.171 of the Companies Act 2006); to exercise the powers in what the directors consider in good faith to be likely to promote the success of the company for the benefit of the members as a whole (s.172)); a duty to exercise independent judgment (s.173); a duty to exercise reasonable skill and care (s.174) and a duty to avoid a situation giving rise to a direct or indirect interest which conflicts, or which might possibly conflict, with the interests of the Company (section 175)."

46. The test in regard to section 172, is a subjective one as to whether the director honestly believed that his act or omission was in the interests of the company (see *Re Regentcrest plc v Cohen [2001] 2 BCLC 80*, 105). It is suggested by the JLs that where there is no evidence of actual consideration by the director in question of the best interests of the company, the proper test to be applied is an objective one, that is to say, whether an intelligent and honest man in the position of a director of the company concerned could, in the circumstances, have reasonably believed that the transaction was for the benefit of the company. Reliance is placed on the reasoning of Pennycuik J in *Charterbridge Corpn Ltd v Lloyds Bank Ltd [1970] Ch 62* at [74]. I can see that on the facts of that case where the directors looked only at the interests of the group of companies and failed to separately consider the interests of the plaintiff company, it might be right to apply an objective standard, but I am unwilling to accept that the objective approach applies in all instances, ipso facto, where the director cannot show sufficient consideration of the matter in issue. What is sufficient? Was the director for good reason justified in not giving thought to the matter? These are only some of the questions that appear to me to be capable of argument in an appropriate case. To my mind the subjective test set out by Jonathan Parker J in *Re Regentcrest* is the lodestar unless the facts strongly point in the direction of the line taken in *Charterbridge Corpn Ltd*.

47. There was, rightly in my view, no issue before me as to the application of the common law duty on directors, preserved by section 172(3) of Companies Act 2006, to act in the interests of the creditors. My attention was not unsurprisingly invited to the well-known decision of the Supreme Court in *BTI 2014 LLC v. Sequana S.A. [2022] UKSC 25*. It was accepted that the duty arises where the company in question is insolvent or bordering on insolvency, or where an insolvent liquidation or administration is probable, or where a transaction would place the company in one of those situations. When a company is financially distressed the directors' fiduciary duty to the company to act in its interests is modified to include a duty to act in the interests of creditors as a whole. The duty is modified where the directors know or ought to know that insolvency is imminent or that it is probable the company will enter into an insolvent liquidation

or administration. The directors must take into account and give appropriate weight to the interests of the company's creditors.

48. Whilst Mr McCulloch submitted that the right of a director to delegate could not be stretched to permitting that director to abdicate personal responsibility, I think he accepted the proposition that flows from the example that I put to him of a Human Resources Director of a FTSE 100 energy company, that I suggested could not reasonably be expected to oversee or have full responsibility for the operations of that company's gas trading division. This reasoning is not to my mind in any way inconsistent with the decision of the Master of the Rolls in *Re Westmid Packing Services Ltd (No 3) [1998] BCC 836*, where at 842 Lord Woolf said:

> "… that the collegiate or collective responsibility of the board of directors of a company is of fundamental importance to corporate governance under English company law. That collegiate or collective responsibility must however be based on individual responsibility. Each individual director owes duties to the company to inform himself about its affairs and to join with his co-directors in supervising and controlling them. A proper degree of delegation and division of responsibility is of course permissible, and often necessary, but not total abrogation of responsibility."

49. The answer to the question will always be heavily influenced by the facts of any given company, its business and its management, but to my mind, the proper degree of delegation is not inimical to the responsibilities that will continue to repose in a director. This of course is not to say that a director "may simply leave the management of the company's affairs to his or her colleagues, or to other delegates" as was the observation of Briggs J (as he then was) in *Lexi Holdings plc v Luqman [2007] EWHC 2652 (Ch)*; nor can a director stand by and do nothing, without risk of being in breach of duties owed; "and if the company is involved in inappropriate activity, he risks associating himself with, and taking some responsibility for, that inappropriate activity" (see *Re Park House Properties [1997] 2 BCLC 530,* Neuberger J).

50. What I draw from the analysis of Jonathan Parker J (as he then was) in *re Barings plc and Others (No.5) [1999] 1 BCLC 433* is that a director must maintain sufficient knowledge of a company's business to allow the director to discharge the duties owed as a director; where a director delegates power, the director is not entitled to place unquestioning reliance upon others to do a job that the director may not have the skill or competence to perform; the director must take reasonable steps to monitor any delegate and the extent of this duty depends, as I have already indicated, on the facts, including that where the delegate is objectively adjudged to be trustworthy and competent, less supervision and involvement is required.

51. It seems to me to be entirely correct to hold that no rule of universal application can be formulated as to the continuing duty of responsibility that survives delegation. The extent of the duty, and the question whether it has been discharged, must, as I have said, depend on the facts of each particular case, including the director's role in the management of the company. When grappling with this question, I observe that the learned Chief Judge came to a similar view in the *Glam and Tan* decision:

> "It has been submitted that a director's duties are "non-delegable". In my judgment the proposition is put too high. A director is entitled to delegate certain duties as

long as the delegation is reasonable. There has been some consideration by the courts as to what constitutes reasonable delegation and whether all the powers of a director can be delegated.

In *Re Barings plc (No 5)* [2000] 1 BCLC 523 Jonathan Parker J (as he was) explained that directors have a collective and individual duty to maintain sufficient knowledge and understanding of the company to enable them to discharge their duties. The delegation he spoke of concerned specific duties rather than a delegation of all duties. Accordingly, exercising the power of delegation "does not absolve a director from the duty to supervise the delegate's discharge of the delegated functions".

The determination of reasonableness is fact sensitive. Such matters as the relationship between the one delegating and the one to whom power is delegated is an obvious and important factor. The nature of the tasks delegated, and whether the individual is qualified and trusted to undertake those tasks are other factors."

*Duty owed to a subsidiary company.*

52. It was not contested before me that the duties owed by a director are owed to the company and not to the group of companies of which that individual company may be part. In support of the proposition, the JLs relied upon, and I am glad to adopt the dictum of Lady Rose in the recent Privy Council decision of *Ma Wai Fong v Kie Yik [2022] UKPC 14; [2022] BCC 953*:

"... each company within the corporate group is a separate legal entity and the directors are not entitled to sacrifice the interests of that company for the benefit of the group. But it does not follow that the absence of separate consideration ipso facto means that the directors were in breach of their duty."

*Duty of directors under section 393 Companies Act 2006*

53. I now must deal with part of the case put forward by the JLs in regard to which there was disagreement at the bar. The Respondents do not accept that a duty upon directors arises under section 393 of the Companies Act 2006, for the breach of which, they may attract civil liability. The section provides that:

"(1) the directors of a company must not approve accounts for the purposes of this Chapter unless they are satisfied that they give a true and fair view of the assets, liabilities, financial position and profit or loss—

(a) in the case of the company's individual accounts, of the company;"

54. Section 414(4) and (5) of the Act provide:

"(4) "If annual accounts are approved that do not comply with the requirements of this Act, every director of the company who—

(a) knew that they did not comply, or was reckless as to whether they complied, and

(b) failed to take reasonable steps to secure compliance with those requirements or, as the case may be, to prevent the accounts from being approved,

commits an offence.

(5) A person guilty of an offence under this section is liable—

(a) on conviction on indictment, to a fine;

(b) on summary conviction, to a fine not exceeding the statutory maximum."

55. It was argued on behalf of SN that no claim can be pursued under section 393, as that provision does not give rise to civil liability. This is because failure to comply with section 393, leads to a criminal offence under section 414(4) of the Companies Act 2006, and is taken into account in directors' disqualification proceedings.

56. Whilst accepting the application of the general rule that where a statute creates an obligation, and enforces the performance of it in a specified manner, that performance cannot be enforced in any other manner, the JLs point to two exceptions to this general rule, the first of which, and it is on this that they rely, being explained thus:

> "Where the only manner of enforcing performance for which the Act provides is prosecution for the criminal offence of failure to perform the statutory obligation or for contravening the statutory prohibition which the Act creates, there are two classes of exception to this general rule. The first is where upon the true construction of the Act it is apparent that the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals, as in the case of the Factories Acts and similar legislation As Lord Kinnear put it in *Butler (or Black) v. Fife Coal Co. Ltd. [1912] A.C. 149* , 165, in the case of such a statute: "There is no reasonable ground for maintaining that a proceeding by way of penalty is the only remedy allowed by the statute... We are to consider the scope and purpose of the statute and in particular for whose benefit it is intended. Now the object of the present statute is plain. It was intended to compel mine owners to make due provision for the safety of the men working in their mines, and the persons for whose benefit all these rules are to be enforced are the persons exposed to danger. But when a duty of this kind is imposed for the benefit of particular persons there arises at common law a correlative right in those persons who may be injured by its contravention." Per Lord Diplock in *Lonrho Ltd v Shell Petroleum Co [1982] AC 173*."

57. The JLs say that section 393, falls within this exception because the duty in regard to the accounts was created for the benefit of a particular class, namely companies subject to the provisions of the Companies Act 2006, their shareholders and creditors.

58. I have to confess a great deal of difficulty with the submissions of the JLs on this limb of their claim. The question I must ask, and if the JLs are to be in in a position to argue this point, answer in the affirmative, is whether on the true construction of section 393, it is apparent that the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals. Whilst I can see why that might be the case where

a particular injured mine employee seeks redress in light of the default of the employer to make due provision for his safety in accordance with mine safety regulations, I am not at all sure that it is apt to construe s.393 in a similar way. When I ask for whose benefit the provision was intended, I find myself unable to say that there is no reasonable ground for maintaining that a proceeding by way of penalty is the only remedy allowed by the statute. Did the legislature really intend that a remedy should be available to shareholders or office holders? In the absence of more developed argument on the point, I find myself unable to say so.

59. Mr McCulloch was unable to point to any authority on the question and nor was he, in my judgment at any rate, able to offer a satisfactory response to the challenge laid down by Mr Young appearing for SN, who posited that if the duty were to exist every member of the public - or shareholder - would be a potential claimant for any set of accounts signed by directors.

60. It follows that this is not a head of claim that I will permit the JLs to advance, and accordingly, I do not have to consider the arguments on limitation or causation, raised by the Respondents in regard to it.

61. There is however a limitation point which I do have to address. The last of the alleged breaches with respect to the Restructured Ramadan Loans took place on the 30 June 2010. Under section 21(3) of the Limitation Act 1980, an action for breach of fiduciary duty by a director will be time-barred six years from the date of breach. Because this present application was brought on 18 December 2019, the JLs rely upon section 21(1)(a) of the Limitation Act of 1980, which makes provision for time limits for actions in respect of trust property:

> "(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—
>
> (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy;"

62. Thus the Respondents submit, unless the JLs establish that the matters alleged amount to a fraud on the Company or fraudulent breach of fiduciary duty to which the Respondents were a party or privy, the action will have been commenced too late.

63. The JLs accept that in order to fall within section 21(1)(a), it must be shown that the director in question was acting fraudulently and therefore dishonestly. I agree with Mr McCulloch that the *Ivey* test to which I have already referred, will now be relevant to that question of dishonesty and thus the Limitation Act point. It will be for the court to decide upon the question whether the Respondents' conduct was honest or dishonest, applying the standards of ordinary decent people. There is no requirement that the Respondents must have appreciated that what they were doing was, by those standards, dishonest.

64. Although GB, and doubtless SN too, given that the Respondents sought to rely upon submissions of the other wherever potentially helpful, takes issue with the JLs as to whether fraud is adequately pleaded against him, let me say now that I see no merit in that submission. The point was not advanced with any great enthusiasm by Mr Gloag and having read the contents of paragraph 94 of the Amended Points of Claim, I have

to say that I have no difficulty whatsoever in dismissing the notion. Save for referring to what is on my reading, self-evident from paragraph 94, I do not propose to take up any more time on this issue. It seems to me that Mr Gloag sees his real case as turning on his central submission that in this case there was no fraud; there was no dishonesty.

*Standard of Proof*

65. Before turning to the evidence in the case, I should say something about the standard of proof to be applied in cases of this nature where fraud is alleged. The standard to be applied is of course the well-known civil standard, that is to say whether something has been established on the balance of probabilities. But what is the approach to the satisfaction of that standard when serious allegations involving fraud and dishonesty are at hand? Counsel for the JLs invited my attention to the decision of the House of Lords *In Re H (Minors)* [1996] 2 WLR 8, where, in a family case that called for a review of the approach to the standard of proof in non-criminal cases, Lord Nicholls of Birkenhead observed at [586]:

> "The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A step-father is usually less likely to have repeatedly raped and had non-consensual oral sex with his underage stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.
>
> Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established. Ungoed-Thomas J. expressed this neatly in In re Dellow's Will Trusts [1964] 1 W.L.R. 451 , 455: "The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it."
>
> This substantially accords with the approach adopted in authorities such as the well-known judgment of Morris L.J. in *Hornal v Neuberger Products Limited* [1957] 1QB 247. This approach also provides a means by which the balance of probability standard can accommodate one's instinctive feeling that even in civil proceedings a court should be more sure before finding serious allegations proved than when deciding less serious or trivial matters."

66. There are serious matters alleged by the JLs in this case. It seems to me important to apply the guidance of Lord Nicholls in seeking to arrive at a view as to whether the matters brought before the court by the JLs have been proved. I am also fortunate to have the benefit of further guidance on the relevant standard, laid down by Sir Geoffrey Vos C. (as he then was) in *Bank St Petersburg PJSC v Arkhangelsky* [2020] EWCA Civ 408. At [44] the Chancellor said this:

> "It does not seem to me that the law is now much in doubt. It is encapsulated in the following passages from Lady Hale's judgment in Re B, which, though stated to be applicable to care proceedings are, I think, of more general application in civil proceedings:-
>
>> "Lord Nicholls's nuanced explanation [in Re H] left room for the nostrum, "the more serious the allegation, the more cogent the evidence needed to prove it", to take hold and be repeated time and time again in fact-finding hearings in care proceedings" …
>>
>> My Lords, for that reason I would go further and announce loud and clear that the standard of proof in finding the facts necessary to establish the threshold under section 31(2) or the welfare considerations in section 1 of the 1989 Act is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies. …"
>>
>> "As to the seriousness of the allegation, there is no logical or necessary connection between seriousness and probability. Some seriously harmful behaviour, such as murder, is sufficiently rare to be inherently improbable in most circumstances. Even then there are circumstances, such as a body with its throat cut and no weapon to hand, where it is not at all improbable. Other seriously harmful behaviour, such as alcohol or drug abuse, is regrettably all too common and not at all improbable. Nor are serious allegations made in a vacuum. Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog."
>
> Both parties cited Bryan J's recent decision in Bank of Moscow v. Kekhman [2018] EWHC 791 (Comm), in which he cited at [41] a passage from Flaux J's judgment at an earlier hearing in the same case where he had said:
>
>> "[t]he claimant does not have to plead primary facts which are only consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence. As Lord Millett put it, there must be some fact "which tilts the balance and justifies an inference of dishonesty".
>
> I entirely agree with that passage."

67. In this case, it will be for me to decide whether there are facts and matters which tilt the balance and justify an inference of dishonesty.

*The issues and the evidence*

68. As was considered convenient by the parties, I propose to review the evidence I heard in the context of the issues raised and the claims made by the JLs. It might also be helpful at this stage to set out, by way of reminder, the simple propositions upon which both GB and SN rely.

69. I have to ask myself the questions, was TIL conducted in a way that was fraudulent, that is, with intent to defraud the creditors of TIL or of any other person or for any other fraudulent purpose? The Respondents say that there was no intention to defraud creditors of TIL; put another way, their case is that nothing they did was fraudulent or dishonest. As it is argued for SN, his conduct always "fell on the right side of the line". It is GB's case that he was doing his best to serve the interests of TIL in the face of the significant challenges presented by the 2008 financial crisis.

70. The JLs' case made under section 213 of the Insolvency Act 1986, is that that TIL was carried on with an intent to defraud not only the Fund itself, which was creditor of TIL, but also the investors in the Fund *qua* creditors of the Fund; alternatively the JLs characterise this case as being one in which the court can be satisfied that there was a fraudulent purpose – and not simply an incidence of fraud. The JLs' case is that TIL's trading fell within section 213 in that the Respondents:

a) caused the refinancing of the Ramadan Loans, in breach of express promises made, at the same time falsifying the representations made to the Fund and to its investors;

b) carried on business by preparing and filing accounts for TIL which did not give a true and fair view; and

c) carried on business in a manner otherwise than in the best interests of TIL, its members or its creditors, acting in deliberate breach of their fiduciary duties to TIL.

*The Ramadan Loans*

71. The essence of the charge laid by the JLs is that GB and SN both knew that their existing borrower Mr Ramadan was in financial difficulty; in order to keep him from a general default, they developed a scheme with him, whether piecemeal or as a coordinated plan, to re-arrange his borrowing on extended terms. This is where the controversy lies. Both GB and SN were clear in their evidence that rearranging the borrowing in this way, was the right thing for the company; it was the right thing for TIL. They had no eye on TPLC or its continuing liquidity; what they were interested in was allowing a borrower with a substantial track record of success, to be permitted to carry on business. It was,

both Respondents said to me, business that had every likelihood of being profitable both for Mr Ramadan and for TIL.

72. In his evidence to the court, GB explained that he had realised that Mr Ramadan was experiencing problems and there had to be a solution found. GB accepted that one of the reasons for the pressure on Group cash flow was Mr Ramadan not servicing regularly his existing borrowing. He was shown an email from TPLC Financial Controller Mr Read from May 2008, which made this plain.

73. He thus conceived the idea of a "restructure". It was not, GB told the court, a fully formed idea when the first existing loan was rearranged; however, the concept developed over time, and as each existing loan was re-financed. Each loan was viewed on its merits and invariably further security taken or a joint venture entered into, so as to generate for TIL a share of the profit resulting from a successful development of the commercial property which was the subject of the lending. Because of Mr Ramadan's track record in commercial property development, which GB cited to the court on numerous occasions, there was every reason to believe that TIL would eventually do well from its relationship with Mr Ramadan, and those of his associates who were also borrowers under the Restructured Ramadan Loans.

74. I ought to say something here about the evidence I heard from GB and SN. It is important when assessing the evidence of both Respondents to keep in mind the passage of time. Many of the events under review took place at least 14 years ago. In a number of instances the Respondents were being asked to answer questions on matters that they had not reflected upon or heard about since they happened in 2008/2009. Taking those factors into account, I found GB to be a witness who on the whole tried his best to answer the questions put to him, albeit that it became clear to me that he often sought to craft answers in a way that would fit his case. That said, he gave clear evidence and, in the main, did not try to obfuscate by the responses provided.

75. Unfortunately the same cannot be said about SN, who I found to be an altogether unsatisfactory witness. It was plain to me that during his period of cross examination, SN developed the habit of trying to work out in his mind, prior to formulating any answer, what the question put to him was aimed at eliciting from him. This led to an unnecessarily protracted time in SN giving evidence. More than once, I was compelled to intervene in order to remind SN that what was required of him was his honest answer to a question put based on his recollection, but that if he could not remember or did not know, he should say so. This became necessary as SN manifestly sought to formulate answers based on what he thought was the most appropriate evidence for him to give, rather than offering his truthful response.

76. It is important to start with an understanding of the Ramadan Loans to which I have already made some reference. By 2008, the Ramadan Loans were under close review. An attempt was made on behalf of the Respondents to challenge whether they had become non-performing, but that I found hard to fathom given the evidence of GB. I was shown a spreadsheet of amounts owed by Mr Ramadan and his associates to TPLC and its subsidiaries, dated 22 May 2008. It was accepted by GB that all 15 loans were in arrears save for one. It was not disputed that the Ramadan Loans had not been repaid

at the end of their respective terms, and that interest payments had been sporadic, if made at all.

77. From the evidence given in respect of each property that was due to be developed with the benefit of lending under the Ramadan Loans, it was possible to understand that no development had in fact taken place by the point in time that the loans were restructured and refinanced with the benefit of finance from the Fund. This was confirmed by the evidence from property valuation expert, Mr Manley. In his report, and repeated in evidence to me in cross-examination, he said that:

> "The 15 properties had been held for redevelopment and, whereas most had planning consent to be developed, no works had been undertaken prior to the refinancing."

78. One of the central questions posed by the JLs was how it came to be that the Respondents considered Mr Ramadan a credible borrower for any refinancing when the properties the subject of the lending, had not been developed during the term of the original Ramadan Loans. If there was to be any restructured financing, it could not possibly meet the criteria of the Fund, which, as will shortly be seen, required prime borrowers and usually low-risk short term developments, whilst if any lending was to fund commercial property, as many of the Ramadan properties were, then under the Fund's criteria, the approach to lending had to be all the more rigorous.

79. Not only was a refinancing decision problematic because the properties had not yet been developed, as the JLs again asked, where would the additional development finance be found? This portion of funding was necessary to allow the building works to be carried out that would permit the relevant properties to realise their full so-called development value. The evidence I heard was that neither TPLC nor TIL had the liquidity to fund the development.

80. The financial crisis that was evident in 2008 plainly had some impact upon the ability of Mr Ramadan and his associates to meet their obligations. This much was conceded by GB. In his skeleton argument, Mr Gloag explained at para 57 that:

> "Mr Booth, honestly and reasonably believed that the restructuring of the Demi [Mr Ramadan] Loans would provide an exit route for Mr Ramadan and his associates from the financial difficulties they had been experiencing as a result of the financial crisis"

81. The JLs see this statement as an important admission. It is difficult to dismiss the suggestion that GB must have understood that he was arranging for TIL, and as shall be seen, the Fund, to enter into new loans with borrowers who were facing financial difficulties. This has to be considered in the context not only of the obligations which GB owed to TIL, but also, insofar as different, his knowledge of the requirements of the lender of the restructured facilities.

*The impact of the 2008 Financial Crash*

82. I have already touched on the circumstances known as the financial crash. In his report to the court, property finance specialist Mr Griffiths explained the impact the crash had on the bridge lending market:

> "As discussed further below the effect on the bridging industry in making new loans was to exercise extreme caution because they would now be lending into a falling market. As such, they would lend for shorter periods at lower LTVs. In relation to loans made before the financial crisis struck (i.e. pre September 2007, when problems emerged at Northern Rock), these would usually have matured during 2008 and bridging lenders would have been looking on with concern as they saw their LTVs being eroded by the falling market.
>
> Further, the market information to which I refer, below, was published on-line at the time and publicly available. I believe that this is relevant when I consider statements made in the Information Memoranda.
>
> Lending in a falling market is difficult because the Market Value of a property being financed is at risk of falling during the life of the loan, notwithstanding the fact that the property may have been improved and/or refurbished during the same period. In addition, lenders will generally be more risk adverse and will therefore apply lower LTV requirements. This means that borrowers get hit with a combined disadvantage of lower valuations and lower LTVs which will restrict the amount they can borrow.
>
> Frequently properties are initially purchased with a bridging loan and then refinanced with longer term debt once completed and/or let. Hence, one of the key factors for any borrower is the availability of finance for the long-term refinancing of a bridging loan, for example, when a refurbished property is let out and the borrower seeks a BTL mortgage.
>
> The same applies where a borrower wishes to sell the property and the buyer is relying on finance from another lender to complete the purchase. If such finance is in short supply, it will usually take a long time to arrange and/or is only available at a lower LTV and at a greater cost compared LTVs/costs in a more competitive rising or stable market; this in turn affects the price that the prospective buyer can afford to pay. This in turn drives the Market Value down and means that the LTV upon which the bridging lender's loan was originally advanced and secured, is substantially eroded.
>
> Many of the property lenders working in 2008 had direct experience of the recession of the early 1990s and knew how sharply values could fall and how quickly demand could evaporate. Accordingly, many property lenders viewed the events of late 2007 and early 2008 with trepidation and consequently exercised tremendous caution in their dealings. The Bank of England expressed the view that the level of caution being exercised could, itself, become a self-fulfilling prophecy and could contribute to market problems."

83. Mr Griffiths was also cross-examined. I will be referring to his evidence again later in this judgment. I ought to say that the impression I was left with, both from his report and his evidence in court, was that Mr Griffiths was a deeply experienced property

lending banker, very much in command of his subject. I found his evidence to be clear and authoritative.

84. The court also had the benefit of expert evidence, again submitted by the JLs, from Property Valuation specialist, Mr Manley. I found his report to be thorough and well-constructed. In the summary section, Mr Manley added further detail to background circumstances faced by TIL when it was considering what steps to take in regard to the Ramadan Loans, all against the backdrop of the difficulties being experienced in the financial markets in 2007/2008. He began by touching on the price originally paid for the relevant properties, being both the security for, and the focus of the development proposition underpinning, the Ramadan loans:

> "At the times the properties were acquired, the purchase prices were "full" for the market. In some instances, it appears that the borrowers had bid for the sites at a premium level and hoped to recoup sums, either by hoping for a continued rise in the sales market throughout the development period, or by reducing the development costs to a lower level. If either, or both, of these options were not to come about, the profit margins would be severely eroded at these purchase prices. My valuations of each site at the date of acquisition are generally slightly below the purchase prices.
>
> I was asked to address two specific issues, which I summarise below (a) what movement was there in the prices of property of their type between mid-2007 and the start of 2010 (i) in England or the UK generally; and (ii) in the localities of those properties?
>
> There was a dramatic downward movement of both the residential housing market and the commercial investment market between mid-2007 and 2010, caused largely by the onset of the "credit crunch", itself triggered by an over exposure to sub-prime residential lending in the US. This was very widely reported in the mainstream media at the time, and also in the specialist property and banking media. The property sector was one of the worst affected parts of the economy, owing to the large amount of debt that had been secured against property in the five years prior. With the onset of the credit crunch, most banks recalled whatever loans they could, and debt funding rapidly reduced in availability. In the limited instances that debt remained available, it increased substantially in pricing. Generally, only extremely well capitalised corporates with strong track records could achieve debt funding at all, with property development in many cases coming to a standstill.
>
> With capital more expensive, property prices fell dramatically, even for completed and let developments. This was widely reported in both the specialist property press and mainstream media. The worst affected sector was speculative development, which came to an almost complete standstill owing to the lack of debt funding available and the high cost of utilising equity. This was against a backdrop of rapidly falling end values, and steadily increasing build costs, squeezing both developer's profits and substantially reducing site values. The Market Value of each of the sites fell markedly from the time of its acquisition to the time of its refinance by Tiuta. Any banker active in the market at that time would have

expected to see speculative development sites falling dramatically between these periods.

I have addressed the market generally in Section 3 of this report, which confirms and clarifies this poor performance. Although many figures and indices were quoted on a national basis, I have also referred to specific indices and data available for the localities of each of the subject properties. Many of the properties were located along the north Kent coast and in the Channel Ports of Kent, which are all depressed areas when compared to most of southeast England. These areas were affected worse than many other parts of southeast England and also took much longer to recover. As with the rest of England, the other subject localities (Ipswich, Northampton, Leicester, and Eastbourne) were also adversely affected."

85. He then carried on:

> "As the properties were all sites, held for development, they were all within the category that was worst affected by the credit crunch. Speculative development schemes such as these were faced with declining end values (gross development value ("GDV")) against a backdrop of continually increasing building prices (through inflation), together with very limited and much more expensive debt funding. This led to a very marked deterioration in site values and prices and in many parts of the country speculative development came to a complete standstill."

86. As might be expected, both the happening and the consequences for bridge lenders of the financial crash, or credit crunch as it also known, was generally accepted by both Respondents in the evidence I heard. GB accepted that the value of property held as security had been diminished. This was consistent with an internal TPLC memo which stated:

> "At Tiuta, we are of course being affected by the on-going credit crunch crisis. However, there is no reason for alarm. Whilst the market for lenders and bridging companies is becoming smaller we continue to have a full loan book and continue to turn a profit. The effects of the credit crunch have been felt throughout the business from front end sales with an increase [in] enquiries and a decrease in parameters in a shrinking market to choose from and diminishing exit routes to be considered in underwriting. We are also feeling the effect in back end redemptions where existing clients are finding it harder to redeem in a constantly changing market. This means our funds are tied up longer than we would want and has a direct effect on accounts. This will inevitably lead to a higher level of problematic loans and therefore more work for the legal department which is also under pressure to maintain our relationships with our subordinated lenders. We have been adjusting our lending criteria accordingly and have stepped up our underwriting procedures …"

87. As evidence of the diminution in business activity, I was referred to TPLC's consolidated accounts as at 31 March 2008 which revealed debtors (debts due from borrowers to the Group) totalling £68 million; bank loans and overdrafts totalled £58.6 million, whereas as at 31 March 2009, debtors (excluding debtors of TIL) were down to £51.5 million and bank loans and overdrafts fell to £44.2 million. By 31 March 2010,

debtors (excluding debtors of TIL) were at £26.7 million and bank loans and overdrafts, were only £18 million.

88. The Respondents accepted, as do I, that the funding lines from bank lenders were vital to the business of TPLC. This is where TPLC found the money that it on-lent to short term borrowers. I heard no evidence that persuaded me that TPLC, TIL or any of the subsidiaries had either substantial reserves of cash or other lending facilities available. I heard evidence regarding further funding available from Laiki Bank, but in my judgment it was clear from the communications with that bank that the supposed additional liquidity was in fact a sum being held as a blocked deposit, this being a condition of the facility.

89. It was plain that in 2008 the sources of funding for the Tiuta business were drying up. In evidence GB confirmed that yes, there was substantial pressure to redeem loans but he added that the banks did not stop lending. Nevertheless he accepted that another lender, AIB, had stopped lending to the Tiuta businesses, and that subsequently Bank of Cyprus did too. It seems that there was an imperative to find a new source of lending so as to allow the business model to continue to operate.

90. The new source of funding was the Fund. In its 2008 end of year Report, TPLC warned that:

> "The fund although being more expensive than our historic lenders, is now crucial to the ongoing survival of the Company given the attitude of our banks."

91. The Respondents gave evidence of some additional funding being available from a supposed "off-balance sheet lender". This lender was the Octopus Group, and the facility had been arranged through a Mr Jonathan Samuels. I was told that a facility of £35 million was available to TPLC and its subsidiaries. I have to say that I agree with the JLs that the immediate availability of such funding was entirely inconsistent with the documentary evidence I was shown from the relevant period, which made it clear to me that that TPLC and its subsidiaries, including TIL were desperate for cash. The financial controller Mr Adam Read, sent numerous messages that I read, making it plain that cash was needed. At no stage did he allude to other facilities being available, whether through Octopus, Mr Samuels or other deposits.

92. The Respondents also accepted that pressure from the financial markets led to borrowers taking longer to repay bridge facilities already extended by TPLC or its subsidiaries. Holding onto money longer had the knock-on effect of reducing the fees earned by the TPLC companies on new lending business; it also led to reduced profit and generally, reduced working capital liquidity. This tightening in the market was again reflected in another internal memo of February 2008, on this occasion from GB, to which reference was made by the JLs. This communication appeared to corroborate

the submission that the companies were re-evaluating the business they were doing, and with whom:

> "AS OF TODAY WE DO NOT EXCEPT [sic] ANY MORTGAGE ARREARS WHATSOVER. CURRENT CASES AGREED WILL BE HONOURED SUBJECT TO A SECOND APPRAISAL BY UNDERWRITING."

93. In another February internal communication seen by the Respondents, it was stated that:

> "[W]e too are looking to cover our funds by offering 12 month terms with an absolute maximum LTV of 65% […] We require a valuation instructed by us – NO RE-TYPES – and a demonstrated exit route in place (please use your heads with this … if someone tells you they will re-finance in 2 months with Birmingham Midshires they are lying … BM only re-finance after 6 months) […] It's our job to lend money – not sit on it … where there is a will there is a way (within reason)!"

94. Further internal communications that I saw, together with confirming evidence from the Respondents that I heard, demonstrated that TPLC felt it necessary certainly from March 2009, to adopt tighter Loan to Value (**LTV**) ranges, being up to £500k – 70%, £500k to £1m – 65%, and above £1m – 60%. Lending above those ranges was considered by GB, and in my view SN would have known this too at the time, to be accepting risk for the business that was not commercially sensible.

95. How it is that the tightened regime for lending that the Respondents thought was prudent for TPLC and TIL, can be reconciled with the approach adopted by the Respondents to arranging lending from the Fund, is not easy to see. This difficulty will come into altogether starker focus when I come to an analysis of the Restructured Ramadan Loans.

*The Fund*

96. I must now turn to the evidence of the creation of the Fund; this evidence is in itself linked to the facts surrounding the incorporation of TIL. It appears that TIL started trading in mid-2008. GB explained to the court that TIL was established to provide another funding source that would be available to the Tiuta group of companies. As I understood what he told the court, the new funding was to come from the Fund. As to the setting up of the Fund, in his Witness Statement GB said:

> "I did not design or work on the setting up of the Connaught Asset Management Fund except if I was asked by Steven Nichols, Tim Nichols or later Adam Reed for specific detailed information within my field of expertise. Nigel Walter, Mike Davis, Steven Nicholas, Tim Nichols and possibly other people did this from CAM who I did not know or ever meet. I looked at it purely from the sales and product perspective plus cost of funds for product design."

97. It is here noteworthy that in his first witness statement, GB explained that the Tiuta Group, rather than TIL, was to be the Specialist Partner to the Fund.

98. It was put to GB that the creation of TIL could only be understood against the background of the non-performing Ramadan Loans, the financial crash that occurred in 2008, and the cash flow difficulties being suffered by TPLC and its subsidiaries. The

evidence in response was simply that the plan had been to have separate lines of funding for discrete parts of the business. For TIL, the funding source was the Fund, whereas for other parts of the Tiuta group, the evidence of the withdrawal of bank funding notwithstanding, the liquidity would be provided by bank lenders.

99. A further understanding of the position can be gleaned from the 2008, End of Year Report for TPLC, which set out:

> "The fund although being more expensive than our historic lenders is now crucial to the ongoing survival of the Company given the attitude of our banks. […] Going into the 2009 the utilisation of the fund and maintaining the relationship with Connaught and Capita remains key. We have to use funds in the short term to maintain the relationship with our other lenders and provide cash for the business, however one of the crucial tasks for management will be to time the marketing and sales of the new fund products as the clean up of older loans comes to an end, this will keep the fund utilised and also mean lower LTV loans and loans more likely to redeem quickly will improve the statistics for the Fund administrators and investors."

100. The JLs invite me to see the reference to "older loans" as being a reference to the TPLC non-performing loans, and in particular the Ramadan Loans. I accept that GB did not appear to demur to the suggestion when it was put to him, that the Fund provided important financial support for "Tiuta", albeit that he did not know if it was a direct reference to the Ramadan Loans.

101. Further light on the role of the Fund, and its position as a provider of lending to TIL can be gleaned from "The Directors Review" from 2008-09, which stated:

> "In light of increasing levels of new business and repeat borrowers the main threat to the group is the availability of funds to consolidate and grow the business, in reaction to this Tiuta has launched, in partnership with Connaught Asset Management a fund, invested in through the Independent Financial Advisor network that Tiuta can utilise for property based lending. This has been a success and as at March 2009 had raised £23m and continues at a rate of about £5m per month, this helps mitigate the groups funding risk and will also assist us to grow and diversify in the future".

102. Thus it was accepted by both GB and SN that the purpose of the Fund was to attract investment in accordance with provisions of the Fund's Investment Memorandum (the **FIM**); both Respondents also accepted that TIL had entered into a Services Agreement with the Fund manager, which required TIL to make bridging loans to its customers, using monies advanced by the Fund. The loans made were to be consistent with the requirements of the FIM.

103. The first version of the FIM was drafted in the course of March and early April 2008. In cross examination, SN eventually accepted his involvement in the drafting of the FIM; GB also agreed that he had looked at and approved the final versions. He told me that he was "perfectly aware of its terms". It is perhaps worth noting at this juncture that SN's reluctance to accept his involvement in the development of the FIM was

perhaps surprising in light of the numerous contemporaneous emails that clearly demonstrated his extensive involvement in the process.

104. It seems that the FIM was finalised and sent to prospective investors and Financial Advisers from April 2008. The operator of the Fund was Capita Financial Managers Limited.

105. From the evidence that I heard, there can be no doubt that GB and SN were both fully aware of the basis on which investment would be made in the Fund, and the terms upon which TIL could access those funds. It was as SN described it, a "Sales Document".

106. The FIM is an important document. It is necessary to consider its contents carefully. The first point to note is its title in 2008: "The Guaranteed Low Risk Income Fund". There was a 2009 later version of the FIM which still carried the same title; however, sometime after June 2009, it became the Connaught Income Fund. This version of the FIM was not, as I understood the evidence, relevant to the Restructured Ramadan Loans. If it was, it could only have been to the final three Restructured Ramadan Loans. In any case, I do not find that anything material turns on the change of title.

107. The reassuring title of the Fund notwithstanding, the first section of the FIM is concerned with warning prospective investors of the inherent risks. It provides:

> "Risk Warning
>
> An investment in the Limited Partnership or the Exempt Unit Trust involves a degree of risk. Investment results may vary substantially over time. When reviewing historical performance data in this Information Memorandum, prospective investors should bear in mind that such information is not indicative of future performance.
>
> Certain information in this Information Memorandum represents or is based upon forward looking statements or information. The Operator believes that such statements and information are based upon reasonable estimates and assumptions. However, forward-looking statements and information are inherently uncertain and actual events or results may differ from those projected. Therefore, undue reliance should not be placed on such forward-looking statements and information.
>
> Throughout this document, reference is made to \`very low risk\` \`low risk\` and \`medium risk'. Such terms are used with the specific meanings as set out on page 12 of this document and should not, therefore, be considered, or relied upon, as having a generic meaning."

108. In order to arrive at some understanding of the investment opportunity being offered, it is helpful to set out the Executive Summary of the FIM which appeared at page 2:

> "With increasing volatility in world-wide markets, Connaught Asset Management was formed in February 2007 to research and offer investment opportunities directly into the investment market based and secured against tangible assets to minimise investment risk and offer investors and institutions innovative ways to diversify their asset portfolios. The current conditions in the lending market have

resulted in an increase in the time it takes to obtain a mortgage; traditional mortgage lenders have increased their credit and affordability checks, meaning that the time between applying for a mortgage and obtaining funds is longer. Equally a number of businesses may wish to exploit a market opportunity to acquire a property more quickly than it takes to process a traditional mortgage application.

This has resulted in growth in demand in the 'bridging' finance market and this Fund has been developed to offer potential investors the opportunity to invest money directly into the bridging loan market with a guaranteed annualised income paid quarterly in arrears from 8.15% to 8.5%, depending on investment levels, with any monies lent being secured as a first charge on the property made in favour of the Limited Partnership.

Bridging loans charge a premium interest rate typically between 1.25% and 1.4% per calendar month which is based on the speed the loans are required by a third party and not only on the risk profile of the loan itself, which is designed to be a very low or low-risk investment, based on strict investment rules.

Initial interest costs and charges made on a bridging loan are taken from the loan up front by deducting from the gross loan, which further reduces the lending risk. In addition, the interest paid out to investors will also be guaranteed and underwritten by the Specialist Partner to the Limited Partnership.

The combination of a relatively high guaranteed income from The Fund, one month's notice to withdraw monies and with all loans secured against a property makes this potentially a very attractive investment proposition for the investor market.

Internet searches suggest that the best rates achievable from long-term savings accounts are less than 6.5%. (Source: Moneyfacts.co.uk (26/3/08)). All interest monies will be paid to investors quarterly in arrears and will be paid on the first working day of January, April, July and October. After an initial minimum investment period of 6 months, investors can withdraw their money from The Fund giving one calendar month's written notice.

Historically property as security for lending has been low risk and remains so. House prices have increased from an average of £85,879 in Jan 2001 to £196,649 in February 2008, and have shown no annual decreases of 10% or more in the last 20 years. (Source: Property Prices: Halifax Price Index March 2008).

Bridging finance is offered as a percentage of the market value on which it is secured and will cover a maximum of 80% of the value of a property to ensure that the bridging monies are protected in the event of any loan default."

109. What can be distilled from this so-called sales document, is that the principal purpose of investment in the Fund would be to obtain exposure to the bridge financing market. The impression given is of niche market, that exists to provide liquidity where there would otherwise be a funding gap. The picture is painted of a borrower in a rush to buy, who for some reason or another has not managed to obtain a mortgage loan offer in time and so for a short period takes advantage of the short term Bridge Finance market. The impression clearly conveyed is that a long term savings account is a proper

comparator, and that the assessment of investment risk should be considered in the context of the performance of the 20 year housing market.

110. The feeling of being in safe hands, was also instilled in the prospective investor through the description of TPLC:

> "To March 2008 Tiuta Plc has made 721 loans (542 of which have redeemed), and has never failed to claim back the full capital amount lent on any of the loans. This is a reflection of its low risk lending criteria detailed on page 16.
>
> The annual value of the loans provided has risen from just over £1 million at the end of 2004 to £117 million at the end of 2007. The number of loans made annually in the same period has risen from 6 to 374 per year.
>
> The default rate (being when the loan is unable to be repaid and Tiuta has exercised its first charge and taken possession of the property) remains at less than 1%.
>
> Tiuta Plc. is authorised and regulated by the Financial Services Authority for the conduct of mortgage business in the UK.
>
> The Guaranteed Low Risk Income Fund, Series 1, has been developed to make this market accessible directly to investors whilst reducing risk levels through: strict lending criteria; independent valuation of any asset lent against; secondary valuation by the Specialist Partner; investment diversification; a first charge secured against the asset; title insurance to protect against third party negligence with regards to the title; using a Limited Partnership structure so the beneficial ownership of the first charge and income guarantee remains with the investors and the guarantee from the Specialist Partner for all interest monies due to The Fund."

111. It is plain that investors were being offered an opportunity to access a specialist market – bridge financing – with the help and guidance of a market professional, applying strict lending criteria, backed up by strong security. The image of sensible lending to a borrower with the ability to pay on the one hand, and taking security to provide a route to repayment if things "go wrong" on the other, was at the heart of the investment on offer. The low risk lending approach of TPLC was an essential part of the investment assessment. In the main body of the FIM, the default rate of TPLC was referred to as being less than 1%.

112. When describing the virtues of bridge financing at page 8 of the FIM, it was explained that:

> "From an investment perspective, the high rates of interest charged reflect the speed of the loan and not only on the risk profile of the loan, which potentially offers an excellent low risk investment opportunity for investors.
>
> Bridging finance is a very low risk lending business because it rarely allows the lending to be more than 80% of the valuation for mortgage purposes of a property (a higher percentage lending is only allowed when the borrower has a guaranteed exit route). Interest and fees deducted up front normally reduce the net amount lent to nearer to 75%. Because of its short term nature of between three and six months, property values would have to fall by more than 20% in the corresponding period

for the loan not to be secured against a tangible asset. Therefore, in the worst case scenario that the property is repossessed, the full loan amount should still be recovered. If the full amount is not recovered, Tiuta Plc has a legal obligation to repay the original investment to all investors."

113. An example of a typical transaction was provided to those attracted to the idea of investing in bridge financing, but needing to know more about how it worked:

> "Bridging finance is best explained through the use of an example. Take the example of a property investment company which has purchased a prime development property at auction for £500,000. The majority of the property investment company's equity is being effectively used in other projects and they require quick funds to complete the purchase within fifteen days or forfeit their deposit. A further £70,000 is needed to refurbish the building.
>
> The available equity has covered the deposit and can fund some of the purchase price - £150,000 in total; a further £350,000 is needed to complete the initial transaction. The developers' high street bank cannot release funds within the timeframe required, so a bridging loan is utilised. The current value of the property is £500,000 and expected value once refurbished is £750,000. Initial funding of £400,000 constitutes 80% of the value of the property as is, and total development funding of £420,000 is 56% of the expected value on completion.
>
> Because the developer has a clean credit rating and the loan to value ratios are acceptable the loan is provided. The project is completed in 3 months and the property sold at a healthy profit; the money lent by the bridging loan is then re-paid plus interest and fees."

114. It will have been observed that in this example, a number of elements feature that might be thought crucial to a low risk investment of this type: the fact that a High Street Bank might have lent but for the pressing time constraint; the 80% LTV ratio, taking the value of the property as purchased; the short term nature of the building work, and finally, the clean credit rating of the developer, giving comfort as to obligations being met and the likelihood of a successful venture.

115. The Lending Strategy of the FIM was explained as being aimed at a range of investors seeking "short term finance". The FIM set out at page 12:

> "The majority of loans will be to fund a property purchase with a short completion deadline, to fund a short term renovation or project or to refinance to raise capital. All loans will be secured with a first legal charge over one or more properties that will be registered to the Limited Partnership for the duration of the loan.
>
> The Fund will seek to reduce risk by ensuring that not more than 15% of the total lending of The Fund is to any single loan after the first six months of The Fund opening date. Each individual will have a clean credit record as confirmed through an Experian Credit Report and have a viable exit route to pay back the loan.
>
> Only loans in England, Wales and Scotland will be considered, however exposure to any one geographical area will be managed. The Specialist Partner and Asset Manager will assess the property market and avoid areas in which there is a

perceived risk of a material fall in property value during the loan period. Areas in which property prices are expected to remain most stable such as the South East of England and areas of Scotland will be looked upon more favourably.

Property types are also assessed as part of the lending decision. Certain properties, such as commercial properties, carry greater risk in the current economic market and therefore are subject to greater restrictions or are deemed unacceptable for security purposes.

Loan size ranges from £25,000 to £7,000,000, but must always fall within the ratios of loan to value defined in The Fund lending rules.

Regardless of the loan categorisation, all clients must currently be prime borrowers, i.e. have no CCJ's, no previous loan defaults, and no mortgage arrears or missed credit card payments in the previous 12 months. The Fund is designed to be of Very Low to Medium risk within the above loan to value risk categories. It will seek to lend monies in Great Britain with differing time scales, criteria and risk profiles to fully utilise lending capacity whilst minimising exposure to risk.

The targeted risk profile of The Fund is for up to 90% of the available monies to be held in Very Low or Low Risk loans and up to 10% in Medium Risk loans."

116. The risk categories were set out as follows:

"Very Low Risk Loan to Value < 70%; Low Risk Loan to Value 70% to 75%; & Medium Risk up to 85% (above 80% must have a guaranteed exit route)"

117. The impression given by FIM's explanation of its Investment Objective, based upon its Lending Strategy, was once again of finance being provided to borrowers with a good credit record, in need of short term liquidity, against a short timeline to completion of a property transaction, in a stable location so far as value risk was concerned. Commercial development would be rare and in any case subject to "greater restrictions", by which was probably meant in the context of this venture, elements such as a more onerous risk appraisal and a need for a more secure LTV ratio, as well as a clear and reasonably short period to completion.

118. Investors were however alerted to the fact that riskier transactions were possible. The FIM warned of that risk in these terms:

"To maximise the usage of investor funds, it is recognised that the Operator can, if necessary utilise funds for medium risk loans (up to 80% LTV, or up to 85% where there is a guaranteed exit route)."

119. Much of the controversy in the case before me turned on the extent to which the Restructured Ramadan Loans in fact met the relevant LTV ratios, and whether the Respondents were entitled to or did believe that there was *a guaranteed exit route*.

120. In light of the contents of the FIM which I have just reviewed, which in these respects did not change over the four versions relevant to the case against the Respondents, I accept the submission of the JLs that it was being represented to prospective investors

that investing in the Fund was low risk, because bridging loans were themselves low risk.

121. When asked in evidence about the low risk nature of the lending required by the Fund, SN accepted that TIL's lending required a very high chance of redeeming principal, interest and fees. The responsibility was to ensure that the loans had a very high chance of redeeming.

122. During cross examination, GB dealt with the meaning of Bridge Financing. Unlike the explanation given in the FIM, GB explained that "Bridging per se is up to a year". SN was prepared to stretch the definition even further, certainly if the label "short term" was applied to the loan. Recognising that the FIM made no mention of such a period SN, sought to rely upon an alleged change in the lending criteria by the Fund. SN's evidence was that "there is a document saying that the Asset Allocation Committee extended their loans from 12 months to 3 years." No other evidence of the change was produced to the court, certainly nothing as would have advised investors in the Fund of such a material change to the lending criteria. Indeed it might be thought that to have made such a revision, would have amounted to a fundamental change in the entire basis of the Fund.

123. As has been seen from the description of Bridge Financing in the FIM, and in evidence the Respondents accepted this, interest and fees on loans were to be deducted from the loan advance made to a borrower, thus reducing the LTV ratio in respect of the secured property, and in turn reducing the risk of a loss. It appeared on the evidence however to be the usual practice of TIL to add all or most of the interest and fees to the amount of the loan, thereby increasing the LTV and risk of non-recovery.

*Refinancing the Ramadan Loans*

124. Before me, the JLs made much of the fact that the terms for accessing finance from the Fund were very different to the terms that had been available to TPLC when securing its financing stream from the bank lenders. Receiving money from the Fund, came at a cost. This cost, the JLs say, was such as to render the undertaking unprofitable; that is to say, by financing its property transactions by borrowing from the Fund, the business of TIL would inevitably lead to insolvency. Under clause 5 of the Services Agreement entered into by the Fund and TIL, TIL was obliged to pay the Fund quarterly interest of between 8.15%, and 8.5% on all moneys paid by investors to the Fund. The cost was incurred whether or not such moneys were advanced to TIL.

125. In addition to the high cost of funds, TIL was obliged to pay a range of not insignificant fees to the Fund. These fees included a fixed fee of £5,000 plus VAT per month, an initial commission fee equal to 1% of all new moneys raised in the Fund each month, an annual trail commission fee of 0.5%, rising to 0.75% after the first year on all moneys raised in the Fund, and an annual commission payment of 5% of gross profit. All of this

fee burden prompted an internal message in April 2008, from Adam Read to the Respondents:

> "My worries are that in the current environment we are almost discouraging new lending so will not be able to utilize large amounts of money without compromising our lending policy. I think the absolute maximum we should be accepting is £5m and the more we can get direct from your contacts Steve the better.
>
> We are to pay interests on all monies in the fund, not just those we draw down, and while Nigel's eyes may be widening at the prospect of the fees he can earn at the end of the day he hasn't got our best interests at heart. I think that anything over 5m would mean that at the current rates of sales Tiuta may not remain profitable. We should be viewing this as a short term manoeuvring tool rather than a long term source of funds."

126. As explained to the court by GB, the business model of TIL was to lend as much money as possible and as frequently as possible. If lending was repaid, the aim was to see the money re-lent promptly. It was plain therefor that a tension was developing in the undertaking, with high costs and fees on the one hand, and a business model that demanded the lending of money on the other. But because of those very costs and fees, the pressure to lend in order to earn income, was intense. The evidence I heard from both of the Respondents, was entirely consistent with this commercial picture.

127. As I have already mentioned, the principal thrust of the JLs' case turned on the decision to enter into what GB described as the Demi Restructure. This was the process by which the Ramadan Loans were converted into what I have labelled the Restructured Ramadan Loans. Given the financial plight of TPLC and its subsidiaries, and the lending criteria of the Fund together with its cost of funds, the JLs argued that that the effort made by the Respondents to bring about the Restructured Ramadan Loans was in character essentially fraudulent.

128. In order to bring about the intended result, TIL obtained inflated valuations of the various properties which provided security for the Ramadan Loans. The important evidence here in my judgment was the valuation obtained, contrasted with the original loan outstanding. In numerous instances, if the value obtained for the purpose of moving forward with the restructure of the lending and securing fresh financing from the Fund were accurate, the property could have thereupon been sold and the non-performing Ramadan Loan re-paid. There was no question of the relationship with the lender continuing, so as to produce an enhanced income on a successful ultimate development, for the simple and obvious reason that these facilities were invariably non-performing. They represented a problem for TPLC that, on his evidence to the court, GB explained that he had set about trying to fix.

129. I also found it hard to understand how it was that the surveyors' valuations of these properties, appeared invariably to demonstrate substantial increases in market value. This was altogether curious given the onset of the financial crash and the fact that earlier much lower valuations had been carried out at a point just prior to or shortly after the start of the financial crisis in 2007. There was nothing in the evidence that persuaded me that the Respondents had grounds for believing the valuation increase was

attributable to development works or important planning permission having been secured.

130. To take an example, the Folkstone Road property, which had been financed by a TPLC subsidiary with Mr Ramadan as the borrower, with an original loan of £1,657,500 in May of 2008, had a valuation of £1,915,000. For a Restructured Ramadan Loan in July of 2009 of £1,768,000, borrowed entirely from the Fund, a valuation of the secured property was obtained at £2,210,000.

131. The Respondents sought to make the case that they were entitled to rely upon valuations obtained from properly instructed professional surveyors, but in my judgment that only goes so far.

132. Another example is the Sweyn Road property, where the lending was to Ms Brinson and Mr Green. A fully reasoned in-house, desk-top valuation prepared by TPLC in January 2008, put forward a value of £225,000. Despite the distress in the financial markets and the accepted problems in the property market, and despite no material development in the interim period, Messrs Douglas Duff, Chartered Surveyors put forward a valuation of £515,000. It might have been thought that this differential would have set the Respondents upon an enquiry as to the true position. The evidence from GB was however that the TPLC internal valuations team were not qualified valuers and little reliance was to be placed upon their opinions.

133. It is important to reflect upon the values attributed to the Northside property, another lending to Ms Brinson. This property had, in December 2007, against a valuation of £750,000, originally justified a loan by Tiuta Finance Limited of £612,000, together with development finance of £175,000. The facility term was eight months. In July of 2008, Craig Booth wrote in these terms to the Respondents:

> "I have just been told by Josh Martin that Northside has a GDV of 1.45mil but in it's current state with the underground car park scheme it is worth £113k and without the car park it is worth in the region of £400k.
> Our loan outstanding on this is £644k – im not sure if there is a mix up or we have been fucked but im sure all will come to light once we get all the reports in as this is only an indication on value verbally.
> If you talk to Demi tell him he isn't getting any money this week because we need to look at the whole picture because I think we might have a few shocks!!!"

134. The important point to note is that the Gross Development Value (**GDV**) represents the value of the property if all of the proposed development work is successfully carried out and the property is then sold at full value. The GDV does not represent the value of the property as security for lending in its current state. The Fund required the LTV calculation to be assessed on the "valuation for mortgage purposes of the property", alternatively described in the FIM as the "as is value".

135. Applying the terms of the FIM, and so as to manage risk exposure, loans were to be made to customers of TIL at a maximum LTV of 80%, or exceptionally 85%, if the borrower had a guaranteed exit route. In evidence, GB accepted that this term meant something that was certain although he added that "there's no such thing as a guaranteed exit, unless it is a closed bridge", which he defined as where "there's a property chain which is all exchanged contracts with one another and we provide the interim finance

for a period of time because there's a delay with one of the parties on completion." Both the Respondents knew that loan proposals taken to the Fund had to meet the LTV criteria, the crucial aspect of which being that if above 80%, the more immediate and secure had to be the prospect of repayment.

136. This was consistent with the other terms of the FIM, well known in my judgment to the Respondents, which represented to investors that:

> "loans that will be completed by the Fund will have been assessed as having a very high chance of redeeming both capital and interest and fees. The time frame for redemption of each loan cannot be guaranteed to be within the contractual term of the loan, but the risk-profiling of each loan based on the extensive experience of the legal, survey and financial specialists and the resultant underwriting criteria are designed to be conservative…".

137. The documentation from the Fund that I have just pointed to notwithstanding, I take the view that there is some force in the submissions of Mr Gloag appearing for GB, that the Fund at times revealed a willingness to take into account the value of a property after refurbishment or conversion. This is made clear by the questions asked on the Fund's loan Release Approval Forms – for example in respect of York Street, Leicester. The threshold however was nonetheless 85%, and in the case of York Street, required confirmation of a guaranteed exit route. As will become clear in this judgment, it is my view that in respect of none of the Restructured Ramadan Loans could it be said that there was anything approaching a guaranteed exit route. Somewhat surprisingly, although not completed during its originally envisaged term, and despite the lack of any meaningful development work during that period, a valuation of £1,365,000 for York Street was obtained in March of 2009. This is a remarkable figure in light of the impact of the financial crash. SN claimed in his evidence to have had no involvement in this financing.

138. I have already mentioned Mr Manley the property valuation expert. Dealing with the Northside property, in his report, Manley said this:

> "In February 2009 the property was valued by SE Surveys at £1,365,000, almost three times the purchase price and over twice the internal valuation. It was 82% higher than the DDuff valuation of 15 months prior, although no works had been undertaken at all. By this time, however, the market had dropped substantially, which is illustrated both by comparable transactions evidenced and HMLR statistics."

139. It is therefore something of a surprise that TIL put forward Ms Brinson as a borrower to the Fund for lending of £1,020,000. It is all the more extraordinary when the prospects for a successful outcome to the development are considered. Mr Manley addresses this in his report at paragraph 265 *et seq*:

> "In February 2009 Tiuta refinanced the loan at £1,023,750 at an interest rate of 1.75% per calendar month. I have appraised of Northside to reflect the actual

position that Tiuta put it in with the new loan. I have used the amount of actual loan made, £1,023,750, as the day-one site cost.

As Tiuta charged, I have added an arrangement fee at 1.00% of the loan amount, together with a provision of the cost of legal fees on the loan at £700. I have then calculated the development taking place with interest charged at 1.75% per calendar month (23.14% pa), the amount charged by Tiuta.

On this basis, on completion the Northside development would show a total loss of £1,018,599, with the total costs (including the construction costs, fees, loan capital and interest payments) at £2,418,599, compared to a projected GDV of £1,400,000.

Undertaking appropriate analysis of the proposals and financing, Tiuta would have known that their refinanced loan placed too high an obligation on to Northside in terms of the amount of debt to service and the cost of servicing the debt, such that any development of Northside was entirely hopeless."

140. In the light of this evidence, which I accept, it is astonishing that the Respondents should have considered the Northside property development as being appropriate for financing by the Fund. Nor can I see how it might have been thought by the Respondents that the development proposition made good or indeed any commercial sense for TIL. Whatever the reason was for pursuing this transaction, it is hard to see how it was consistent with the best interests of TIL.

141. Another important internal communication dealing with the move towards the Restructured Ramadan Loans is an email sent by GB to SN and the other TPLC director, Charles Baba, on 27 October 2008. GB said this:

"Steve/Charles

Following on from our conversations on Friday and my text on Saturday requesting your ideas for creating liquidity after Fridays collapse of the deals going through Clydesdale which would have released in excess of 650K including Laiki returned interest, kept my promise to Laiki on redemptions including helping to facilitate cash required to redeem Navigator and plan C would have been well underway.

I have copied in Craig, Lisa, Martine, Adam, Kiki, Martin and Andy S with my thoughts as I feel we will need the input and cooperation off all the key players to make my plan D or either of your plan D's or any combination off them to work. I have not copied the legal team because I am still not sure who the "leader" is, therefore Steve will have to take the lead and also take a view where necessary.

The figure may not be accurate as I do not have access to shared doc's so am working from memory but hopefully it provides a template for a discussion and plan of action.

1. The deals refused by Clydesdale to be repackaged for the fund and stacked up accordingly.

2. Slice into Demi deals and pick a couple which have large amounts of Tiuta cash in and that are currently with Laiki. I have agreed with Demi that if there are a

couple he will sell to NEW names and we will have to bear the cost of Stamp Duty. Ideally try to raise 3-400k. As well as raising cash this enables me to give something to Laiki including some Navigators. We now have the majority of valuations in so this exercise should be quite easy. They must be 100% residential to get through Clydesdale and all under £1 million loan size. All to be DONE by Friday 31st October.

3.Redemptions due imminently, try for THIS WEEK, Keem net 215K, Achilia net 40K, Kusia Appia net 60K plus an unencumbered property we can put into Tiuta Property at 65% ltv, Wellesley Cole net 20K and possibly 25K refund interest from Laiki if these happen. Complete purchase of Mrs Nortey ground and basement falt at Homerton High St.

4. Mukhtar and Rai. Ensure these two happen simulteanousy (sic) as per Kiki's notes will provide 400K cash and as much as 800K flexibility (sic) in the short term.

Points 2,3, &4 should raise in circa £1.2 million short term liquidity THIS WEEK. This could only happen if we start now with urgency and Direction.

Also redeems two Bank of Ireland problem loans and maintains my promise to Martin Dakin and gives me some credence when talking to Laiki. Long term liquidity is dependant upon redemptions and the fund starting to provide the "promised" £5 million per month minimum. If this happens, plan B (which incorporated approximately £15,000,000 of longer term differed deals that we have satisfied ourselves that it is prudent to look at as longer term) would kick in and eventually release approx 2 milllion of Tiuta Cash.

The other effect of the fund becoming liquid will be to reactivate sales and therefore generate profit for many reasons not least to ensure we meet lender covenants. This would be done by reintroducing Underbridge and Refurbridge which is where we are currently losing vast amounts of business. Just by having these products available we would automatically capture the "standard 60% pp" type deals also. The other major effect would be to enable banking/redemptions to operate with a relatively clean bill of health and predict more accurately to assist with the oiling of the business as a whole.

Steve, Craig has offered his services to Connaught if they would like. For political or regulatory reasons you may not like this idea, but I am sure if we sent our A team of Craig and Lisa over there we would create energy and work ethic if nothing else. Worth a thought because whilst I am finishing this email it is obvious how important the fund is to the short/medium term and also where the problem started when we had the discrepancy and then Lehman Bros. Steve has come up with a good idea on reducing Tiuta cash left in Tiuta repossesions and I will let him explain this himself. Steve, I have one idea on this which I will explain when I next speak to you.

Other options as previously discussed at board meetings are further injection of cash from existing shareholders. Dilution of equity to enable new funds into company if an interested party can be found or close for new business until say January 09 to allow redemptions and fund to catch up. The problem with the latter option is that we will not be able to satisfy Lender covenants which may result in loss of facilities and a "Snow ball" effect with so much nervouseness about at the moment. I suggest you have a brainstorm and let me know your thoughts. This is priority.

The balancing act continues...........”

142. This message to my mind confirmed the liquidity pressures being faced by TPLC and its related companies. It also demonstrated a certain attitude to the Fund on the part of the Respondents, that will become more apparent as I continue with this judgment. The eyes of those involved with the TPLC business and the best interests of TIL were plainly on how best to raise cash. In other evidence, GB was heard to say that he had discussed with Mr Ramadan those transactions that would “release the most cash” upon receipt of the relevant valuations.

143. An interesting example of the pressures faced by TPLC is provided by the Harold Road, Margate facility. That had been financed in the books of TPLC by Laiki bank. In the internal Proposal Assessment prepared by TPLC in October 2008, answering the question “why is it urgent”, the answer is given, “to remove from Laiki”. Further down in the form this was added: “Gary requires this out of Laiki by the end of this week to ensure we retain our facility”. It is unlikely in my view that this particular exigency was ever explained to the Fund.

144. There was also a schedule prepared by Mr Read, which so far as I could discern, the entire purpose of which was to raise cash for TPLC and its subsidiaries through the restructuring of already non-performing facilities. When the Clydesdale Bank refused to finance certain of these property lending transactions, as can be seen from the 27 October message, the solution was simply to “repackage them for the Fund”. The issue for the court in this case is how taking such an approach was consistent with duties owed to TIL, to the Fund and to its creditors.

145. It is also troubling that the Respondents appeared to treat the Ramadan Loans as all in reality operating through and at the desire of Mr Ramadan. I did not hear any evidence which suggested to me any independence of mind on the part of the borrowers, Green, Brinson, Karashialis and Swann, all of whom featured in the 15 properties at the centre of the breach of duty claims in this case. To the contrary, I heard much that seemed to suggest that these names were a mere convenience for the Respondents and Mr Ramadan. This again can be seen from the message recited above, in which GB refers to Mr Ramadan agreeing to put certain loans through “New names”. This in my judgment was not simply a case of friends or business acquaintances of Mr Ramadan being introduced to the world of property owning and development opportunities, as was suggested by the Respondents.

146. This point is perhaps best illustrated by reference to an email sent in January 2008, by Anita Kirkbright of TPLC to SN and GB, entitled “Demi deals”:

“Whilst looking at Top Introducers for Lisa on MPS, I looked at Demi’s deals, as Lisa is looking for the amount that any one introducer has passed to us this financial year. You may wish to be aware of the following loans for Demi that are still outstanding according to MPS.

The figures shown are the original gross loan amount:-

| | |
|---|---|
| Karashialis | £ 348,500 |
| Brinson | £ 361,250 |
| Brinson | £ 408,000 |
| Brinson | £ 680,000 |
| Brinson | £ 612,000 |
| Brinson | £ 497,250 |
| Brinson | £1,606,500 |
| Brinson | £ 616,250 |
| Brinson | £ 305,150 |
| Brinson | £ 204,000 |
| Brinson | £ 800,000 |
| Brinson | £1,335,000 |
| Brinson | £ 752,250 |
| Artimades | £ 637,500 |
| Artimades | £ 259,250 |
| Patel | £ 784,000 |
| Patel | £ 561,000 |
| Patel | £ 216,000 |
| Kyriacou | £ 285,000 |
| Kyriacou | £ 212,500 |
| Kyriacou | £ 670,000 |
| Ramadan | £1,100,000 |
| Swann | £ 238,000 |
| Swann | £ 471,000 |

| | |
|---|---|
| Swann | £ 714,000 |
| TOTAL | £14,674,400 |

The following deals have redeemed and are not included in the above figures:-

| | |
|---|---|
| Karashialis | £ 238,000 |
| Brinson | £ 221,000 |
| Brinson | £ 782,000 |
| Green | £ 750,000 |
| Green | £ 427,000 |
| Green | £ 561,000 |
| Green | £ 595,000 |
| Green | £ 382,500 |
| Green | £ 304,000 |
| Hassan | £ 212,500 |
| Hassan | £ 272,000 |
| Satanas | £1,105,000 |
| Swann | £ 255,000 |
| TOTAL | £6,105,000 |

Whilst this means a whopping £20,779,400 worth of business from Demi, he still has £14,674,400 outstanding. Also, we shouldn't put any more deals in Sally Brinson's name for a while as she is already well exposed."

147. GB maintained that Mr Ramadan and his associated borrowers were interchangeable and that he dealt with them as a group. SN referred to them as a "Club", and also as the Demi Gang. It seems that as at May 2008, the loans to this so-called club, represented 20% of the loan book of TPLC and its subsidiaries. Properties offered as security, appeared to be moved amongst them, often it seems because the particular borrower was suffering from a negative credit profile. None of it had the appearance of being individually judged or managed. This was all the obvious with the evidence

that a surplus on one property sale and loan repayment, could be and was applied to the benefit of an outstanding on a facility to a completely different borrower, the only connection being Mr Ramadan.

148. In October 2008, Craig Booth, GB's son, who was at that time Head of Sales at TPLC, wrote to the Respondents and Mr Read as follows:

> "I am re-financing another one in the name of Khan... it is one of Brinsons properties and she owes £270k odd and the val is £495k so we will be able to release him some cash but more importantly I want to retain some cash for us to cover the massive deficit looming! It wont be a lot to hold back, but I will agree once I see the redemption statement that we give him half the cash – he will take anything at the moment and has also confirmed there are others that he can chuck into new names and pull a bit of cash out of. I am not doing any favours on new deals for him so 70% is his max with interest deducted... he has more than he lets on, that's why its so hard to get A & L statements out of him!"
>
> My aim is to keep him alive whilst also getting back the thousands released to him and also paid to insurance companies and valuers!"

149. To my mind not only does this document suggest continuing problems with Mr Ramadan and the lending to him and his associates, it also corroborates the impression that names of borrowers were used simply as a medium for lending that in reality was for the benefit of Mr Ramadan.

150. Another internal email which leads me to that conclusion was an email from GB to the Respondents on 12 November 2008, with the heading, York Street – owner Sally Brinson:

> "Have a chat and if he wants to proceed we will talk to Demi and get it assigned to us. This will be useful because this is a site which I need to get out of Clydesdale by January and mothball in the fund if Heskew does not get him out."

151. This remarkable message again demonstrates a somewhat cavalier approach to the identity of the borrower but perhaps of greater concern is the suggestion first that there is an imperative to refinance a Ramadan Loan because of pressure from the original lender, and further, that the facility will then be "mothballed" in the Fund. It need hardly be said that this is a long way from the specialist partner bringing a low risk financing proposition to the Fund.

152. In that same exchange of emails in November, another TPLC employee, Mr Broadbridge corresponds with Mr Stylianou in these terms:

> "Hi Andy,
>
> Mr Mujibur Ibrahim called regarding 38-44 York Street, LE1 6NU (owner Sally Brinson). He found our details on the Land Reg along with Sally Brinson's. He was enquiring over the possibility of renting the land until such time as

> development begins. He asked if I could pass the details on to Sally Brinson but as this is one of Demi's I thought we had better look into it first."

153. It seems to be suggested from the way in which the TPLC team dealt with the Ramadan Loans in 2008, that whilst facilities might be in other names, the lending was in reality to Mr Ramadan.

154. In another internal message to GB in 2008, on this occasion from an Andy Stylianou, the issues of valuations and also the collective nature of the loans to Mr Ramadan both feature:

> "Hi Gary
>
> Regarding the Demi deals
>
> The In-house valuation team as well as Claire believes that all Demi deals we are getting are over valued between 10-15% for each individual flat built.
>
> This is also affecting the GDV/site value......"

155. GB dismissed this document with the rather surprising evidence that Mr Stylianou although advising on valuations within TPLC, in fact had no competence to do so as his training was as a painter. This suggestion appeared at odds with the way Tiuta PLC was organised at that time and how information was coming to GB.

156. At all events, at some point it seems that GB, and in my judgment SN was well aware at the time, decided that the Ramadan Loans would be refinanced with new lenders. The original lenders would be repaid. Fresh valuations would support the new lending. The appropriate vehicle for the lending would be TIL, and in the main the lender would be the Fund. An important after the event email, sent by GB to Andy Stylianou, Adam

Read, Charles Baba and SN on 13 November 2009, seems, to my mind at any rate, to have made the position clear.

> "My final input on this subject is to remind all of the reality as follows –
>
> - I am not going to go over old ground of why we are here because I have voiced my opinions previously
> - We took the view 18 months ago to deal with the whole portfolio in the best possible way, which was to get out of existing lenders to avoid withdrawal of facilities and get as much of the shareholder cash out as possible.
> - This was done successfully and it was agreed that we would have to mothball a large amount particularly the sites until the market improved enough to realise some fair value.
> - We then agreed to micromanage by developing sites we thought we could sell or rent.
> - These were decided upon and actioned
> - We agreed at a later stage to enter into joint ventures to pay off dept.
>
> It appears this stuff in Margate is no longer saleable or rentable in the open market. I think we will have to agree to let Demi rent to scum bags and use thugs to evict and collect rent. Demi starts his marketing this weekend Andy, do you want to cancel?
>
> The lesson from this is we need to do more research before developing any of his stuff. Better to mothball at lower levels of dept.
>
> You all may have other ideas and I will be guided by you as Steve, Andy and Charles have all visited."

*What did the Respondents ask the Fund to finance?*

157. It is against this backdrop that the manner in which TIL engaged with the Fund must be viewed. What did GB and SN ask the Fund to finance? What did they represent was the quality of Mr Ramadan as a borrower? Were the loans they applied for individual financings for bridge lending as foreseen by the FIM? Was it in fact a scheme from the outset to get the TPLC business out of trouble by utilising liquidity from the Fund until such time as "mothballed" property could realise a higher value? If this was the case, was that something that the Fund or the investors into it would have expected, given the terms of the FIM?

158. In order to set the scene, it is helpful to have regard to the evidence of Mr Manley given in cross-examination. Asked about the values and prospects for the successful development of the various properties, he explained that his Report had been written on basis that no work had been undertaken on the 15 underlying properties, prior to the inception of the Restructured Ramadan Loans; no work had been undertaken as would substantiate any uplift in value; he had not seen any "certificates of completion of

works, any warranties or anything like that". Nothing had happened as would enhance value. He referred to the photographs in his report; he could see no work undertaken. If there had been, on one particular small property, such large sums spent as was at one point suggested to him, he would have seen it. But he did not. Mr Manley could see evidence of advances paid to borrowers but he could not see any relationship to build costs. None of the properties had a hope of reaching value. None of the expenditure shown to Mr Manley by counsel for the Respondents in his view showed where it was going. It was expenditure from a bank. He was shown Surveyors fees which he regarded as unusual as they would typically be collected from the borrower: "this shows us that the borrower had very little money." In any event the expenditure shown to Mr Manley and suggested as being evidence of development work to the Restructured Ramadan Loan properties was cost incurred after the loan from the Fund had been drawn down. On no account could it have affected property values put to the Fund.

159. I should add at this stage that no part of the cross-examination of Mr Manley did anything to shake my confidence in the strength and quality of the evidence given by him. Mr Young on behalf of SN, put to him numerous elements of the make-up of his valuations and at each turn the answer given only served to satisfy me that his view was soundly-based. His knowledge of the practice of valuations appeared comprehensive, experienced and based on well though through propositions of building and property market practice.

160. Turning now to Mr Woodward, at paragraph 37 of his Report he said this by way of summary when commenting upon the eventual shortfall on the Restructured Ramadan Loans:

> "What these figures suggest very clearly is that more than one-half of the eventual deficit on the Ramadan Loans was already present from the outset of the loans within TIL – which is not surprising given that they followed the financial crisis of 2008 and had been identified as problem debtors, in many cases representing re-financing of earlier unpaid debts. The increase in shortfalls in 2010 and 2011 reflects the continued application of normal monthly interest on the loans, with no evidence of material repayments – as is evident from the analysis within Appendices 6.1 – 6.15."

161. The Respondents' answer to all of this was that the Restructured Ramadan Loans were transactions entered into with every expectation of providing a return given the relevant ratios of lending to development value. Their evidence to me was that Mr Ramadan had a track record of delivering developed properties; amongst other things, he was an excellent site manager; he was skilled at organising and directing labour. But then the JLs ask, why had that not happened with the properties the subject of the Ramadan Loans?

162. The following passages of evidence from GB seem to me to highlight the reality. In cross examination GB explained that the so-called restructure, came about from discussions with Mr Ramadan, doubtless with SN, triggered by internal emails with the aim of finding a solution. The fact that GB considered that a solution was needed at all, is troubling given how the Ramadan Loans were repackaged for the Fund. GB went on to explain that he had meetings as "bad cop" with Mr Ramadan to see if "we could structure a deal to work for all". GB came to the idea of a Joint Venture with Mr

Ramadan on a profit sharing basis; TIL would also obtain additional security and personal guarantees.

163. Although I was told that I would in due course see a joint venture agreement none in fact appeared during the trial. GB had some difficulty recalling the precise terms of the joint-venture, albeit that a profit sharing agreement was referenced in the Loan Facility Letters between TIL and certain borrowers.

164. In GB's mind, TPLC would back this restructure scheme financially, and provide funds for the underlying property development projects to reach a conclusion, albeit that the TIL team would have to micro-manage the developments on planning and in terms of economies of scale where sites were close together. The key to it so far as GB was concerned, was embarking upon additional projects with Mr Ramadan if TIL deemed them profitable, and all the profit would be retained by TIL and paid against what was described as the "Ramadan Group", to repay all the debt. This plan, which once again revealed a collective approach to the problem of the Ramadan Loans which on the face of it at any rate were all facilities advanced to individual discrete borrowers, also hinged on TIL's ability to meet a £6 million a month sales target. This was the commercial target that had to be reached in order to generate sufficient liquidity in the business so as to be able to provide the additional development funding. GB explained that the Sales Team target was in fact £10 million each month, and that had business gone as planned, "a process should have been available to develop the sites such as those at Dover Street and York Street, and then all of the debt would have been cleared".

165. The difficulty with this evidence from GB was that it served to reinforce the conclusion that GB and in my view SN too, were seriously anxious about the Ramadan Loans. A solution was needed. One had to be found. GB felt that he had come up with plan that in his mind reduced the exposure of TIL because further security and also guarantees were being provided. But that plan rested on what appears to have been little more than a property speculation venture, that is to say, the joint-venture with Mr Ramadan which would allow profits from the eventual sale of developed properties to be split with TIL. Because of the cost of financing from the Fund and the distressed state of the property market, it must have occurred to GB and to SN that this supposed solution to the problem was in reality a desperate gamble to try to rescue the position for the Tiuta businesses.

166. If one is to have the lending strategy of the Fund in mind when looking at the nature of the Restructured Ramadan Loans, there would at once appear to be some significant issues. GB and SN knew that the loans they put forward to the Fund had to comply with the relevant criteria of the Fund. Although GB sought to argue the point in his evidence, I do not accept that he ever really had the view that the Restructured Ramadan Loans were short term bridge loans. Howsoever that term might be understood, in my judgment it could not have applied to the 15 Restructured Ramadan Loans. This view is arrived at even putting to one side the fact that GB accepted and SN would have known that the extra development finance needed to fund the build out of the properties was very difficult to find in the market as it then was. In my view GB accepted this.

167. None of the Restructured Ramadan Loans were capable of being repaid within the time scale expected by the Fund. They could hardly have been repaid within 12 months. Again, this was accepted by GB and in my view SN. None of them were short-term finance: the Restructured Ramadan Loans had all been Ramadan Loans. I do not accept

that a so-called restructure of the Ramadan Loans was anything other than a refinancing of them.

168. Another important aspect of how the lending proposals were put to the Fund, was the “rolling up” of interest and fees which served to render the LTV ratio certified to the fund, artificial. That happened more than once. SN’s evidence was that rolling up interest and all fees such that they did not have to be paid until loan maturity was “all agreed with Steve” and that “yes I was aware and agreed as part of Restructure”. He certainly knew about the decision to proceed in this way for the Ms Brinson facility in respect of the Eastbourne, Seaside property, the Initial Property Assessment form for which states that the terms were agreed by SN, GB and Mr Ramadan. It was said by SN to be the TIL contribution to the supposed profit share agreement, which the Assessment form perhaps surprisingly, describes as being a 30% profit share or interest due, whichever is the higher. Despite making it “more challenging and not a great idea” according to SN, he explained in his evidence that he “went along with it.” He did not consider it a breach of the terms of the FIM as he said he never looked at those again, and if a loan passed through the underwriting team of TIL “then it must be fine”.

169. A further difficulty with GB’s evidence going to his optimism in the prospects for the successful completion of the developments underlying the Restructured Ramadan Loans, is the lack of available development funding. It is not enough to possess the properties, funding must be forthcoming to pay for the necessary building works so as to put the property in a condition for sale. It was in the prospect of such a sale, that GB and SN claimed confidence that the necessary funds would be realised so as to repay the Fund; it was also on this basis that the Restructured Ramadan Loans were said to amount to good commercial business for TIL. It might however have been considered a matter of some concern that these developments sites required the “micro-management” of the TIL team. In an internal message of July 2008, from Andy Stylianou to the Respondents, on the subject of the “Demi Deals”, Mr Stylianou offers this as his summary having given his view of the state of development of a number of properties the subject of the Ramadan Loans:

> “SUMMARY
>
> Speaking to Sally they have no money plus most of the workforce has left but will not have a problem getting more staff. Work must be done on the sites that are nearly finished enabling funds to be released with finished product redeemed. I believe No. 1,4,5,6 and No. 2 (being the gem) being worked on first. Number 2 needing about £300,000-£400,000.but must have roof done first then things should move quickly. Then No.3 if council agree what has to be done then No.10,11. Number 10 was the only one that had people working on it.
>
> Then take a view of what should happen next.”

170. GB was compelled to accept that Mr Ramadan was at this juncture, unable to develop any properties himself. This message was followed on 3 July with an email from GB to SN:

> "Steve
>
> WARNING - we do not have any spare cash to fund Demi deals.
>
> Please be careful and talk to Adam and me before you agree anything.
>
> Thanks"

171. GB's rather unsatisfactory gloss on these exchanges was that all this was prior to the Demi Restructure.

172. By November of 2009, even GB was driven to accept that the relationship with Mr Ramadan was far from smooth. On the 13th, Mr Stylianou wrote to the Respondents in these terms:

> "Regarding the Demi Deals in Margate.
>
> The feed back I am getting from the agents regarding the proposals that Demi has put forward regarding us Paying the Deposit's and us Paying the Agent a £3000 - £4000 for everyone sold has been very negative.
>
> Reasons
>
> The areas that these properties are in our for the Investors there is no residential market in this area and has not been for a long time The Rics Valuation will be Low due to the repo that have taken place and sold in this market.
>
> Milton Ashbury have been selling repo 1 bed at £35,000 2 bed £50,000
>
> It seems a £1.2 million offer which equates to around £57,000 per unit seems good considering what's going on
>
> These agents need figures that I will need to try and market these properties at if we are going to try and sell to residential people Or a figure that we would let the 21 flats go to an investor
>
> We also need to calculate the interest that we are paying every month on these properties to see if rents' coming in is covering our cost.

173. GB replied:

> "Thanks Andy
>
> I have tried everything I know with this guy. Maybe time for a fresh look from either Steve or Charles ?
>
> He phoned me today with a new offer from the investor of £1.25M, we owe the bank £1.85 !"

174. On the subject of the Margate Properties, these being facilities advanced in the names Ms Brinson and Mr Green, Mr Stylianou contributed to the discussion as follows:

> "I don't mean to sound negative but we may have to consider this kind of offer to release us from these properties and the shortfall will have to worked off with any Joint Ventures that we do with Demi.
>
> The way the interest is accumulating we will owe more that the properties are worth even in a good market. This is something that is needed to be discuss at Monday Cash meeting (I have already had a discussion with Adam)
>
> I don't like the idea of taking a hit as much as everyone else but we do need act."

175. The reply from GB was his message of 15.03 on 13 November reminding all the addressees that:

> "We took the view 18 months ago to deal with the whole portfolio in the best possible way, which was to get out of existing lenders to avoid withdrawal of facilities and get as much of the shareholder cash out as possible….
>
> It appears this stuff in Margate is no longer saleable or rentable in the open market. I think we will have to agree to let Demi rent to scum bags and use thugs to evict and collect rent. Demi starts his marketing this weekend Andy, do you want to cancel ?
>
> The lesson from this is we need to do more research before developing any of his stuff. Better to mothball at lower levels of dept."

176. It is hard to resist the conclusion that this appears to be yet a further reference to the notion of problematic developments being refinanced with the Fund so as to buy time. That is the construction to be placed upon the term mothball, that is frequently used by those engaged on behalf of TPLC and TIL. There is again no suggestion of involving Ms Brinson or Mr Green in any of the decision-making; it all appears to be a matter for Mr Ramadan. As put to GB in cross-examination, if the valuations of these Margate properties obtained for the purpose of the Restructured Ramadan Loans had been correct why was it felt necessary to mothball? No response was forthcoming that served to put my mind at rest on this issue. I certainly do not accept the rather obviously self-serving evidence to the effect that no steps were taken to realise the value of property security because the Respondents had their eyes on the profit to be made as a result of

a successful implementation of the so-called joint venture, which they wanted to run its course.

177. The property lending expert Mr Griffiths, commented upon a number of the development proposals taken to the Fund. He first made the point that market rates for construction should always have been used when arriving at values, not supposedly cheaper rates from a particular builder. The suggestion that Mr Ramadan could somehow complete development works at a lower cost than other builders should have been ignored. But in any event, the finance costs imposed by borrowing from the Fund made the Restructured Ramadan Loans unviable. In the opinion of Mr Griffiths, by the time the refinance came, there would be insufficient to repay the lending and no development profit, all because of the weight of the finance costs. A good example was the lending for the Black Bull property. It was, in the view of Mr Griffiths, all a bit desperate: lending well over 100% of market value on day one.

178. On the evidence that I heard from GB and taking account of the documents from the time, a number of which I have set out in this judgment, I am satisfied that GB set about the scheme to refinance the Ramadan Loans which were causing real problems to TPLC and its subsidiaries given the demands of the existing bank lenders, in order to relieve those problems and raise cash for the TPLC businesses generally. Again, I find that SN was well aware of this at the time. His evidence in cross examination was clear that he knew that the Restructured Ramadan Loans would "raise cash for the benefit of everyone".

179. The Restructured Ramadan Loans were set out in a Loan Schedule provided to me by the JLs. I am satisfied that the LTV rations for the properties offered as security for the new financing to be provided by the Fund for the Restructured Ramadan Loans, ranged from 75% to 117%. By way of example, for the York Street property which had been financed by one of the TPLC subsidiaries with a Mr Ramadan associate Ms Brinson as the named borrower, moved from a valuation of £1,650,000 supporting a loan of £1,335,000 in January 2008, to a valuation of £2,250,000 supporting a loan from the Fund of £1,800,000 in January 2009.

180. The property valuation expert Mr Manley reviewed each of the property valuations that lay behind the 15 Restructured Ramadan Loans, including the York Street property. In every case, Mr Manley called into question the valuations that were the basis of the Restructured Ramadan Loans. He also made it clear that in his opinion, the development of the various properties anticipated by TIL in its packaging of the loan proposals for the Fund, were entirely misconceived and not grounded upon a realistic view of the prevailing property market.

181. Looking at the York Street example, Mr Manley said this:

> "York Street comprised a cleared site, located close to Leicester city centre in an area where some residential development had taken place. Although the area had been emerging as popular for development, there were still a large number of derelict and semi-derelict buildings and vacant sites.
>
> York Street was described in the Belleveue [TIL Valuers] report as being in an established residential and commercial area which had seen a spate of high-quality developments over the previous five years and was one of the more sought after

locations within Leicester. Had Tiuta inspected the site, they would have seen that this overstated the position. Being close to the town centre, there was potential for development, however, at the time of the lending, the area was still developing.

York Street had planning consent for the development of a five to seven storey building to accommodate 20 x two-bedroom and 4 x one-bedroom flats with semi-basement parking and three further flats fronting Dover Street. Several other buildings on York Street also had planning consent.

York Street had been acquired in January 2008 for £1.1 million. At the same time Belleveue valued the property subject to the developments proposals at £1,650,000, 50% more than the acquisition price of the same time. There was no explanation as to why this should be higher; no work had started on the site.

Tiuta undertook an internal valuation as part of a credit review on 14 January 2008, which placed a value of £1,400,000 on York Street, 27.3% above the acquisition price, but 15% below the Bellevue Valuation. In their SWOT analysis, Tiuta identified the weakness as being 83% LTV, with a handwritten note "price £1,100,000 – lending in excess of this." The threat was defined as "current market conditions".

SE Surveys valued York Street in January 2009 at £2,250,000, more than double the purchase price a year prior and £600,000 more (over 36% higher) than Belleveue's January 2008 valuation. This value was also well in excess of Tiuta's own internal valuation of April 2008 at £1,400,000.

Notwithstanding the high value reported, the SE Surveys report states "Due to the recent credit crunch, there has been a lack of development finance funding for such projects…".

It seems to me that the valuation reports were based on over optimistic end sales figures, which Tiuta should have been aware of through a basic benchmark to pricing in the area. As set out above, the SE Surveys report confirms there was little funding available in the market, which should have acted as a warning to Tiuta.

I find the previous valuation reports that were undertaken to be wrong in several areas, especially in the treatment of building costs where the valuers have relied too heavily on what they have been told by the borrower. If advancing development funding, Tiuta should have commissioned a quantity surveyor or project manager to properly assess these build costs to prevent the site values from being artificially over inflated.

I have attached my own valuations explaining in more detail the Market Value of the site as at Annex G to this report. In my view, it would have been clear to any valuer or any bank that site values in Leicester were falling between January 2008 and January 2010, caused by diminishing end values and increasing costs of construction.

In January 2009 Tiuta refinanced the loan at £1,800,000 at an interest rate of 1.75% per calendar month. I have appraised York Street to reflect the actual position that

Tiuta put it in with the new loan, to assess the commercial viability of development. I have taken the initial site cost as the amount of actual loan made, £1,800,000 to show the profit (or loss) which would be made by developing York Street on this basis.

As Tiuta charged, I have added an arrangement fee at 1.00% of the loan amount, together with a provision of the cost of legal fees on the loan at £700. I have then calculated the development taking place with interest charged at 1.75% per calendar month, the amount charged by Tiuta.

On the Tiuta refinance, on completion the York Street development would show a total loss of £2,868,366, with the total costs (including the construction costs, fees, loan capital and interest payments) at £6,986,366, compared to a projected GDV of £4,118,000.

The loan and finance costs together were over four fifths of the expected realisation before the costs were even considered and so Tiuta would have known that the refinanced loan placed too high an obligation on to the site to be commercially viable. The amount of debt to service and the cost of servicing that debt, meant that any development was entirely hopeless.

In the market at the time, it was inappropriate to commit any further funds to a site where a development had not even started, owing to the substantially enhanced risk profile this gave. In my experience, the only properties where further funds were drawn from a bank at this time were those where the development scheme was substantially complete, and an exit could be seen through completion and selling the units for a relatively small sum of additional funding.

The development of York Street did not proceed until much later when the market had recovered and the planning was slightly revised to a larger, student led scheme."

182. From this evidence, and the similar analyses offered by Mr Manley in regard to the other properties, I draw the following conclusions. There was no proper attempt made by GB and SN to arrive at a real understanding of the development prospects for the properties lying behind the Restructured Ramadan Loans. Nothing I heard from either GB or SN persuades me otherwise. Indeed I am not persuaded that these loan proposals for the Ramadan Restructured Loans, which resulted in commitments for the Fund and TIL, were assembled on an objective basis, by which I mean the various circumstances and factors to which I have already adverted in this judgment were the primary motivating features.

183. I have to say that I saw no evidence to support the contention repeated by the Respondents that the Restructured Ramadan Loans would have resulted in the successful development of the underlying properties had only the correct management decisions been taken by TIL. The issue that the Respondents pointed to was the absence of GB from the management team after he left the business due to ill-health at the end of 2009, coupled with SN's inability to steward the undertaking after 2010. There were a number of factual difficulties with this argument. In no instance was I persuaded that a development could have been completed by Mr Ramadan and his associates in a way that would have resulted in a return to TIL; where the case was made by GB, for

example in regard to the Grafton Road property, in fact the property was sold at a loss. But none of this served to address the obvious point that the Restructured Ramadan Loans should never have been entertained in the first place, by TIL and certainly not the Fund. The suggestion that the joint-ventures with Mr Ramadan, even if one accepts their existence which is not without its own difficulty, somehow converted his otherwise wholly unsuitable profile into an attractive proposition for the Fund or TIL, is in my judgment entirely misconceived and in terms dishonest. The investors in the Fund did not believe that they were entering into a property speculation venture; it was similarly entirely wrong for TIL to take on such lending given what was in my judgment obvious at the time to the Respondents. In any event, GB was compelled to accept in cross examination that the purported joint-ventures ultimately realised no benefit at all for TIL. In each instance, the relevant property was eventually sold at a loss to TIL.

184. GB explained to the court that he had had no suspicion whatsoever about valuations that had been prepared by professional valuers upon which he had felt entirely justified in placing reliance. Indeed it was his case, pressed by Mr Gloag on his behalf, that absent evidence of fraud, dishonesty or collusion on the part of the valuers, and there was none before the court, GB was entitled to rely upon them. When it was put to him that at the values suggested by the valuers, the Ramadan Loans could simply have been repaid without any further risk or exposure his answer was that the Demi restructure was to develop properties with new security and Joint-Venture projects, as profitable ventures for the whole group and a good commercial proposition for everyone. "Properties would not have been looked at individually to see if they should be sold in order to repay loans. It was all part of the Demi restructure." I have to confess the greatest of difficulty with this evidence. Not only does it fly in the face of commercial common-sense, it is at odds with the thrust of GB's oral evidence which sought to convey the picture of someone struggling to find a solution to the serious problem that the Ramadan Loans represented to the Tiuta businesses. Given the desperate need TPLC had for cash at the time, it is inexplicable that no suggestion was made to realise the high property values appearing in the valuers reports in order to repay Ramadan Loans and bring liquidity to the undertakings. The reality is that neither of the Respondents believed the valuations were accurate.

185. It has for generations in the world of banking been a well-known adage that the best lending is unsecured. Not of course to be taken literally, this maxim supports the proposition that a lender is principally concerned with the borrower's ability to repay. The aim of the lending transaction is to see the loan repaid – it is not to have to enforce security taken in support of the covenant. Taking a different approach, the Respondents sought to persuade me that the borrowing extended by way of the Restructured Ramadan Loans was sound because putting to one side the myriad problems with the character of the borrower, second charges had been offered as had personal guarantees. I do not accept that these steps had they represented true valuable security, would have converted the Restructured Ramadan Loans into attractive lending propositions for TIL or the Fund, somehow satisfying the criteria of the Fund as the Respondents well understood from their knowledge of the FIM. But in any event, I do not accept that the sureties, including Mr Ramadan himself and Mr Karashialis, to whose credit record I shall turn shortly, could have been said to be "good for the money". As to the purported second charges, the Respondents were both driven to accept that not only had they been made out in the name of TPLC and not TIL, none were ever registered with

the Land Registry. What value might have been represented by these charges, such as they were, was not explained.

186. There is a further point made by the JLs, to which I ought to give attention. If the Ramadan Loans were as attractive as bridge finance lending propositions as GB sought to argue in his evidence, such that they were suitable for TIL and the Fund, why was it thought necessary to go to the lengths of arranging additional security and guarantees? Either they were satisfactory lending propositions or they were loans in distress which needed to be restructured, with the benefit of new and added security and guarantees, so as to have some prospect of avoiding default. In my judgment it was the latter.

187. It was put to me by the Respondents that in fact the Fund was well aware of the true nature of the Restructured Ramadan Loans. The argument was made that over time, the lending criteria of the Fund softened to the extent that facilities with the LTV ratio displayed by the Restructured Ramadan Loans, were perfectly acceptable; it was also of no concern to the Fund and its investment advisers that the bridge financing was of a riskier character such that property development speculation was at its heart and the tenor of the lending was well beyond 12 months. I have already in this judgment made reference to this evidence, put forward most vigorously by SN. The evidence was that Mr Davies, representing the Fund, had discussed the parameters of individual proposals with SN before he and GB signed off the necessary application form to the Fund representing that the Fund's lending criteria were met.

188. As I have already made plain, in my judgment this line of argument faced a number of difficulties. Nowhere was this critical agreement to permit a departure from the Fund's stated lending criteria – in its documentation promulgated to investors – to be found in writing. If Mr Davies and the Fund were to agree to such a change in the risk profile of the Fund I find it remarkable that nowhere could a written record of that variation be found. And surely the Investors would have to be alerted to the change? I found this suggestion of an ad hoc, oral agreement to a relaxation of the lending criteria, very difficult to accept. It was so far as I am concerned, an invention designed to produce a response to the overwhelming evidence pointing to the plain unsuitability of the Ramadan Loans for financing by the Fund.

*What did the Respondents think of Mr Ramadan?*

189. It is necessary to deal in some detail with whether the Respondents could ever have believed that the Restructured Ramadan Loans were being extended to "prime" borrowers. Again, the requirements of the Fund's lending criteria must be kept in mind. Mr Griffiths the bank lending expert who gave evidence for the JLs, expressed the view that "prime" means a borrower has a clean credit report and no history of defaults over the past 12 months. That to me seemed a sensible approach to the meaning of the term in the context of lending by the Fund. I have no reason to doubt that it is broadly accurate.

190. It will be recalled that the Ramadan Loans were non-performing at the time of their repackaging to become the Restructured Ramadan Loans, in the sense that the interest was not being serviced. GB expressed the view in evidence that this was the "trigger when we started to look at the restructure." It is beyond doubt to me that SN was also

involved in the decision to work out a solution to the problem of the non-performing Ramadan Loans.

191. In September 2008, GB wrote to SN and Mr Read in these terms:

> "The deal I negotiated with Demi is outstanding balance at time of loan including ALL penalties will be transfered to the new loans in International. Fees will be added to this and interest rolled up on the basis we take a profit share, register (or best endeavours,OS1's) all Brinson 2nd charges that we have details of plus a new one for Swann.
>
> 1% fac fee. 1.75% per month, deffered monitoring fees. Val, admin and legals as per normal. Craig will give copy of val instructions asap to Adam. When vals are in Me Craig and Adam will finalise the deal.
>
> Lets go for the end of the month!"

Mr Read replied:

> "When we get vals back we'll look at the ones that will release us the most cash. It may be that I prioritise those rather than doing all at once to better manage the fund pipeline."

192. This exchange shows that the Respondents were cognisant of the fact that the lending proposal for the Fund involved repackaging existing loans that comprised penalties. They would have known that lending of this type was inimical to the criteria laid down by the fund and clearly explained in the FIM. It also suggests an approach to the Fund that was driven by a need for cash rather than ensuring that well-structured, low-risk, criteria compliant, lending proposals were developed for consideration by the Fund.

193. A table of arrears was produced to GB by the JLs, showing penalty interest payable on the Ramadan Loans. He was asked whether these borrowers were in his view still prime. The so far as I am concerned unsatisfactory answer given, was that a lot more goes into whether or not a borrower is or can be considered prime. For Mr Ramadan there was a credit report showing a history of missed credit card payments over the course of a year but GB was resolute; Mr Ramadan had repaid up to £12m with Tiuta and had stood behind personal guarantees "to the tune of £7m": GB took the view that this was a prime borrower and on this basis he believed that TIL did comply with the Investment Policy of the Fund when putting forward Mr Ramadan as a borrower. But if the credit problems became too bad, time could be given to allow the borrowers to repair their Credit.

194. GB felt on more difficult ground in regard to the Mr Ramadan associate, Mr Karashialis. Here he accepted that he was not a prime borrower on account of his problematic credit record however his recollection was that "something was going on to repair his Credit". Having first sought to argue that the existence of mortgage arrears did not prevent a borrower from being labelled prime, in an unusually clear answer to a question put, SN similarly confirmed that in his view the Karashialis Credit Report revealed a bad credit

score and yes he agreed Mr Karashialis was not a prime borrower. "It is a very poor Report I have to say."

195. GB went on to say that the whole question of whether the borrower was prime or not was secondary, because "we were joint-venture partners which puts a whole different perspective on the loan." Somehow the loan would be acceptable to the Fund because TIL had the benefit of a joint-venture agreement with Mr Ramadan which encompassed the loan to Mr Karashialis, in this instance in regard to the Black Bull property. This joint-venture meant that TIL would share in the profit to be made, if any, on the realisation of the property development scheme.

196. In a passage of evidence touching upon the proposed development of the Station Road property where the advance was to Mr Karashialis, GB accepted that an internal TIL schedule appeared to record that in December 2008 the client had no more money for the build out and then in January 2009, that funds were required from TPLC in order to settle a County Court judgment registered against Mr Karashialis. Pausing at this point to note that the lending to Mr Karashialis through TIL and the Fund as part of the Restructured Ramadan Loans took place in May of 2009, it is somewhat remarkable that GB should have been quite so sanguine about having been called upon to settle an unpaid court judgment for the borrower. This was explained away by GB on the basis that paying off the judgment as part of Joint Venture process, rather than having to sell property and incur stamp duty, was the sensible course for TIL to take.

197. I have to confess to having enormous difficulty with the evidence of GB in respect of the borrowers. He knew perfectly well that the borrowers were anything but prime. He knew that evidence of mortgage payment arrears in respect of a prospective borrower, disentitled that borrower from financing from the Fund, yet he knew and SN knew, that all the borrowers under the Ramadan Loans were already in arrears. I do not accept GB's evidence that there was more to the credit process than simply looking at mortgage arrears; this was a central and crucial factor for the Fund. And whether they appeared or not in a formal credit report, as suggested by GB, is really nothing to the point. Nor do I find it easy to accept GB's position when he said in giving evidence to the court, that he knew the lending criteria of the Fund were strict, but in his opinion "none of the Ramadan loans did not have a high chance of redeeming." This evidence does not sit easily with claims of trying to find a solution and reducing exposure. These loans were after all problems in the books of TPLC and its subsidiaries, which had not been performing. That is why a solution was needed. Additional security and guarantees have in themselves no impact on the likelihood of development succeeding and a loan being repaid in accordance with its terms.

198. The lending by TIL to Mr Ramadan and his associates by way of the Restructured Ramadan Loans typically, save for one shorter term loan, had a 12 month term. It was an important facet of the lending terms that the fees and interest were added to principal sum and only repayable at maturity. This had the effect of ensuring that the loans made by TIL did not default. This is important because in my judgment the Respondents knew well that Mr Ramadan was already in default under the Ramadan Loans and in reality could not service the lending. This was not something disclosed to the Fund or its investors.

199. In a passage of evidence sadly typical of SN's period under cross examination, SN persistently refused to respond to what in my mind were straight forward and clear

questions, deserving of a clear answer, put to him by Mr McCulloch for the JLs. The principal question asked was whether or not SN agreed that the associates of Mr Ramadan were otherwise than prime borrowers on account of their evident prior mortgage payment arrears. Eventually SN did answer indicating, in terms, that they were not.

200. The Restructured Ramadan Loans were, as I have found, anything but short term bridge financings; in fact it seems that in several instances they might be properly characterised as property development speculation. That was not the business of the Fund and both Respondents knew that very well. In evidence, GB offered the view that the Restructured Ramadan Loans were indeed "low risk" as that phrase is defined and explained in the FIM, when the restructure was completed. He felt the Ramadan loans met the definition when restructured. Despite what has been seen of the history of the Ramadan Loans, and whilst agreeing that they were supposed to be bridging loans, GB insisted that "the majority of loans on the restructure were short term lending."

201. I have to say that these statements from GB severely tested my opinion of the credibility of GB as a witness, and indeed his evidence generally.

202. Addressing another point raised by GB in evidence, on no account could the existence of a property speculation deal between TIL and Mr Ramadan, of which, as I have observed, I saw no corroborating Agreement between the alleged parties, lead to a miraculous transformation in the credit history of Mr Ramadan, as a consequence of which he would assume the status of a prime borrower.

203. It is as I have already indicated, important to take into account the views that the Respondents held of Mr Ramadan as demonstrated by contemporaneous documents. In July 2008, the Respondents sent emails to each other in the following terms, the first from GB:

> "I agree Demi needs controlling. We also need to liquidate our repos and bad dept asap. We also need to increase availability in the fund to transfer some existing clients so as we can release cash. We also need the Andy bar as a matter of urgency. What I am looking at the moment Steve is liquidity which has to be our priority but I must try to balance it with the required ratio's for our lenders."

This was the reply from SN:

> "This seems appropriate at this time . it will slow things down until we get demi money back . If we have to finish the works ourselves to move things along with Demi then I think we should . What ever we do for him he always seems to dig a bigger hole for himself . We need to keep out of it.
>
> What do you think. I can go down with Andy and get a commercial view on what to do."

204. In November of 2008, matters do not seem to have improved. Another email from GB to SN and others, said this, the references to Demi being to Mr Ramadan:

> "This whole Demi thing is pissing me off. Its costing us a fortune, there in co-ordination.
>
> Martin
>
> Please do a spreadsheet of what we have paid, owe on everything related to Demi eg valuers, brokers, building works, gangsters, blow jobs and general shit.
>
> Can I have this by close of business on Monday. You may as well include all the outstanding black hole monies not redeemed."

205. The picture as gleaned from these messages in 2008, does not suggest to me a borrower in whom the Respondents had complete confidence. Nor does it suggest a borrower whose track record in property development somehow justified overlooking an unsatisfied County Court Judgment and numerous credit card defaults, as was the gist of the evidence as I heard it from GB. I also heard that GB was extremely troubled by what was described as over-exposure to Mr Ramadan, a matter brought to his attention by SN. This supposed over-exposure to one client, was evidence that GB gave in cross examination, by way of his explanation of the comments he made in his July 2013 interview with the JLs. In that interview a question was put to him and then he provided an answer:

> "Q: But the properties we're going to sort out, they need to be valued by Glenny's," and there are other emails where it actually says, "Go and arrange the valuation." So I infer from this email that's consistent with other emails we've seen. So that's Tiuta saying to Demi, "You go and sort the valuation with Glenny's" is not a normal communication you have as a lender telling your borrower to go and sort their own valuations. But then he has at the bottom of that little group, "These are urgent." So if we had the existing facilities with the other lenders, I don't understand why it's expressed as "these are urgent." Then the other ones "you need to get out ASAP" which I'm guessing is because we're not prepared to take the hit on those. But why don't we just say to Demi, "Sorry, we want out of all of them"?
>
> A: From my perspective, they dug the hole too big by underexposing in the first place. That was the problem, it should have never got that far, and these others that have to be dealt with ASAP, they should never have been lent on.
>
> A: I don't think we'd created the three-year by then. But the Laiki were very dubious of this guy Demi and we were stuck with him, we had him. Make no bones about it, I didn't want him but we got him, okay? He was a client and we were stuck with him. Now they knew him from the community as well, and the chairman or whoever he was there at the time said to me, and I relayed this back to Steve and I think you'll find that the Sava brothers relayed the same information back from another Cypriot bank or institution as well not to deal with this guy because he's a bloody crook. He was seen in the community as some sort of crook. But we had him. We were stuck with him because of Steve's "we got to go with this guy." So once we'd lent to him and we were stuck with him and there was nowhere else to put him, so, I'm thinking back here to that one, that would have probably been a

> meeting I had with him where he said to me, “Get this guy off my books because he’s known to my people.
>
> We don’t want him on our books, get him off our books.” If I’ve got an email there saying, you’ll find loads of emails from me winding people up, trust me, if I wanted things done, I’ll wind them up. That’s it. It wouldn't have been that they were going to withdraw the facility the next day. I’d have had a conversation with Sophocles and he said, “Get this guy off our book.”
>
> That’s why I sent Steve down there. Because in the very beginning once I had the first row with Steve over Demi, I said “On your shoulders be this. If you want to do this, you go down and you check these properties out and make sure they're worth what we’re being told they're worth and you do the touchy-feely and you come back to me and tell me that it’s okay, that these properties are all right.”
>
> Demi’s were a problem. I’m telling you that, I agree with you. You’ll find the witnesses to the rows I had with Steve over this, and if people are honest and true they will tell you. But I was stuck with it, I had to deal with it.”

206. In light of this material, for which GB had the greatest of difficulty providing an explanation when cross-examined, I find it very hard to accept that the Respondents honestly believed that Mr Ramadan and his associates represented acceptable prospective borrowers for the Fund given the terms for lending by the Fund which they both understood. In my judgment the Respondents knew very well that they the Ramadan Loans should not have been repackaged for financing by the Fund if the terms of the FIM were to be adhered to. There was plain and obvious over-exposure to one borrower, who could not in any reasonable understanding of the term, be described as prime. The evidence from SN was that none of the Restructured Ramadan Loans were bad loans. For the reasons I have set out, I have enormous difficulty accepting this statement at face value. In an exchange with Mr Gloag on behalf of GB, I asked what he meant by the statement that TIL had Mr Ramadan “over a barrel”. It seemed to me that this was an acceptance of the proposition that Mr Ramadan had been in severe financial distress and needed a solution. He would have accepted any terms offered to him by TIL. Mr Gloag sought to withdraw the statement which on its face had obvious relevance to the question of the extent to which GB recognised that Mr Ramadan was far from a prime borrower. When pressed as to whether GB’s case was that Mr Ramadan was not in fact “over a barrel”, Mr Gloag declined to say.

207. In another surprising passage of evidence given by GB, it was confirmed that each of the associates of Mr Ramadan was content with the cross-collateralisation of any excess arising on the completion of their property developments. Why they would each do this was not made clear. The evidence also had the effect of pointing to the involvement of each Respondent in the negotiations with the Restructured Ramadan Loans. I asked GB whether he had had discussions with all the different borrowers individually in order to secure their agreement to the use of their funds for the benefit of other borrowers. The answer given was yes, all the borrowers were involved in the process and they knew exactly what was happening; “yes I did discuss that with them; either

myself in the majority of cases - it may well have been Mr Nicholas or Mr Baba with some of them".

208. At this point it is instructive to consider a series of TPLC internal communications from June of 2009. The first is from Mr Read to the Respondents where he explains that:

> "I think Bank of Cyprus are probably close to calling in our loans.
> Rather than have another panic if they do, I suggest we get Folkestone Road valued, this will allow us to drawdown monies from the Fund to pay of Bank of Cyprus.
>
> Admittedly it is only moving the debt but I would feel more comfortable with owing the Fund than having Bank of Cyprus (a) charging us extortionate fees and (b) potentially pulling the funding.
>
> Let me know what you think."

209. This rather surprising attitude on the part of the TIL/TPLC Financial Controller, to the formulation of lending proposals for the Fund is met with this reply from GB:

> "Ok, what do we owe and what was the last val, by whom and how much for ?
>
> When did it go in to B of C ?"

210. Mr Read replied:

> "Sorry I didn't say the one I want to repay is Golban, not all the remaining.
>
> The BoC loan is £959k and 15 months old, I am proposing we use Folkestone Rd to move our debt away from BoC and on to the fund by drawing £959k against the val and get Demi to sign a new facility letter.
>
> This means that we have two loans drawn on Folkestone Rd rather than two on Pembridge Villas. Like I said it doesn't solve anything but takes the pressure off of us for hopefully enough time to rectify the situation.
>
> Folkestone Rd was last valued by Glennys for £1.95m about a year ago."

211. This evidence shows what was happening within TPLC and TIL at the time the Restructured Ramadan Loans were being agreed with the Fund. One financing had just closed and three were still to draw down. This reveals a business in distress; it points to decisions being taken that were heavily influenced by factors other than the underlying commerciality of the lending.

*Conclusions on the Demi restructure*

212. In all the circumstances I am driven to agree with the JLs that the net effect of the so-called Demi restructure exercise, which led to the Restructured Ramadan Loans, was that TIL took on a book of bad loans which greatly increased the exposure of TIL. There was little prospect of recovering interest and the supporting security was well

below the value that was needed in order to provide any prospect of meeting the eventual liability.

213. I have to some extent already in this judgment addressed the submission made in opening by Mr Young to the effect that Mr Davies acting on behalf of the Fund, had approved all of the Restructured Ramadan Loans. Mr Davies was Chair of Connaught Asset Management who operated the Fund and also Compliance Officer of the Tiuta Group. This Mr Young submitted, demonstrated that there was no attempt made to conceal anything related to the Restructured Ramadan Loans; everyone sanctioned this as a way of exiting the problems caused to the loan book by the financial crisis. There is a straightforward response to this argument. It seems plain to me for the reasons that I have set out, that on no account could the repackaging of the Ramadan Loans for lending by the Fund have been an acceptable means by which to resolve the troubles caused to TPLC and its subsidiaries by the financial crisis. If there was one thing that the Fund was not, it was not a repository for problem facilities with borrowers already in default, saddled with security of questionable value, against property which as the Respondents well knew, had hitherto whilst financed by TPLC, proved difficult to develop.

*The role of the Respondents*

214. That GB and SN were the primary stewards of TIL and indeed TPLC, was not a matter which gave rise to any real controversy at the trial. GB accepted that he and SN were the main decision-makers, and so far as the "Demi restructure was concerned, he had been the person responsible for the overall approval. Although he sought to suggest that he was merely the "head of the legal team", in my judgment the role of SN went far beyond that. It was hardly a surprise that SN took over the running of the business when GB took time away due to ill-health. A wealth of day to day documents generated in the processing of loans revealed the extent of the involvement of SN, as well as GB.

215. It must be kept in mind that it was the Respondents who were responsible for representing to the Fund that the Restructured Ramadan Loans met the Fund's lending criteria. The standard application pack included the following statement which was "signed-off" by the Respondents:

> "We confirm that the loan meets the investment criteria for assets to be acquired for the fund, as set out in the investment memorandum for the Guaranteed Low Risk Investment Fund, and complies with Tiuta Plc Credit Policy."

216. The internal TIL Initial Proposal Assessment form, completed for the Mr Karashialis funding of the Black Bull Road, Folkstone, development is important for a number of reasons. Not only is it described as a "multiple Demi deal" although the borrower is stated to be Mr Karashialis, the credit history of Mr Karashialis is said to be "good". The loan is described a re-finance on "refurbridge" terms, but then later in the form it is conceded that it is it not at all a refurbishment exercise but rather a development to which SN and GB have agreed. They appear to have agreed because the deal "needs to get done". The reason is explained: "need to get it out of Laiki". This transaction claims to benefit from a 25% profit share. It is at once not easy to reconcile these aspects of the transaction that I have recited, with the lending criteria of the Fund and anything other than a desperation to keep the plate spinning so far as the lending to Mr Ramadan was concerned. It certainly demonstrates the involvement of both GB and

SN in the lending decisions. Insofar as SN tried to distance himself from this business and decision-making of TIL, on the basis that his responsibility was exclusively for legal matters, I do not accept that evidence; his direct evidence to the contrary was unconvincing, and as I understood it, directly at odds with what I heard from GB and saw time and again from contemporaneous documents, in particular relevant and important emails to which he was invariably the addressee or on copy.

217. An example of these emails is one from June 2008 from Mr Ramadan to SN (not GB).

> "Hi guys
>
> I have listed below a number of developments for finance for your consideration:-
>
> 1) Developments in need of part redemption/development finance
>
> a) 306 London Road, Dover, CT17 0SX
> b) 4a Broad Street Ramsgate CT11 8NQ
> c) 25 Sittingbourne Road Kent ME14 5EU
> d) 45 -47 Black Bull Road Folkestone CT19
> e) 7-9 Woodbridge Road Ipswich IP4 2EA
> f) 25 Hill Road Harwich CO12 3PD

g) High Street Aveley Essex RM15 4BL
h) 96-98 Harbour Parade Ramsgate CT11 8LP

i) 56 Station Road Birchington CT7 9RA

2) Developments in need of part development finance

a) 28 – 30 Harold Road Margate CT9 2HT

b) 131 – 141 King Street Ramsgate CT11 8PN

c) Southward Tavern Ramsgate CT11 0AZ

3) Developments in need of 100% development finance with profit share

a) 14-20 St Michaels Road Northampton NN1 3SU

b) 151 -153 Folkestone Road Dover CT17 9EJ

c) 31 -33 Dover Street Leicester LE1 6PWd) 38 -44 York Street Leicester LE16NU

e) 19 Surrey Road Margate CT9 3J

f) 3 Thanet Road Margate CT9 1U

g) 77 -79 Norfolk Road Margate CT9 2HX

h) Parkmount Margate CT9 2QG

Look forward to meeting up with Steve midday Monday 30th June 2008 and with Steve and Gary on Wednesday 9.30 am 9th July 2008."

218. SN's evidence was that he had no recollection of this message or the meeting that was due to follow it. He had no recollection of the various messages he was shown touching on the financial position of TIL and TPLC, despite being a recipient. It is in my judgment hard to accept that SN had no involvement with Mr Ramadan and GB on the subject of the Restructured Ramadan Loans, or that his involvement in the running of TIL and TPLC was confined to matters of a purely legal character. In cross examination SN did in fact ultimately accept, not without some reluctance, that he was aware that

the Restructured Ramadan Loans were being processed by TIL and that there were aspects of it that he was involved with.

219. By way of example, in a January 2008 GB email to a number of TPLC addressees, which once again touched on the parlous state of TPLC liquidity, SN's central role was confirmed:

> "Cash flow is extremely tight at the moment, therefore NO DEVELOPMENT LOANS TO BE SENT OUT WITHOUT AUTHORISATION FROM BOTH MYSELF AND STEVE UNDER ANY CIRCUMSTANCES."

220. Then again in September 2008, the TIL Initial Proposal Assessment for the financing of the Margate properties by Ms Brinson and Mr Green contains the box requiring completion: "Outside Criteria, why? Agreed by who, when?" The answer provided was "25% profit share to be entered into…agreed by Gary and Steve".

221. Responding to questions which again SN found difficult, SN expressed his view that the Ramadan associates had always been treated individually, and not simply seen as acting as a cover for lending which was in truth to Mr Ramadan. This awkwardness was observed when SN asked about the January 2008 email from Anita Kirkbright referred to earlier in this judgment, which was sent only to him and GB.

222. SN also expressed himself to be confused, when asked about another message from Ms Kirkbright to GB, stating:

> "Just thought I would bring to your attention that the new "Demi" deal in Chris Theo's name – 126 Northdown Road, Margate, has been to Lancashire Mortgage Corporation – there are 2 priorities on – one to Lancashire Mortgage Corp dated 17th April 2008, and one to Blemain Finance Ltd (same group) dated 25th April 2008. There is also a priority on in favour of Georgiou Nichola"

223. GB then sent on this message to SN, with the comments:

> "Interesting
>
> Are you sure you want to keep lending to Chris, it is just Demi and know one else is doing it, ALTHOUGH THEY ARE OBVIOUSLY TRYING.
>
> If a bridger will not lend what chance have they of a take out ?
>
> Let me know"

224. It seems to me that SN was fully involved in the Ramadan lending and was well aware that loans held in a variety of names had been arranged at the instance of Mr Ramadan. Numerous internal documents revealed SN agreeing to valuations, for example on the Dover Street property, or otherwise giving necessary confirmation to the relevant TIL team to proceed, as with the Sweyn Road property where the case notes were indorsed with the following:

> "Have spoke to Gary, Steve and Pui and they are happy to lend over the purchase price on this Demi deal as the discount is under 20%"

225. In another internal email, this time from SN himself to Craig Booth, GB and others, SN passes on instructions to refinance certain lending:

> "Boys
>
> We have to refinace two deals out of liaki into the fund 1. 45/47 black bull road folkestone and parkmount . We have a 25% profit share on each of these. Interest rate is 1.75% pcm .
>
> Please-restructure asap .
>
> Ta
>
> Steve"

226. Not only does this show a determination to move lending from Laiki bank, as a consequence of pressure from that lender, it reveals a particular attitude to the use of the Fund as a source of financing. It also, of course, shows SN at the heart of the business and decision-making of TIL.

227. SN also knew perfectly well the terms for lending imposed by the Fund. I have this view despite his evidence that all he did was introduce the idea of a fund, after which his colleague Tim Nichols took over and he and GB were mere "passengers". The evidence he gave that he would not even have a clue about the Fund, was in my judgment not credible and contrary to the wealth of contemporaneous documents that I saw throughout the trial, including internal documents from March 2008 asking SN directly for his input into the FIM. As was often the case with the evidence of SN, his position began to change as documents emerged suggesting that his earlier evidence was not easy to adhere to. As regards the FIM, SN's evidence developed along a path which eventually saw him accept that he had reviewed and contributed to drafts of the FIM. He also accepted that he had "sent the final draft on to Gary"; and that "yes I was involved in the FIM on the legal structure, it involved my department." SN also accepted that TIL had to lend in accordance with the FIM.

228. Towards the end of his cross examination, SN was asked about the Dover Street property and the lending in respect of it. The LTV ratio for the Fund was 117%, well above the thresholds set by the FIM. Medium risk lending was contemplated by the FIM though at LTV ratios well below 117%. In order to qualify for medium risk lending, evidence of a guaranteed exit route was a crucial term that had to be satisfied. SN initially held to the opinion that there was a guaranteed exit route for the Dover Street development despite the evidence that it had been put on hold and no development work was being undertaken. SN eventually relented and expressed the view that he had simply gone along with GB; he had deferred to GB and had trusted him; with the benefit of hindsight, he wished he had not done so.

229. In light of the evidence I heard and to which I have made reference in this judgment, I have arrived at the view that both GB and SN knew very well that the Restructured Ramadan Loans were not in the best interests of TIL and nor did they meet the lending criteria of the Fund. The Restructured Ramadan Loans were repackaged distressed loans which through deception, GB and SN arranged to refinance through the Fund. As

Mr Griffiths put it, it was a high risk rescue strategy which did not fit with the strategy of the Fund.

230. Whatever was their motive is little to the point; whether it was to somehow relieve TPLC of burdens it faced, or generally to raise cash for the business being undertaken by TPLC and its subsidiaries is not something I need to express a concluded view upon. What I can say, because the evidence I heard drives me inescapably to this conclusion, is that the Respondents devised a scheme based upon property valuations which they both had no basis for believing to be accurate and in my judgment, as experienced property market professionals, they did not believe were correct, with the singular aim of keeping the Ramadan Loans from defaulting with the existing lenders. The values were self-evidently unrealistic, being in almost every case far higher than the previous valuation carried out prior to the onset of the financial crash and the depreciation of property prices generally in the market. It did not require fraud or collusion on the part of or with the valuers, for this to have been obvious to the Respondents. The victim was the Fund and also TIL. As Mr Griffiths put it, the point here was whether the Fund went into new lending deals or into a restructuring of problem loans; under the FIM, the latter was not allowed. The borrowers were paying default interest; they were in default.

231. It was as I have already recounted, urged upon me by counsel for the Respondents, that each of the Restructured Ramadan Loans was carefully considered by the Fund itself. It knew of the terms of each loan and decided to accept the proposal. If the lending appeared to be outside the criteria laid down by the FIM, it was nonetheless approved by the Fund, whose lending criteria changed from time to time. I regret to say that I see nothing in these arguments. From the evidence I heard and the material put before the court, I saw nothing to suggest that the Fund was aware that it was entering into property development speculation of the character that the Restructured Ramadan Loans in my judgment represented. The Fund did not know that the various borrowers were anything but prime; the Fund did not know that they were taking on hastily repackaged lending so as to protect facilities offered to TPLC by other lenders such as Laiki bank; the Fund did not know that the Restructured Ramadan Loans were in the manner of a workout of problem facilities based around one borrower, which were in default and premised upon property developments that had not completed as expected (as bridge financings) during the original term of the facilities with TPLC and its subsidiaries. Whatever the investors in the Fund or its managers knew, in my judgment they were deliberately kept from a proper understanding of the foregoing. It was the Respondents who carefully engineered this state of affairs.

*Fraudulent Trading*

232. Accordingly, and taking full account of the high threshold that must be applied in reaching such a finding, I do arrive at the view that both GB and SN acted dishonestly, and carried on the business of the company with intent to defraud the creditors of TIL

or the creditors of the Fund, that is to say the investors in it. I find that their behaviour amounted to the carrying on of the company's business for a fraudulent purpose.

233. Both of the Respondents had knowledge of that dishonest conduct and both participated in it. They both knew that the transactions that they were participating in were fraudulent.

234. I am therefore satisfied that the JLs have succeeded on their case pleaded at paragraph 94 of the Amended Particulars of Claim, in that the business of the company was carried on with intent to defraud the creditors of TIL or the creditors of the Fund, that is to say the investors in it, alternatively for another fraudulent purpose, within the meaning of section 213(1) of the Insolvency Act 1986, and each of the Respondents was knowingly party to the carrying on of the business in that manner within the meaning of section 213(2).

235. I find that the case has been established principally on the basis of TIL refinancing the Ramadan Loans, in the manner I have set out in this judgment however I also agree with the JLs that their case is also made out on the basis of the preparation and filing of accounts for TIL for the financial years ending 31 March 2009 and 2010 which, for all of the reasons connected with the circumstances surrounding the Restructured Ramadan Loans, did not give a true and fair view of TIL's assets, liabilities, financial position or profit and loss.

236. I agree with the JLs that they have established that there was intent to defraud creditors of a person other than TIL, specifically the investors in the Fund as creditors of the Fund, in that the carrying on of the business of TIL in the manner I have described, falsified the representations made in the FIM.

237. It is clear to me that as pleaded in the Amended Particulars of Claim, both Respondents acted dishonestly, involving, according to current notions of fair trading among commercial men, real moral blame. In particular:

a) they each knew that investors in the Fund were investing on the basis that the investments made and to be made by the Fund were in accordance with the representations made in the FIM. The Respondents each knew that in causing the company to refinance the Ramadan Loans by drawing funds from the Fund, the company was making loans at variance with the representations in the FIM, and was making loans which no honest or reputable mortgage lender would have made;

b) the preparation and signing of the 2008 and 2009 Accounts of the company, which did not disclose a true and fair view of the company's assets, liabilities, financial position or profit and loss, was dishonest; and

c) each of the Respondents knew, or turned a blind eye to the fact, that the property valuations underlying the Restructured Ramadan Loans were not credible.

*The JLs model*

238. The JLs gave evidence of a model that they created that they say demonstrates beyond doubt that the business was doomed to fail from inception. This evidence was

challenged by the Respondents, but I am in any case not altogether sure quite how far it goes. I am not sure that the court would accept that every undertaking needs to be tested at the outset by a sophisticated model, or if it was, and the model did not reveal a strong basis for a belief in future success, that the consequence of embarking upon the undertaking would *ipso facto* provide evidence of dishonesty. For the purposes of disposing of this matter, it does not seem to me necessary to address the evidence given in respect of the various models and the response to it from the Respondents.

239. I say this despite the case made by the JLs and the evidence from GB and SN relating to the cost of borrowing from the Fund. I do not accept that there was evidence that the funding provided by the Fund had to be disbursed by TIL "at all costs", as the JLs have suggested; nor do I accept that the evidence of the high costs of the funding meant that the directors must have known from the outset of TIL that the business could not ever succeed. A degree of latitude has to be given to the promoters of an undertaking, and in my judgment when the appropriate degree of entrepreneurial tolerance is extended in the circumstances of this case, the evidence I heard, taking into account what I read and heard from Mr Woodward who gave expert accounting evidence on behalf of the JLs, did not persuade me that the Respondents ought to have seen clearly and easily from the commencement of trading, that TIL was bound to fail. It is though another question altogether as to whether they ought to have entertained the notion of the Restructured Ramadan Loans whether with financing from the Fund or as obligations of TIL.

Breach of Duty

240. On the facts as I have found them, I have to ask myself whether it can be said that each of the Respondents acted in the way which he considered, in good faith, would be most likely to promote the success of TIL for the benefit of its members as a whole.

241. There can be little doubt that on the evidence that I heard, both GB and SN considered the Tiuta business as one undertaking, whether that was in regard to TPLC or TIL. Little if any thought was given to the independent interests of each company. GB accepted that they all merged into one, whilst SN seemed only interested in whether a decision had been taken to proceed with the Restructured Ramadan Loans.

242. I have already indicated that I approach the question of whether there was a breach of duty, applying a subjective test: I ask myself did the Respondents honestly believe that his act or omission was in the interest of the company. As Jonathan Parker said in *Re Regentcraft* [120]:

Rather, the question is whether the director
honestly believe that his act or omission was in the best interest of the company at the time the decision or agreement was made. The good faith of the directors must be determined subjectively. The question is the director's state of mind.
Rather, the question is whether the director
honestly believe that his act or omission was in the best interest of the company at the time the decision or agreement was made. The good faith of the directors must be determined subjectively. The question is the director's state of mind.

> "The duty imposed on directors to act bona fide in the interests of the company is a subjective one (see Palmer's Company Law (Sweet & Maxwell), para. 8.508). The question is not whether, viewed objectively by the court, the particular act or

omission which is challenged was in fact in the interests of the company; still less is the question whether the court, had it been in the position of the director at the relevant time, might have acted differently.

Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind. No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the court that he honestly believed it to be in the company's interest; but that does not detract from the subjective nature of the test."

243. GB's evidence was that he did all that he could to in order to arrange the Restructured Ramadan Loans with the objective of protecting the interests of the Tiuta companies. It is my view however that neither GB nor SN could honestly, and in my view they did not honestly, believe in the valuations that supported the Restructured Ramadan Loans. They knew they were inflated; they knew that in the property market as it was, the values must have been far too high; they were neither of them inexperienced in that property market. It could not have been in the best interests of TIL to keep trading with Mr Ramadan at that point. Another solution should have been found. It might have been to stop trading.

244. In arriving at my finding, I have taken into account the evidence of Mr Griffiths. It was his view, with which I agree, that for TIL to take what I have described as property speculation development risk, across 15 properties, was a huge risk that no sensible lender would have taken on at the time. As he said, with interest on its financing running at times as high as 23%, it was a high risk, ill-founded strategy that had no prospect of success. Nor was money available with which to carry out the required developments, and this was an inexplicable risk to have taken in what was known to be a falling market. In responding to the point that one of the properties was ultimately developed and sold at a reasonable price by another developer, Mr Griffiths was adamant that the deal that ultimately succeeded was a very different development proposition to that which TIL had had in mind, and not at all what was presented by TIL to the Fund. The point can perhaps be best summed up in the trenchant remark offered by Mr Manley the valuations expert, who observed that if during the credit crunch period you were advancing money on a speculative development, you were probably the only person doing it.

245. I must have regard to the whole of s.172. Not only must a director:

> "act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole….",

pursuant to subsection 1.(e) the director must also have regard to:

> "the desirability of the company maintaining a reputation for high standards of business conduct"

246. Even if it had been the case, and I have found that it is not, that the Respondents honestly believed that what they were engaged upon was in the best interests of TIL, in my judgment a belief that they were acting so as to promote the success of the company for the benefit of its members as a whole, could not in the circumstances as I have found

them to be, have been a belief held in good faith. A dishonest manipulation of a process necessary to bring about the desired result, that being the Restructured Ramadan Loans, even it was based upon a belief that it might have ultimately protected the company from imminent defaults upon the Ramadan Loans and the withdrawal of facilities from various bank lenders, could not have been a good faith discharge of the duty.

247. Further, in my judgment the Respondents each knew that the steps they were dishonestly taking in processing the Restructured Ramadan Loans, were inconsistent with the duty upon them to have regard to the company maintaining a reputation for high standards of business conduct. In my judgment GB wanted a scheme that would at any costs preserve the Tiuta undertaking as a whole. He wanted to find a way to prevent the Ramadan Loans from infecting the whole business venture. He pursued the Restructured Ramadan Loans in any way that so far as he was concerned would best guarantee the outcome he was set upon. He was well aware that there was no good faith involved in what he was doing and he was quite prepared to involve TIL in misleading and fraudulent conduct so as to secure the fresh financings: he had no regard to the need to maintain a reputation for high standards of business conduct. He knew what he was doing was inimical to such standards.

248. SN on the other hand was in a different position. My assessment of his evidence is that he found the events a strain almost from the outset of the so-called Demi restructure exercise. As his evidence to the court so often was, he simply "went along with it". It was a strain for him as he too knew that what was being done was otherwise than in good faith; he knew that by putting forward the loan applications to the Fund as he did together with GB, based upon valuations he had no belief in the validity of, concealing the true nature and background of the borrowers, no regard whatsoever was being paid to the need for maintaining a reputation for high standards of business conduct. Whether in fact SN had merely been an anxious passenger or not, in my judgment he knew very well what was being done to keep the lending to Mr Ramadan going. Understanding it all now, his evidence was that he should have resigned: but he did not.

249. It follows that I find the breach of duty claim pleaded by the JLs at paragraph 103 of the Amended Particulars of Claim, succeeds in that the Respondents procured the Company to enter into the Restructured Ramadan Loans, and thereby breached their duty under section 172(1). There was no benefit to the Company in agreeing to any of the Restructured Ramadan Loans, nor did they promote the success of the Company, as the Respondents each knew.

*The duty under s.172(3)*

250. As I outlined earlier in this judgment, the Respondents were also under a duty to consider or act in the interests of the creditors of TIL, by virtue of the provisions of section 172(3) of Companies Act 2006. I now have the benefit of guidance from the Supreme Court on the application of the duty: this is the decision in *Sequana*, to which I earlier referred.

251. The JLs submit that the Respondents were each under a duty to act in the best interests of its creditors from the inception of trading of TIL given that its business was inherently unviable. Reliance is placed upon the report of Mr Woodward. The case is

also made on a series of alternative bases, those being that the Respondents owed the relevant duty:

a) by the end of 2008, by which time it is argued that the Respondents had caused TIL to refinance six of the Ramadan Loans and enter into corresponding Restructured Ramadan Loans;

b) by the end of January 2009, when it is submitted the Respondents had caused TIL to refinance a further two of the Ramadan Loans and enter into two further Restructured Ramadan Loans;

c) by 30 June 2009, when the Respondents signed TIL's 2009 accounts in the knowledge that no provisions had been made in respect of any of the 11 Restructured Ramadan Loans (those at Appendices A-K of the Amended Particulars of Claim);

d) by the end of November 2009, when the Respondents had caused the Company to refinance each of the 15 Restructured Ramadan Loans;

e) by 30 June 2010, when SN signed TIL's accounts for 2010 in the knowledge that no provisions had been made in respect of any of the 15 Restructured Ramadan Loans advanced by TIL to refinance the Ramadan Loans.

252. It is certainly the case that when TIL entered into the Restructured Ramadan Loans, it was well known to the Respondents that the company was entering a period of financial distress. I am in no doubt that this point was reached by November 2009. The duty on the Respondents at that point was to act in the interests of creditors as a whole. The JLs invite me to find that the duty was breached because the Respondents knew that there was no benefit to TIL or its creditors in refinancing any of the Ramadan Loans by entering into the Restructured Ramadan Loans. The Respondents perfectly well knew or ought to have suspected that the Restructured Ramadan Loans would not promote the success of TIL or its creditors. For the reasons set out in this judgment going to the conduct of the Respondents, I have no difficulty in concurring with this submission.

*Breach of Duty - Relief*

253. The JLs have claimed equitable compensation in respect of the loss caused to the company by reason of the company refinancing the Ramadan Loans and making the Restructured Ramadan Loans. It is submitted that the entitlement to this relief flows from the breach of duty under section 172 of the Companies Act 2006.

254. I agree with the JLs that the court must be satisfied that the instances of breach of duty that the court finds proved, must have caused the loss claimed. On the facts of this case, and there was no disagreement on this at the bar, I am not concerned with the principles of mitigation and contributory fault.

255. The Amended Particulars of Claim offer calculations of the relief due to the Applicants on a series of alternative bases, which it is submitted by the JLs apply equally to a

finding of liability under section 213 fraudulent trading, and section 212 breach of duty. It is pleaded that:

a) each of Mr Booth and Mr Nicholas is liable to contribute to the Company a sum equal to the increase in the net deficiency of the Company's assets from 30 June 2009, when they signed the Company's accounts for the year to 31 March 2009. If the accounts had been properly prepared the Company would have ceased trading from the date of their preparation,

b) further or alternatively the Fund would have terminated its dealings with the Company, further or alternatively no further investments would have been made in the Fund.

256. The alternative declaration sought is that:

a) Each of Mr Booth and Mr Nicholas is liable to contribute to the company a sum equal to the loss caused to the company as a result of the refinancing of the Ramadan Loans from September 2008.

b) The carrying on of the business fraudulently by Mr Booth and Mr Nicholas, in causing the Restructured Ramadan Loans to be made, resulted in a loss to the company for which they should be liable to contribute.

c) Alternatively, Mr Booth and Mr Nicholas acted in clear breach of duty in causing the company to enter into the Restructured Ramadan Loans, and should be liable to pay equitable compensation for that breach.

257. Mr Gloag has sought to persuade me that there is, in reality, no nexus, between the making of the Restructured Ramadan Loans by TIL, and the loss suffered by anyone. Such a nexus must be evident for the JLs to justify the making of an order for a contribution pursuant to section 213 of the Insolvency Act 1986; just as the court must be satisfied that the breach of duty caused the loss claimed, if an equitable compensation order is to be made.

258. It is GB's case that the deficiency the company ultimately suffered on insolvency, and the loss sustained by the Fund and its investors, is subject to credit for compensation realised for the Fund, by the JLs, from the regulator. It is also argued that the insolvent position of TIL was in truth caused by the decision to cease lending subsequent to the departure of GB, this being exacerbated by the decision to put TIL into administration without pursuing, or pursuing with sufficient pertinacity, a recovery against either the security in place for the Restructured Ramadan Loans, or the various negligent professionals.

259. On behalf of SN it was submitted that the court does not have sufficient material before it as would allow it to make a finding of the appropriate amount of compensation to be paid. It is said that the Fund investors and the creditors of TIL have already been compensated. Whilst the wide discretion of the court in arriving at the proper amount of compensation is recognised, the question is raised, certainly by inference, as to whether any assessment can be arrived at on a rational basis here, given the incomplete nature of the evidence before the court. In any event, SN asserts that the Fund has already been compensated in full, albeit that I heard no evidence as would establish

that, and that the amount due to the Fund was limited by an agreement with the asset manager, which capped the amount due at £12 million.

260. The nexus between the breach of duty and the loss was raised by SN in his evidence. His view was that the new management team led by Mr Patellis sold off properties too early without allowing the deals time to mature, albeit that certain properties were sold at a profit, allowing loans to be repaid. In the main however he had been told to just sell the assets at whatever price he could get and "bring in the cash".

261. In my judgment the JLs are right to point to the salient fact that the Restructured Ramadan Loans were entered into prior to GB's departure from TIL. As is clear from my findings in this judgment, I do not accept the proposition that the Restructured Ramadan Loans were performing at this juncture and would have proceeded to satisfactory repayment but for the want of effective management. There was a wealth of internal communications within TPLC and TIL recording the difficulties that TIL had in finding development funding for the properties underlying the Restructured Ramadan Loans, and as GB accepted in evidence, there was no simple exit strategy available at the time, in light of the severely depressed property market. The suggestion of micromanaging properties in the context of a joint-venture seemed to me to be entirely unsubstantiated by the evidence.

262. It seems clear to me that TIL ought never to have taken on the Restructured Ramadan Loans. They certainly should not have been packaged for lending by the Fund. As soon as they were, a loss became almost assured. The loss sustained was in the event much larger than might have been the case for TPLC had the decision to enter into the Restructured Ramadan Loans with TIL not been taken. At any rate the question has to be looked at from the perspective of TIL. Was the loss sustained by TIL a result of the breach of duty of the Respondents: in my judgment it was. Had there been a prospect of the management of TIL procuring development funds for Mr Ramadan to complete the development of the various properties securing the Restructured Ramadan Loans, such that they could have been sold for something approaching the valuation levels or the higher development values, then the enquiry might have been different. It might have been necessary to challenge the nexus by looking at the steps taken to realise the investments and repay the loans. But that is not the case here; there was no development finance; the valuations were fantastically high; there was no prospect in the market as it was of the loans being repaid through a sale or development of what in any case should have been short term bridge financings; added to all these obstacles was the unusually onerous finance burden arising from the way in which the lending had been procured from the Fund, and which played its part in ensuring that the loss ultimately sustained by TIL was inevitable.

263. I do not accept that any case was made out by the Respondents to the effect that the relevant properties were in due course wantonly sold at an undervalue, so unnecessarily increasing the loss sustained by the Respondents. I saw no evidence as would persuade me of that case. To the contrary, I saw clear evidence of SN at the time being quite prepared to accept sale prices for property well below the valuations supposedly applying to the property in question and without any hesitation arising from a need to hold on to the property so as to see it developed to what might have been thought was

it full or real value. It is my view that the losses sustained were unavoidable, given the history of the Restructured Ramadan Loans and the basis of their financing.

264. A further difficulty for the Respondents is the submission, which I accept, that the remedy under section 213, does not take into account questions of causation, contribution or mitigation; the principles of mitigation and contribution are also irrelevant to the calculation of equitable compensation for breach of fiduciary duty under section 212, save where, as is not the case here, a failure to avoid loss is so obvious that it would be unjust to hold that the behaviour complained of caused that loss.

265. In light of my finding that both GB and SN knowingly participated in the fraudulent trading of TIL contrary to section 213 of the Insolvency Act 1986, I will make a declaration that each of GB and SN are liable to make such contributions to TIL's assets and I will do so on a joint and several basis. I am satisfied that there is a sufficient connection or nexus between the conduct of the Respondents in carrying on the business of TIL which gave rise to the loss sustained by the creditors of TIL, and the contribution to the assets of TIL which I propose to order those responsible should make.

*Quantum*

266. This court is entitled to make a declaration of an amount due by way of a contribution from the Respondents, to the extent thought proper (see section 213(2)). As to quantum, paragraph 99 (a) of the Amended Particulars of Claim, pleads the case in this way in respect of the basis of claim that I have set out at paragraph 256 above:

> "a. As to (b), the Liquidators contend that the loss should be calculated on the basis that had the Company not refinanced the Restructured Ramadan Loans, the Company could instead have advanced commercially viable loans to creditworthy borrowers which would, almost invariably, have fully redeemed, permitting the Company to re-lend to other creditworthy borrowers. The Liquidators will therefore contend that the contribution should equal, in respect of each of the Restructured Ramadan Loans:
>
> > (i) the principal advanced by the Company to Ramadan/the Ramadan Associate in fact, less the net realisation made on sale of the relevant property;
> >
> > (ii) interest on the principal in fact advanced by the Company at the rate of, the Liquidators have estimated, 1.4% per month from the date on which each loan by the Company in fact incepted to the date of administration, being 5 July 2012, or (in the event that the hypothetical loan would have remained outstanding for a period of time after 5 July 2012, the estimated date of redemption); plus
> >
> > (iii) a multiple of the fees as typically charged by the Company, which the Liquidators have estimated as £350 per loan, the multiple being based on the time between inception of the loan in fact divided by an average redemption and re-lending time (i.e. "churn rate") of, the Liquidators have estimated, 332

days; and the facility fee charge, which has been based on an average fee of 1.11% multiplied at the same churn rate.

An indicative schedule of the quantum of the contribution sought under this head is at Appendix P, which calculates the overall loss as £18,683,555.22. The indicative schedule is calculated on the assumptions pleaded above, i.e. that the relevant "churn rate" would have been 332 days, that the fee for each loan would have been £350, that interest would have been charged at 1.4% per month (though the indicative schedule calculates interest only to 5 July 2012). The indicative schedule gives credit for professional negligence recoveries made in respect of certain of the loans but does not make any allowance in respect of the extent to which any of the hypothetical loans may have defaulted;"

267. Mr Woodward has calculated the quantum of the loss suffered by TIL as a result of TIL making each of the Restructured Ramadan Loans at £19,990,358. As pointed out by the JLs, this figure was unchallenged either by an alternative expert report or in cross-examination: as a consequence, it is submitted, the court is entitled to accept it. At paragraph 73 of his Report, Mr Woodward sets out his figures:

"What is the quantum of the loss suffered by the Company as a result of the Company making/refinancing each of the Restructured Ramadan Loans?

I have reviewed the eventual shortfall on each Ramadan Loan as at 5 July 2012, and the net loan balance (excluding penalty interest) at each balance sheet date. The shortfall applicable at each balance sheet date is individually calculated as the lesser of the eventual shortfall and the net loan balance. The gives me a total shortfall for the Ramadan Loans at each balance sheet date that needs to be deducted from the reported net assets. This gives me shortfall provisions of:

a) £(10,654,863) at 31 March 2009;

b) £(17,628,983) at 31 March 2010;

c) £(19,145,454) at 30 September 2011; and

d) £(19,990,358) at 5 July 2012.

Based on that summary, the overall shortfall and hence the loss suffered attributable to the Ramadan Loans was £(19,990,358) (paragraph 36)."

268. It is helpful to look at how Mr Woodward arrived at these values which he suggests are more accurate, being based on actual recorded loan book figures, than the values appearing in the Amended Particulars of Claim. His explanation, which is based on a review of the Restructured Ramadan Loans, is at paragraph 30 *et seq*, of his Report under the heading " Ramadan Loans":

"Each of the 15 loans is individually summarised at Appendices 6.1 – 6.15. Data has been lifted from the TIL statements where available, corroborated by loan book transactions, and supplemented by loan book transactions from the "CK - Summarised Access Dimensions" Excel database.

I have summarised those transactions at each of the Appendix 4 balance sheet dates (31 March 2009, 31 March 2010, 30 September 2011 and 5 July 2012). I have compared those figures in total with totals lifted from Schedule P in the APOC Appendices. I have broadly reconciled the difference in balances between those two sources, which comprise a number of factors, principally:

a) capital invested or repaid;

b) actual interest charges, compared with a notional 1.4% per month applied to each loan in Schedule P; and

c) penalty interest applied in the loan book, but not reflected in Schedule P.

It is not necessary to reconcile those differences exactly, and I have not attempted to do so because, whilst the APOC Appendices appear to give a reasonable analysis of the origins and history of each of the Ramadan Loans, I understand that Schedule P itself was prepared using estimated figures, and my analysis suggests that these do not appear to be wholly accurate as far as the transactions recorded in TIL are concerned. My review is therefore based on the transactions recorded in the loan book, and the recoveries (whether asset disposals or negligence claims) recorded in Schedule P.

Appendix 5, then, is a summary of the loan movements drawn from Appendices 6.1 – 6.15. Based on the loan book, I get a total of £29,686,205 at 5 July 2012 less recoveries of £3,136,619, making a shortfall of £26,549,586. This compares with a shortfall of £18,683,556 according to Schedule P – a difference of £7,866,030. At Column FF in Appendix 5, I show that the vast majority of that difference (£6,559,227) is penalty interest applied in the loan book, but not included in Schedule P.

I note from the Minutes of a meeting between the auditor and Adam Read (Tiuta's Financial Controller) on provisions policy (reference number H12-1, in Audit Papers file 10.4 - Appendix 2) in the auditors' working papers for the year ended 31 March 2010 that:

"The loans that have hit certain trigger points such as missed interest or capital repayments will be brought to the attention of the (credit) committee. When these points are triggered, Arrears Interest and Penalty Interest amounts are credited against the gross loan in balance sheet, as around 80-90% are rebated as an exit route incentive. Tiuta tend to use these penalties as incentives rather than an income stream."

In light of the above, the penalty interest cannot be treated as a recoverable income stream, and must be eliminated from the loan balances. At Appendix 5, therefore, I deduct the penalty interest (£6,559,227 in total) to arrive at the net loan balance at each balance sheet date, this being the amount recognised within the accounts, based on paragraph 34 above. This reduces the recovery shortfall from £26,549,586 to £19,990,358, which is much closer to the Schedule P total of £18,683,556.

As noted at paragraph 28 above, the deficiency movements estimated at APOC paragraphs 99(a) & 99(c) represented a reasonable basis for formulating and pleading the claim, but I have made my own revisions to these figures when estimating the deficiency movements. The figures in Appendix 5 show the eventual shortfall on each Ramadan Loan as at 5 July 2012, and the net loan balance (excluding penalty interest) at each balance sheet date. The shortfall applicable at each balance sheet date is individually calculated as the lesser of the eventual shortfall and the net loan balance. The gives me a total shortfall for the Ramadan Loans at each balance sheet date that needs to be deducted from the reported net assets. This gives me shortfall provisions of:

a) £(10,654,863) at 31 March 2009;
b) £(17,628,983) at 31 March 2010;
c) £(19,145,454) at 30 September 2011; and
d) £(19,990,358) at 5 July 2012.

What these figures suggest very clearly is that more than one-half of the eventual deficit on the Ramadan Loans was already present from the outset of the loans within TIL – which is not surprising given that they followed the financial crisis of 2008 and had been identified as problem debtors, in many cases representing re-financing of earlier unpaid debts. The increase in shortfalls in 2010 and 2011 reflects the continued application of normal monthly interest on the loans, with no evidence of material repayments – as is evident from the analysis within Appendices 6.1 – 6.15."

269. The question of how the court should approach the fixing of the contribution that might be ordered under section 213(2) of the Insolvency Act 1986, was considered by the Court of Appeal in the *Morphitis* decision to which I have already made reference in this judgement. Dealing with the exercise of the power to order a contribution, Chadwick LJ, said this at [53]:

"The power under section 213(2) is to order that persons knowingly party to the carrying on of the company's business with intent to defraud make "such contributions (if any) to the company's assets" as the court thinks proper. There must, as it seems to me, be some nexus between (i) the loss which has been caused to the company's creditors generally by the carrying on of the business in the manner which gives rise to the exercise of the power and (ii) the contribution which those knowingly party to the carrying on of the business in that manner should be ordered to make to the assets in which the company's creditors will share in the liquidation. An obvious case for contribution would be where the carrying on of the business with fraudulent intent had led to the misapplication, or misappropriation, of the company's assets. In such a case the appropriate order might be that those knowingly party to such misapplication or misappropriation contribute an amount equal to the value of assets misapplied or misappropriated. Another obvious case would be where the carrying on of the business with fraudulent intent had led to claims against the company by those defrauded. In such a case the appropriate order might be that those knowingly party to the conduct which had given rise to those claims in the liquidation contribute an amount equal to the amount by which the existence of those claims would otherwise diminish the assets available for distribution to creditors generally; that is to say an amount equal

> to the amount which has to be applied out of the assets available for distribution to satisfy those claims. In the present case there is nothing to suggest either (i) that the deception which the judge found to have been practised on Ramac led to the misapplication or misappropriation of the company's assets, or (ii) that the letter of 12 November 1993 led Ramac to make a claim in the liquidation that it would not otherwise have had. In my view there was no material on which the judge could have reached the conclusion that it was correct to order contribution of £17,500, or any other sum."

270. It seems right to me that the enquiry so far as it relates to an order under section 212(3) in respect of the fraudulent trading, should focus upon what led to the misapplication, or misappropriation, of the company's assets. The compensatory order should direct that those knowingly party to such misapplication or misappropriation contribute an amount equal to the value of assets misapplied or misappropriated. Adopting this reasoning, in my judgment the correct approach to arriving at the appropriate level of contribution, is to adopt the method of Mr Woodward when he arrives at the 2012 balance sheet deficiency attributable to the Restructured Ramadan Loans. The shortfall applicable at each balance sheet date was individually calculated as the lesser of the eventual shortfall and the net loan balance. The sum arrived at is £19,990,358.

271. In arriving at this sum I take account of the credit given for the amounts set out as recoveries in Schedule P to the Amended Particulars of Claim both in terms of property realisations and also amounts flowing subsequently from professional negligence action recoveries. I accept that nothing further could have been recovered from the asset managers to the Fund who were themselves in insolvent liquidation at the time of the appointment of the JLs. To try to place a value on what their liability might have been, if any, would be an exercise in speculation.

272. In this regard I place reliance on the evidence to the court given by the J-L, Mr Bouchier, who said:

> "A claim was made for professional negligence in respect of the Dover Street property but the settlement was eaten up by costs. Claims were made against Lorrels [Solicitors]. In respect of conveyancing solicitors, all claims were made that could be. I disagree with SN. We reviewed each and every loan and advanced a claim to the extent possible.
>
> Consideration was given and each loan looked at to see if development possible but there was already a Mortgagee in possession and also other security enforced…. No development funding was given for the Restructured Ramadan Loans. The borrowers were long in default and the properties were marketed over 4/5 mth period as is standard practice."

273. In my judgment the approach I have alighted upon is the just basis for the calculation of the contribution, rather than that provided by paragraph 99(a) of the Amended Particulars of Claim, which takes as its foundation the claim of the Fund as creditor. It is said that the increase in net deficiency in the estate from the wrongfully prepared 2009 accounts to the point of TIL entering administration was £69.9 million, it being £72.7 million at liquidation. There are to my mind too many cooperating factors giving rise to this value, as to persuade me that that it would not be right to base any order upon it. I am mindful of the need to identify a nexus between "*the loss which has been*

*caused to the company's creditors generally by the carrying on of the business in the manner which gives rise to the exercise of the power, and the contribution which those knowingly party to the carrying on of the business in that manner should be ordered to make to the assets in which the company's creditors will share in the liquidation*". To my mind that nexus becomes less obvious when the calculation is to be based upon what might be described as composite claims by the Fund which could very well include costs and losses which have not, so far as I am concerned, been properly particularised and evidenced certainly in a manner as would persuade me to base a contribution order upon it.

274. I have thus far dealt with the claim based upon fraudulent trading. At paragraph 101. *et seq*, of the Amended Particulars of Claim, the JLs also seek orders in respect of their claims alleging breach of duty on the part of the Respondents. It is pleaded that:

> "The Liquidators therefore seek orders pursuant to section 212(3) of the Insolvency Act 1986 compelling each of the Respondents to contribute such sum to the Company's assets by way of compensation in respect of their breaches of duty as the court thinks just.
>
> In respect of the breach of duty under section 172 of the Companies Act 2006, the Liquidators claim equitable compensation, alternatively damages, in respect of the loss caused to the Company by reason of the Company refinancing the Restructured Ramadan Loans. As regards that loss, paragraph 99(b) and 100 above are repeated."

275. It will be observed that these breach of duty claims seek relief in the alternative to such amount as may be ordered under section 213(2). In light of the order I propose to make in the fraudulent trading claim, I do not propose to address these claims at any length save to say that Mr Woodard's calculations upon which I have relied, seems to me to be an entirely sensible way of assessing the equitable compensation pursuant to s.172 of the Companies Act 1986, as should flow from the findings of breach that I have made.

276. On behalf of SN, Mr Young made a submission to me that I ought to exercise the power available to me under section 1157 of the Companies Act 2006, which provides the court with power to grant relief in certain instances:

> " (1) If in proceedings for negligence, default, breach of duty or breach of trust against–
>
> (a) an officer of a company, or
>
> (b) a person employed by a company as auditor (whether he is or is not an officer of the company),
>
> it appears to the court hearing the case that the officer or person is or may be liable but that he acted honestly and reasonably, and that having regard to all the circumstances of the case (including those connected with his appointment) he

ought fairly to be excused, the court may relieve him, either wholly or in part, from his liability on such terms as it thinks fit."

277. I regret to say that this provision which has most obvious relevance to a breach of duty involving strict liability, has no relevance in this case given the findings I have made in regard to SN and the particular nature of his conduct.

278. Nor do I see anything in the argument raised by Mr Young that investors in the Fund are not out of pocket as they have been compensated elsewhere, thus extinguishing the liability of the Respondents. Whatever might be the case with the compensation or other recoveries received and applied for the benefit of the Fund or the investors in it, I must take cognisance of the claim made by the Fund as a creditor of TIL. Clear evidence of the amount claimed has been put before the court by the JLs. I am entitled to make a finding based upon that evidence.

279. Mr Young also made reference to an agreement with the fund manager in June 2012 that on some basis capped the amounts due to the Fund to only £12 million from future profits of TIL. I am not persuaded that such an agreement, if entered into, would have been binding upon the Fund and in any case, on the evidence of the JLs, which I accept, it has not operated so as to restrict the claims made on the estate of TIL.

*Conclusions*

280. In all the circumstances and by reason of the findings I have made in this judgment, I will make the relevant declarations sought by the JLs and also make an order for a contribution in the value I have stipulated.

281. I will hear counsel on the form of the order and any other consequential matters although it is to be hoped that an agreed draft can be submitted to the court.