



Neutral Citation Number: [2023] EWHC 2284 (Ch)

CR 2020 000962

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**INSOLVENCY AND COMPANIES LIST**

**IN THE MATTER OF PURE ZANZIBAR LIMITED**  
**AND IN THE MATTER OF THE COMPANY DIRECTORS DISQUALIFICATION**  
**ACT 1986**

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

Date: 20/09/2023

**Before :**

**ICC JUDGE BARBER**

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**Between :**

**THE SECRETARY OF STATE FOR BUSINESS AND TRADE**

**Claimant**

- and -

**MR TARQUIN CHARLES SPENCER BARNSBY**

**Defendant**

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**Mr Raj Arumugam** (instructed by **The Insolvency Service**) for the **Claimant**  
**The Defendant** appeared in person

Hearing dates 7-9 June 2023  
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**Approved Judgment**

This judgment was handed down remotely by email and MS Teams. It will also be sent to The National Archives for publication. The date and time for hand-down is 9.30 a.m. on 20 September 2023.

## ICC Judge Barber

1. This is the hearing of the second part of the Secretary of State's claim issued on 7 February 2020 against the Defendant, Mr Barnsby. By that claim, the Secretary of State ('SoS') sought a disqualification order against the Defendant pursuant to section 6 of the Company Directors' Disqualification Act 1986 ('CDDA') and a compensation order under section 15A CDDA.
2. On 11 June 2021, the Court directed that the claim for a compensation order be heard after the disqualification claim had been determined. The trial of the disqualification claim, at which the Defendant was very ably represented by Mr Usman Roohani of Counsel, was heard over four days, with judgment handed down on 29 April 2022. The Court made a disqualification order against the Defendant for a period of seven years and gave directions for determination of the compensation application.
3. This is the second claim for a compensation order brought by the SoS since sections 15A and 15B were introduced into CDDA 1986 with effect from 1 October 2015. The first case was *Re Noble Vintners Ltd* [2019] EWHC 2806 (Ch), in which this Court granted the compensation order sought and gave helpful guidance on these new provisions.

### **Evidence**

4. The Court gave permission for both the SoS and the Defendant to file any further evidence upon which they intended to rely in connection with the compensation application. In the event, neither party has considered it necessary to do so.
5. The witness evidence before the Court (now read subject to my findings in the disqualification claim) therefore remains the same as that before the court at the time of the trial of that claim, comprising:

(1) For the SoS, the first and second affidavits of David Elliott sworn on 28 January 2020 and 16 September 2020 respectively;

(2) For the Defendant, the Defendant's affidavit sworn on April 2020 and his oral testimony at the disqualification trial.

### **Background**

6. The background to this matter is set out at [12] to [22] of my earlier judgment on the disqualification claim, reported at [2022] EWHC 971 (Ch) ('the 2022 judgment').
7. In summary, Pure Zanzibar Limited ('the Company') was incorporated on 14 August 2006 and commenced trading in or about March 2007. The Company traded as a travel operator, providing safari holidays in Africa. The Defendant was the sole director of the Company and held 80% of its shares.
8. Between 31 March 2017 and 4 February 2020, the Company was the holder of an Air Travel Organiser's Licence ('ATOL'), issued by the Civil Aviation Authority (the 'CAA').

Approved Judgment

9. ATOL is a statutory scheme which is operated by the CAA (a statutory body) pursuant to (inter alia) the Civil Aviation Act 1982 ('the 1982 Act') and the Civil Aviation (Air Travel Organisers' Licensing) Regulations 2012 (SI 2012/1017) ('the 2012 Regulations').
10. The statutory framework governing the ATOL regime is summarised at paragraphs 24 to 31 of the 2022 judgment.
11. The CAA's website explains that ATOL:
  - 'is a UK financial protection scheme and it protects most air package holidays sold by travel businesses that are based in the UK. The scheme also applies to some flight bookings ...
  - ATOL was first introduced in 1973, as the popularity of overseas holidays grew. After a number of high-profile travel business failures left people stranded overseas the UK Government realised consumers required protection when their travel providers fell into difficulties. ATOL currently protects around 20 million holidaymakers and travellers each year.
  - If a travel business with an ATOL ceases trading, the ATOL scheme protects consumers who had booked holidays with the firm. It will support consumers currently abroad and provide financial reimbursement for the cost of replacing parts of an ATOL protected package.
  - The scheme is designed to reassure consumers that their money is safe, and will provide assistance in the event of a travel business failure'.
12. Regulation 69 of the 2012 Regulations makes it a criminal offence for a person (in this case the Company) to undertake certain activities without having a valid ATOL in place.
13. The Company's ATOL expired on 31 March 2017. The Defendant failed to renew it notwithstanding that he was expressly alerted to the need to renew by the CAA in several emails and was expressly warned of the consequences if he failed to do so.
14. From 1 April 2017, the Company illegally took new bookings and payments from four customers, Brian Hladnik, Dr Tonko Mardesic, Steve Bramall and Robert Orr, in each case in respect of holidays which should have been ATOL protected. Each of the booking forms included the ATOL logo and the Company's old ATOL number, suggesting that the Company was ATOL licensed.
15. The Company also failed to refund a fifth customer, Mark Welfare, in respect of a deposit which he had paid in February 2017 for a holiday which, following the expiry of its ATOL, the Company could no longer lawfully provide. The Company took a further payment from Mr Welfare in respect of that holiday on 13 October 2017, the same month in which the Company approached an Insolvency Practitioner for

insolvency advice and very shortly before a decision was taken to place the Company into creditors' voluntary liquidation.

16. Brian Hladnik, Dr Tonko Mardesic, Steve Bramall, Robert Orr and Mark Welfare shall collectively be referred to in this judgment as 'the Customers'.
17. The Company entered creditors' voluntary liquidation on 19 December 2017 with an estimated deficiency as regards creditors of £517,638. None of the Customers received any refund of the monies they paid. Nor did they receive the holidays which they paid for.
18. The Company was dissolved on 11 January 2020. No dividends were declared. According to the Liquidator's Final Report to Creditors dated 5 July 2019, unsecured creditors' claims received totalled £352,780, with total receipts in the liquidation standing at £224.14.
19. The grounds of unfitness relied upon by the SoS against the Defendant are summarised at paragraph 9 of Mr Elliott's first affidavit. In broad terms, it was alleged that between 1 April 2017 and 19 December 2017:
  - (1) the Defendant caused or allowed the Company to continue to sell holidays and accept from customers payments for holidays that were legally required to be protected by an ATOL at a time when the Company's ATOL had expired;
  - (2) the Defendant caused or allowed the Company to continue to display the ATOL symbol and to make reference to ATOL protection on the Company's various websites and promotional material, notwithstanding that the CAA had expressly advised the Defendant of the need to stop doing so; and
  - (3) the Defendant caused or allowed the Company to fail to refund a deposit to a customer as required by the CAA upon the ATOL expiration, again, notwithstanding that the CAA had expressly advised the Defendant of the need to do so.
20. These allegations were substantially made out at trial.

### **The Compensation Order Regime**

21. Sections 15A to C of the CDDA 1986 were introduced into the Act by section 110 of the Small Business, Enterprise and Employment Act 2015 ('the 2015 Act'). The origins of section 110 are helpfully summarised in the Court's judgment in *Noble Vintners*. In the interests of brevity, I will not repeat them here.
22. The 2015 Act received Royal Assent on 26 March 2015. The explanatory Notes to the 2015 Act note (in relation to Part 9 of the 2015 Act generally):

'99. Part 9 ... create[s] a new way in which creditors may receive financial redress for loss suffered through director misconduct ...'
23. The Explanatory Notes also address section 110 specifically, as follows:

'Compensation awards

Section 110: Compensation orders and undertakings

698. This section gives the court a new power to make a compensation order against a person, on the application of the Secretary of State, where the conduct for which that person has been disqualified has caused loss to one or more creditors of an insolvent company of which they have at any time been a director.’

**Sections 15A and 15B CDDA 1986**

24. Insofar as material, Sections 15A and 15B CDDA 1986 provide as follows:

**‘15A Compensation orders and undertakings**

(1) The court may make a compensation order against a person on the application of the Secretary of State if it is satisfied that the conditions mentioned in subsection (3) are met.

(2) ...

(3) The conditions are that –

(a) the person is subject to a disqualification order ... under this Act, and

(b) conduct for which the person is subject to the order ... has caused loss to one or more creditors of an insolvent company ... of which the person has at any time been a director.

(4) An “insolvent company” is a company that is or has been insolvent and a company becomes insolvent if –

(a) the company goes into liquidation at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the winding up...

(5) The Secretary of State may apply for a compensation order at any time before the end of the period of two years beginning with the date on which the disqualification order referred to in paragraph (a) of subsection (3) was made ...

(6) ....

(7) In this section and sections 15B and 15C “the court” means-

(a) in a case where a disqualification order has been made, the court that made the order..’

**‘s.15B Amounts payable under compensation orders and undertakings**

(1) A compensation order is an order requiring the person against whom it is made to pay an amount specified in the order

–

(a) to the Secretary of State for the benefit of –

(i) a creditor or creditors specified in the order;

(ii) a class or classes of creditor so specified;

(b) as a contribution to the assets of a company so specified.

(2) ...

(3) When specifying an amount the court ... must in particular have regard to –

(a) the amount of the loss caused;

(b) the nature of the conduct mentioned in section 15A(3)(b);

(c) whether the person has made any other financial contribution in recompense for the conduct (whether under a statutory provision or otherwise).

(4) ...

(5) An amount payable under a compensation order ... is provable as a bankruptcy debt’.

25. On behalf of the SoS, Mr Arumugam of Counsel submitted that:

(1) The power to make a compensation order under section 15A is a new cause of action; and

(2) The purpose of the power is essentially twofold:

(a) first, to enable creditors to receive financial compensation from a director where the conduct for which the director was disqualified has caused identifiable loss to such creditors not adequately compensated through the insolvency process - thereby helping to protect victims of wrongdoing; and

(b) second, to help ‘to remove the perception that wrongdoers are not held to account and [to] improve confidence in the insolvency regime’

(Hansard, 4 November 2014, Public Bill Committee (13<sup>th</sup> sitting), Column 437-438).

26. I accept these submissions. As put by ICC Judge Prentis in Re Noble Vintners at [19]:

‘So the intention was to enhance in the public interest the protective aspect of the disqualification regime by giving monetary redress to creditors financially affected by the misconduct, thereby giving the regime as a whole more ‘bite’, actual and perceived; and also to fill gaps in the exploitation of IA86 remedies...’

### **Issues for consideration**

27. Mr Arumugam invited the court to consider: (a) the conduct relied upon for the making of a compensation order; (b) whether any such conduct caused loss to any creditors (and if so which creditors and in what sum); and (c) looking at all the circumstances of this case, whether it is appropriate for the court in the exercise of its discretion to make a compensation order.
28. These issues are addressed below.

### **The conduct relied upon by the SoS**

29. Mr Arumugam by his skeleton argument relied upon a rather lengthy list of findings set out in the 2022 judgment. In the interests of brevity, I will not repeat them all here. For present purposes, in my judgment the following findings and conclusions in the 2022 judgment will suffice:
  - (1) The Company made substantial breaches of the ATOL legislation as set out at [33] to [38] of the 2022 judgment in respect of the Customers. It was a criminal offence for the Company to undertake such activities following expiry of its ATOL;
  - (2) The Defendant instructed the Company’s staff, including Ms Buckley, on or shortly after 1 April 2017 that the Company could continue to take holiday bookings that included flights notwithstanding the expiry of its ATOL [159];
  - (3) In instructing the Company’s staff on or shortly after 1 April 2017 that the Company could continue to take holiday bookings that included flights notwithstanding the expiry of its ATOL, the Defendant *caused* material and continuing contraventions by the Company of Regulations 9(b) and 17(1) of the 2012 Regulations over the period 1 April 2017 to 19 December 2017 [170], [178];
  - (4) The Defendant knew that the Company was continuing to take bookings which should have been protected by ATOL after the Company’s ATOL had expired [160];
  - (5) The Defendant made a conscious decision *not* to refund Mr Welfare’s deposit following expiry of the Company’s ATOL, notwithstanding instructions from the CAA that he should do so. The Defendant’s conduct in this respect *caused* a continuing material contravention by the Company of Regulations 9 and 26(1)(b) over the period 1 April 2017 to 19 December 2017 [172], [180];
  - (6) The Defendant did not at any material time instruct the Company’s staff *to stop* booking holidays that included flights. He took no reasonable steps to monitor the extremely modest number of bookings taken by the Company after expiry of its ATOL in order to ensure that no licensable bookings were being taken, or to cancel any such bookings which were taken and ensure that customers were refunded [167];

(7) The Defendant’s conduct (i) in failing to instruct the Company’s staff at any material time after the expiry of the Company’s ATOL that they could not accept holiday bookings which included flights, (ii) in failing to take reasonable steps to monitor the bookings taken by the Company after expiry of its ATOL in order to ensure that no licensable bookings were being taken, and (iii) in failing to cancel any such bookings which were taken and refund the customers, *allowed* material and continuing contraventions by the Company of Regulations 9(b) and 17(1) of the 2012 Regulations over the period 1 April 2017 to 19 December 2017 [171], [179];

(8) The Defendant made a conscious, informed decision not to remove the ATOL logo from any of the Company’s websites for the period 1 April 2017 to 4 May 2017 (at the earliest). His conduct in this respect *caused* material contraventions by the Company of Regulation 16(b)(i) of the 2012 Regulations over that period [175];

(9) The Defendant failed to take reasonable steps to ensure the removal of all references to ATOL from the Company’s websites or to shut down such websites, with the result that references to ATOL remained on at least one of the Company’s websites until December 2017. His conduct in these respects *allowed* material contraventions by the Company of Regulation 16(b)(i) from 4 May 2017 to 19 December 2017 [176];

(10) The Defendant failed at any material time from 1 April 2017 onwards to instruct the Company’s staff to remove the ATOL logo from their own email signatures or to adopt a system of using only the updated booking form precedents when booking holidays. He also failed to check that they had done so. His conduct in these respects *allowed* material contraventions by the Company of Regulation 16(b)(i) from 1 April 2017 onwards [138], [177];

(11) The Defendant’s most serious failings were in causing and allowing material and continuing contraventions by the Company of Regulations 9(b) and 17(1) of the 2012 Regulations over the period 1 April 2017 to 19 December 2017: [183]. Such conduct “was woefully reckless and incompetent conduct on the part of a sole director of a Company operating in such a highly regulated framework.... It could have caused consumers further loss had the Company not ceased to trade. Moreover, it was a criminal offence for the Company to undertake such activities as it did over the relevant period. The impact of these failings was exacerbated by the continued use of the ATOL logo and attendant ATOL references, which misled consumers as to the legal protection they would receive if they purchased or continued with holiday bookings arranged with the Company...” [183].

**Did any such conduct cause loss to any creditors, and if so which creditors and in what sum?**

30. The loss which the SoS seeks to have compensated was set out in a table at paragraph 107 of Mr Elliott’s first affidavit. It relates solely to sums paid by the Customers and totals £88,674, calculated as follows:

Brian Hladnik:           £24,860

Dr Mardesic:             £12,689



**Approved Judgment**

Robert Orr:	£19,665
Steve Bramall:	£12,980
Mark Welfare:	£18,480
Total:	£88,674.

31. It was conceded at the compensation hearing that £6215 should be deducted from the sum of £24,860 said to represent the loss suffered by Mr Hladnik, as a result of a credit card refund of £6215 relating to Mr Hladnik's booking which had not been accounted for at paragraph 107 of Mr Elliott's first affidavit. On the Claimant's calculations, this brought the total down to £82,459. In my judgment a further adjustment is required in relation to the figure given for Dr Mardesic. Dr Mardesic himself confirmed in correspondence with the Insolvency Service in evidence before me that his loss was £11,635, not £12,689. The lower figure was also mentioned at least once in the booking documentation, although the higher figure is reflected arithmetically in the Company's bank statements. An objection was taken by the Defendant's Counsel as to quantum in respect of Dr Mardesic's booking at the time of the disqualification trial, when, following discussions, it was agreed between Counsel that the figure should be treated as standing at £11,635 rather than £12,689: see paragraph 33 of the 2022 judgment. In my judgment the Claimant should not be permitted to withdraw that concession now, particularly in light of the correspondence in evidence from Dr Mardesic himself stating that £11,635 was his loss. The figure should therefore be treated as £11,635 rather than £12,689. Taking into account that adjustment, the total sum sought by the Claimant is £81,405 plus interest in respect of the loss alleged to have been suffered by the Customers, calculated as follows:

Brian Hladnik:	£18,645
Dr Mardesic:	£11,635
Robert Orr:	£19,665
Steve Bramall:	£12,980
Mark Welfare:	£18,480
Total:	£81,405.

**Causation**

32. The SoS maintains that there is a direct link between the Defendant's conduct and the losses suffered by the Customers: Elliott (1), para 118.
33. On the test for causation, Mr Arumugam referred me to *Re Noble Vintners* at [40]. To give some context to the observations of the court in *Re Noble* at [40], I think it would be instructive to set out a fuller extract, starting at [24]:

'24. Radically, liability is based not on loss to the relevant company but on loss to its individual creditors. That removes any direct correlation between this regime and the remedies

available under the IA 86. Potentially, it also enables recoveries to be made in cases where there is wrongdoing which causes no loss to the company...

25. This is therefore a new, freestanding, regime, and must be interpreted as such.

26. It is also a single regime designed in the public interest to cover the entirety of the conduct for which a director might be disqualified. That points, so far as is legitimate, to the most flexible possible interpretation.

27. Most of the Act's bases for disqualification are covered by its s.12C, which engages the Sch.1 list of "matters to be taken into account in all cases" and "additional matters to be taken into account where person is or has been a director". These are no more than factors which the court is bound to consider, but they include not just responsibility for breach of legislative requirements, misfeasance, and breach of fiduciary duty, but also the more open-ended responsibility for the causes of insolvency. The compensation regime must therefore cater not just for breaches of duty, but for conduct which, while falling short of or outside of a breach, is nevertheless unfit or otherwise a ground for disqualification.

28. While, no doubt, most applications for compensation will be following s.6 disqualifications, the pre-condition to the exercise of discretion contained in s.15A(3)(a) requires only a "disqualification order" under any section.

29. The second pre-condition is that at section 15A(3)(b). Its words and phrases require some examination.

30. "Conduct for which the person is subject to the order" must refer only to such parts of the conduct as have caused loss. The regime could not sensibly be disapplied just because certain elements of the misconduct had not been causative of loss.

31. The misconduct must have "caused loss to one or more creditors of an insolvent company of which the person has at any time been a director".....

.....

34. "Loss" is undefined. As by s.15B a compensation order is bound to be in "an amount specified", the loss must be measurable in monetary terms. There seems no reason in policy why, so long as that condition is met, any other restrictions should be imposed on the nature of the loss (although no doubt the court would not exercise its discretion to award compensation were the loss founded on illegality).

35. As a matter of construction, the loss must also be as a creditor of the relevant insolvent company ...

36. However, that does not mean that the compensatable loss and the loss for which the person is a creditor of the insolvent company is the same. That could not be so, because this regime creates the new hypothesised cause of action between the disqualified director and the creditor. By way of practical example, in a detrimental trading to the Crown case its claim against the insolvent company is for the entirety of the tax debt. The misconduct, though, is based on discriminatory treatment. So a compensation order based on that could extend only to the difference between what the Crown actually received over the period of discrimination and what without the misconduct it ought to have received over that period...

37. The loss must also have been caused by the misconduct. The Act does not address directly what it means by causation. However, the unqualified words “caused loss” indicate that the conduct need not be, for example, the predominant cause of loss: if that was required, it could have been specified. By contrast, mere “but for” causality would fail to preserve a sufficiently meaningful relationship between the misconduct and the loss in many misconduct situations (think, for example, of the regular allegation of failure to keep proper accounting records), although it might be a useful device for excluding certain aspects of loss.

38. In locating the middle road I have found assistance in a dictum of Lord Browne-Wilkinson’s in *Target Holdings Ltd v Redferns* [1996] A.C. 421 at 439. Albeit in a different context he said that:

“Equitable compensation for breach of trust is designed to achieve exactly what the word compensation suggests: to make good a loss in fact suffered by the beneficiaries and which, using hindsight and commonsense, can be seen to have been caused by the breach”.

39. Lord Browne-Wilkinson was there assisted by the minority judgment of McLachlin J in *Canson Enterprises Ltd v Boughton & Co* (1991) 85 D.L.R. (4<sup>th</sup>) 129, discussed again in the Supreme Court in *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] UKSC 58... One other element of McLachlin’ J’s judgment was that “Foreseeability is not a concern in assessing compensation”.

40. An amalgam of Lord Browne-Wilkinson’s description of what “the word compensation suggests” and McLachlin’s removal of the concept of foreseeability seems appropriate to the statutory scheme of compensation here. So, using hindsight

and commonsense but without considering foreseeability the court must be satisfied that the misconduct has caused loss within the meaning of the Act to a creditor of a relevant insolvent company. It follows that the loss caused will be assessed as at the date of the final hearing of the compensation order claim, on the basis of the fullest-available evidence. Using hindsight is standard practice in assessing loss in IA 86 claims: As Lord Scott of Foscote said in the transaction at an undervalue case of Phillips (Liquidator of AJ Beckhor & Co) v Brewin Dolphin Bell Lawrie Ltd (formerly Brewin Dolphin & Co Ltd) [2001 UKHL 2... “reality should... be given precedence over speculation”. Should the application of that test cause unfairness because, say, although the loss was caused by the misconduct, it was but one of a number of causes, then that can be dealt with under the court’s discretion either at the s.15A stage, or at the s.15B stage.

41. Section 15B contains a discretion extending both to the amount of any compensation order and for whose benefit is payable.

42. As to amount, the s.15B(3) matters to which the court must have particular regard - the amount of the loss caused, the nature of the misconduct, and what other financial contribution the person has made in recompense for the misconduct- can be read, although non-exclusive, as a sensible order of steps by which to consider quantification.

43. The amount of the loss is the s.15A(3)(b) figure.

44. The nature of the misconduct would extend to consideration of relative responsibility between multiple directors. It could also, as Mr Buckley suggested, permit the court to balance the claimed loss against the nature of the conduct, for example where relatively minor yet culpable negligence had caused vast losses.

45. As to other financial contribution, it will be seen that this is no more than a factor to which the court is obliged to have regard. There is not, and given the difference between the loss-sufferers in this regime and the insolvency regime there could never be, any express provision for setting off one against the other. As I say, the compensation order regime has created a new, separate, cause of action....’

34. Re Noble Vintners was an undefended case involving the misappropriation of funds totalling £559,484 from a company by its sole director, Mr Eagling. Mr Eagling was found to be solely responsible for the misappropriations. He was also found solely to have benefited from the misappropriations: Noble Vintners, [63], [64]. It is perhaps unsurprising in that context, when addressing a case involving a director in flagrant breach of his fiduciary duties, that ICC Judge Prentis sought inspiration from

judgments addressing principles of equitable compensation, such as that of Lord Browne-Wilkinson in *Target Holdings Ltd v Redfern* [1996] A.C. 421, *McLachlin J* in *Canson Enterprises* and those of the Supreme Court in *AIB Group* [2014] UKSC 58, when arriving at the conclusion at [40] in *Noble* that:

‘using hindsight and commonsense but without considering foreseeability the court must be satisfied that the misconduct has caused loss within the meaning of the Act to a creditor of a relevant insolvent company’.

35. On the facts of *Re Noble*, it is entirely unsurprising that the court adopted such an approach. A question does arise, however, as to whether the same approach on causation is appropriate in all directors’ disqualification compensation cases, regardless of the nature of the conduct giving rise to the disqualification order. Where, for example, the ground of unfitness is based on negligence/s.174 CA 2006 or, to use a phrase often employed in disqualification cases, ‘incompetence to a marked degree’, it is difficult to see why, as a matter of principle, foreseeability should not play a role when considering the issue of causation. In this regard I note that the editors of *Mithani on Directors Disqualification* consider that common law principles of remoteness may have a role to play in certain cases.
36. Naturally I am mindful of the fact that I have not had the benefit of full legal submissions from both sides on the issue of causation. Mr Arumugam’s opening position was that I should simply adopt the same approach on causation as that adopted in *Re Noble*. Given that the Defendant was unrepresented however, at my invitation Mr Arumugam helpfully explored alternative approaches on causation during the course of submissions.
37. Having done so, Mr Arumugam’s closing position was that a close examination of the different forms of causation did not make any difference on the facts of this case. He submitted that given the detailed findings of this court set out in the 2022 judgment, it was clear that the loss suffered by the Customers had only one cause; the ‘cold reality of this case’, as he put it, was that ‘it was entirely down to [the Defendant] and his conduct’.
38. Ultimately, on the facts of this case, I have come to the conclusion that Mr Arumugam’s closing position on causation is correct. In this case, whether causation is determined ‘using hindsight and commonsense, but without considering foreseeability’ (*Re Noble* at [40]), or taking foreseeability and other common law principles of remoteness into account, on the evidence before me, the result is the same.
39. Even if the reasonable foreseeability test is applied, the loss suffered by the Customers was plainly a reasonably foreseeable consequence of the Defendant’s conduct. In my judgment such conduct cannot be treated as simply giving the Customers *the opportunity to incur loss*, as in (by way of analogy) *Galoo Ltd and others v Bright Grahame Murray (a firm)* [1994] 2 BCLC 492, the reason being that the ATOL framework was designed to protect against the very loss incurred. In my judgment it is this factor which (by analogy) takes the case out of the bounds of *Galoo* and (again by analogy) firmly into *Sasea Finance Ltd (in liquidation) v KPMG (formerly KPMG Peat Marwick McLintock (a firm))* [2000] 1 BCLC 236.

Approved Judgment

40. For the sake of completeness, I would add that no persuasive case of contributory negligence was articulated or made out on the evidence.
41. It follows that even if common law principles of remoteness were to be applied in this case, the result, on the evidence before the court, would be the same.
42. Accordingly, whilst there may be other cases in the future which warrant fuller debate on whether the same approach on causation is appropriate in all directors' disqualification compensation cases, regardless of the nature of the conduct giving rise to the disqualification order, a detailed interrogation of this issue is unnecessary in this case.
43. I should however address one or two factual points raised by the Defendant on the issue of causation.
44. The first point related to the impact of the Company's continued use of the ATOL logo and the continued references to the ATOL scheme on the Company's websites following expiry of the Company's ATOL.
45. By paragraph [141] of the 2022 judgment, the court had accepted the accounts of Mr Hladnik, Dr Mardesic, Mr Orr, Mr Brammall and Mr Welfare summarised at paragraphs 83, 84, 85, 86, 93 and 96 of Mr Elliott's First Affidavit and had concluded:

'From those accounts, it is clear that Mr Hladnik, Mr Orr, Mr Brammall and Mr Welfare were misled. Dr Mardesic was unaware of the ATOL scheme.'
46. The Defendant argued that the Claimant had not addressed the question of reliance in sufficient detail in the evidence. He argued that the Claimant 'should have gone further to satisfy the Court that these five individuals (i) did rely on the representation that their bookings would be ATOL-protected (rather than simply noting that ATOL was mentioned) and (ii) would not, in consequence, have booked their holidays otherwise.' This, he claimed, was 'a central issue on causation'.
47. The Defendant also argued that as Dr Mardesic had been found by the Court to be completely unaware of the ATOL scheme, the Claimant's case in respect of his loss, at the very least, should fail.
48. The Defendant's attempt to attack the Claimant's compensation application, insofar as it rested on conduct relating to the continued use of the ATOL logo, reference to ATOL on one or more websites and the Customers' reliance (or lack of reliance) on the same, was ultimately academic, however. It failed to meet the other free-standing limb of the Claimant's case against the Defendant, made out at the disqualification trial, that following expiry of the ATOL, the Defendant had caused the Company unlawfully to continue to take bookings and to refrain from refunding existing bookings, such as that of Mr Welfare, which could no longer be performed. Any attempt to attack the Claimant's case on causation in relation to continued use of the ATOL logo had no effect on this free-standing limb of the Claimant's case and the court's findings in that regard, including those listed at paragraph 29(2), (3), (4), (6), (7) and (11) above.

**Approved Judgment**

49. The Defendant also asserted that he believed that ‘at least some’ of the Customers may have obtained some recompense via individually held travel insurance policies and that at least one individual (Mr Welfare) may have obtained a measure of protection ‘from the ATOL scheme itself.’
50. The Defendant filed no evidence to support these contentions, however, notwithstanding having been given the opportunity to do so by Order dated 29 April 2022.
51. The Claimant’s evidence included email correspondence with each of the Customers in March/April 2019, over a year after the Company entered into liquidation. Each of the five Customers was sent an identical list of questions by the Insolvency Service by email on 21 March 2019. The Insolvency Service emails of 21 March 2019 and the emailed responses of all five Customers, sent (variously) in March/April 2019, were all included in the exhibit to Mr Elliott’s first affidavit. Question 6 of the Insolvency Service email of 21 March 2019 in each case asked ‘Did you receive any refunds from either the company, credit card provider, travel insurance, or anywhere else? If so, please let me know the amount of the refund.’
52. Save for Mr and Mrs Hladnik, who by their emailed response confirmed that one passenger in their group received the cost of his holiday (£6215) from his insurance company (the other passenger’s travel insurance not covering insolvency), all five Customers confirmed that they had received no refund from any source. Some referenced attempts to claim back from travel insurers which had been unsuccessful, on grounds comprising or including a lack of cover in the event of insolvency (Mr Hladnik) and a lack of cover where a holiday was booked through a travel agency (Mr Bramall). Others referenced unsuccessful attempts to recover the sums paid from their banks.
53. If the Defendant wished to challenge such evidence, or to contend that any of the Customers received (or became entitled to) refunds from any source at some time after the email exchange of March/April 2019, it was open to him to do so by filing evidence in relation to the compensation application in accordance with the Order of 29 April 2022. Having failed to do so, in my judgment he cannot sensibly invite the Court now to proceed on the basis of his entirely unevicenced (and somewhat self-serving) beliefs that ‘at least some’ of the Customers may have obtained or be entitled to some recompense, whether via individually held travel insurance policies or, in the case of Mr Welfare, through the ATOL scheme itself. This was little more than wishful thinking on the part of the Defendant.
54. In the absence of any evidence controverting that of the Claimant on this point, this court will proceed on the footing that in relation to the sums listed at paragraph 107 of Mr Elliot’s first affidavit, none of the Customers have received or are entitled to a refund from any source save for the sum of £6215 confirmed by the Hladniks.
55. No distributions to unsecured creditors were made within the liquidation and the Company has now been dissolved.

**Conclusions on causation**

**Approved Judgment**

56. On the evidence before me, considered in light of the findings and conclusions set out in the 2022 judgment, I am satisfied that conduct for which the Defendant is subject to the disqualification order has caused loss to each of the Customers: s15A(3)(b).
57. Relatively few licensable bookings were taken after 31 March 2017 and the only consumers who suffered loss were the Customers.
58. Trade creditors fall into a different category. As rightly noted by Mr Arumugam, the ATOL regime is not designed to protect trade creditors; the principal target for the ATOL regulations are consumers. The conduct for which the Defendant is subject to the disqualification order did not cause loss to trade creditors.

**Quantum**

59. In my judgment the amount of loss caused to each of the Customers is plain in this case. In the case of Mr Hladnik, Dr Mardesic, Mr Orr and Mr Bramall, it is the sum of money that each such Customer paid the Company after 31 March 2017, which the Defendant knew the Company should not be accepting after 31 March 2017 without a current ATOL licence (in Mr Hladnik's case net of the refund of £6215). These Customers had no reason to transfer money to the Company other than to pay for holidays which, given their timing, were prohibited by ATOL regulations. In the case of the fifth Customer, Mr Welfare, his loss is the deposit which he paid the Company prior to 31 March 2017 which the Defendant knew should have been refunded on expiry of the Company's ATOL, together with the further sum which Mr Welfare paid shortly before the Company entered liquidation.
60. The Defendant has made no financial contribution in recompense for his conduct.
61. On the evidence before me, the losses are accordingly as follows:

Brian Hladnik:	£18,645
Dr Mardesic:	£11,635
Robert Orr:	£19,665
Steve Bramall:	£12,980
Mark Welfare:	£18,480
Total:	£81,405

**Discretion**

62. Mr Arumugam submitted that looking at the matter in the round, given (a) the conduct in this case; (b) the fact that there was no prospect that any recoveries would be made for the Company's creditors from other sources; and (c) the fact that there was no prejudice to the general body of creditors, this was precisely the sort of situation to which the compensation order regime was intended to apply.
63. Mr Arumugam argued that directors should expect to be saddled with a compensation order in such circumstances, particularly when operating in a regulated industry. He



submitted that a compensation order in this case would appropriately serve the statutory purpose of reinforcing the disqualification regime.

64. The Defendant asked the court to take into account certain factors raised in mitigation on his behalf in the context of the disqualification trial, as summarised at paragraph [206] of the 2022 judgment. In summary, these included the following:
- (1) This was a very well-intentioned project from its inception. The Company had functioned successfully for a number of years until hit by the Ebola pandemic and the Brexit Referendum. The Defendant was already facing a number of pressures as a result of these two factors in the run-up to the planned ATOL renewal on 31 March 2017.
  - (2) The Company was small and the Defendant had little management support. A situation over ATOL renewal, which the Defendant initially hoped could be resolved quickly, rapidly developed into something that could not.
  - (3) The Defendant acted honestly, albeit recklessly and incompetently to a marked degree.
  - (4) This was not a case in which the Defendant was motivated by personal gain. Over the course of 2017, the Defendant withdrew minimal sums from the Company, hoping to keep it afloat.
  - (5) Historically both the Defendant and other members of his family had invested their own personal funds into the Company. Those funds have now been lost.
  - (6) The Defendant also remains personally liable as joint guarantor (with Ms Buckley) for the Company's overdraft of approximately £20,000.
65. The Defendant told the court that the entire project has been a 'catastrophic disaster' for him on a personal level, for which he felt that he had 'paid, and continue[d] to pay, a heavy price'.
66. The Defendant also submitted that the compensation regime should not be used in cases of negligence but only in cases of fraud. Pausing there, I reject that submission. It was clearly the intention of parliament that the compensation order regime would cover cases of negligence or recklessness causing identifiable loss as well. This is also clear from the statutory provisions themselves.
67. The Defendant also addressed me at some length on his financial circumstances. He said that he had no assets of any significance and was on a low income. He said that he could not afford to pay a large compensation award.
68. Shortly before the hearing, the Defendant had made an open offer to the Claimant (in full and final settlement of all matters including costs) of the sum of £10,000, under cover of correspondence from his solicitors which warned that if the offer was not accepted, bankruptcy would inevitably follow. The Claimant had rejected that offer. The Defendant contended that he had done all that he could and that it would be disproportionate to grant a compensation award against him. He maintained that if everything he owned was now sold, it would not reach £10,000.

Approved Judgment

69. Mr Arumugam maintained that the Defendant's claimed impecuniosity and the open 'global' offer of £10,000 should be viewed with extreme caution. The global offer of £10,000 was inclusive of costs, and the Claimant's costs of themselves stood at over £17,000; the sum offered was in context derisory and would not benefit the Customers.
70. Mr Arumugam also submitted that it should not be treated as a valid defence to a compensation order for a director to say that he or she will enter bankruptcy if a compensation order is made. He argued that enforcement of the compensation order (and any bankruptcy application or petition) are entirely separate matters to the principle in issue in this case, which is whether the Defendant should be ordered to pay compensation to the Customers.
71. Mr Arumugam observed that under section 15B(5), a compensation order is provable as a bankruptcy debt. He argued that, given the presence of that provision, the suggestion that a compensation order might tip a Defendant into bankruptcy could not be an outright defence, as the legislation of itself envisaged the possibility that a defendant director could go bankrupt.
72. Mr Arumugam also argued that even if the Defendant became bankrupt, he could still be liable to contribute via an income payments order, dependent on income. In this regard he noted that the Defendant is relatively young and has a job.
73. Mr Arumugam observed that whilst, in his 2020 affidavit, the Defendant had stated that he earned "a nominal monthly income of around £400-£600", from "wherever possible, freelancing work (website design) and gardening jobs", he was now in part-time employment with his father's company, Futures for Children Ltd, earning £1,599.06 per month. As Mr Arumugam put it: 'this demonstrates that D's circumstances have somewhat improved and potentially could do so further'. The Defendant was only in his early forties, Mr Arumugam continued: it was perfectly possible that he could pick up more work soon.
74. The Defendant stated that in real terms, his financial circumstances had not improved significantly since proceedings first commenced. Whilst his income had more than doubled from the time of his 2020 affidavit, this had to be seen in the context of a 'very low starting point'. He said that he had no scope to increase his hours at present. He explained that he worked part-time in order to be able to undertake childcare responsibilities. This arrangement allowed the two mothers of his four children (his ex and current partner) to work full-time, while he looked after the children. The children were aged 12, 10, 7 and 1.
75. The Defendant also reminded the court that it had power to order that he pay compensation reflecting only a proportion of the losses found to have been caused by the conduct in question; that is to say, it was not an all or nothing situation. He maintained that the Claimant was wrong in asserting that his inability to pay any compensation order was 'irrelevant'; the court had a complete and unfettered discretion. Ability to pay was, he argued, a factor that could and should be taken into account.
76. The SoS through Mr Arumugam expressed a concern that the Defendant could be maintaining a low income at the moment in order to discourage the court from making

an order. Any salaries that the two mothers of his four children brought in could not be attached, whereas his own earnings could be attached or (in the event of his bankruptcy) made the subject of an income payments order.

77. The Defendant denied that he was deliberately depressing his earnings. He claimed that he was working more at present than he did when he was working for the Company. He argued that if any significant compensation order was made against him, this would mean that his 'only real option' would be to file for his own bankruptcy. This in turn, he argued, would discharge any compensation order, with the result that the Customers would not benefit.

### **Discussions and Conclusions**

78. For reasons explored, I am satisfied that the threshold requirements of s15A are cleared. I am further satisfied that the loss caused by the Defendant to the Customers by his conduct (net of interest) is that set out at paragraph [61] above.
79. I accept that the court retains a discretion as to whether or not to grant relief under s.15A in circumstances in which the jurisdiction to do so is established. In exercising that discretion, however, the court must have regard to the policy objectives underlying s15A.
80. On the evidence before me I am satisfied that the appropriate course in the exercise of my discretion is to grant a compensation order in an amount representing the full loss of the Customers as found at paragraph [61] above, together with interest at 1.5% from the date of liquidation. In my judgment the circumstances of this case do not warrant the refusal of a compensation order or the grant of an award in a lesser or minimal sum.
81. In reaching this conclusion I take into account the factors put forward by the Defendant as summarised at [64] above. In my judgment these factors must however be considered against all relevant circumstances of the case, including the following:
- (1) As I found in the 2022 judgment, this was a case of 'woefully reckless and incompetent conduct on the part of a sole director of a company operating in ... a highly regulated framework' which conduct 'put customers' money at significant risk'.
  - (2) The Defendant's wrongful conduct clearly caused quantifiable loss to each of the Customers, as summarised at [61] above.
  - (3) The Defendant has made no financial contribution in recompense for his conduct. Indeed, he spent much of the disqualification trial attempting to lay the blame on others.
  - (4) The Customers have no other means of making recovery, as the Company has now been dissolved with no distribution made to any creditors. Realistically, no-one is now likely to apply to resurrect the Company; and it would not be cost-effective for individual consumers to pursue litigation.
82. I also take into account the Defendant's current impecuniosity. Whilst impecuniosity is not of itself, a defence to a claim under s.15A, in principle, a director's resources

(or lack thereof) may be a factor to take into account when the court comes to consider, in the exercise of its discretion, whether to grant relief and, if so, how best to tailor the relief granted to the justice of a particular case.

83. That said, impecuniosity is only one factor of many to consider. Mere impecuniosity, without more, will very rarely weigh heavily in the balance when the court considers, in the exercise of its discretion, whether and if so in what sum to grant a compensation award. Whilst the discretion is at large, it must be exercised judicially, with due regard to the policy objectives underlying s15A.
84. In my judgment the court should be slow to allow mere impecuniosity, of itself, to dictate the outcome of a s.15A application; particularly where, as here, that impecuniosity is, in part at least, a result of lifestyle choices freely adopted. Such an approach would risk undermining the policy objectives underpinning s.15A, as summarised at [25(2)] and [26] above.
85. Given the Defendant's age and abilities, it cannot be said that a compensation award would serve no purpose in this case. There is scope for recovery on the award. The Defendant has been sole director of a company and running a travel agency; it is entirely possible that he will take up full time employment again at some point in the future.
86. Even if the Defendant were to declare himself bankrupt as he has indicated, it would be open to his trustee in bankruptcy to seek an income payments order.
87. The 'global settlement' open offer of £10,000 put forward by the Defendant shortly before the hearing was plainly unacceptable. That sum would not even cover the Claimant's costs and would not benefit the Customers at all.
88. In my judgment, the nature of the Defendant's conduct, involving as it did breaches of important legislation intended to protect the public, cynically ignored by the Defendant after 31 March 2017, is sufficiently serious to merit a compensation order for the full amount of the loss plus interest. This was not a case of 'relatively minor negligence' which might lead the court to balance 'the claimed loss against the nature of the conduct', as suggested in *Re Noble Vintners* at [44]. The Defendant's recklessness and incompetence was wilful and defiant; he had been told by the CAA on four separate occasions not to take new licensable bookings. He had also been told by the CAA to refund any deposits paid by customers for licensable bookings prior to expiry of the ATOL which were referable to holidays scheduled to take place post-expiry. He knew what a licensable booking was. He took the risk with the Customers' money and must now live with the consequences.
89. In my judgment, nothing short of an award in the full amount of the loss plus interest at 1.5% will suffice in this case. Directors cannot escape liability under the compensation order regime by pleading impecuniosity and offering a derisory sum at the last minute. The Defendant must face the full consequences of his actions.
90. I shall therefore make a compensation order in the sum of £81,405 plus interest at 1.5% per annum from the date of liquidation.

**Approved Judgment**

91. On the issue of division, on the facts of this case, taking into account in particular the matters addressed at paragraphs [56] to [58], it is plainly appropriate that the compensation should be collected by the Claimant for distribution to the Customers in the sums listed at [61] above together with the interest awarded.
92. I shall hear from the parties on any further directions required on the handing down of judgment.

**ICC Judge Barber**