Neutral Citation Number: [2019] EWHC 1676 (Comm)

Case No: CL-2014-000921

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 25 June 2019

Before :

Mr Justice Andrew Baker

- -

Between :

Tobias Gruber and another — **Claimant**

- and -

AIG Management France, SA and another — **Defendant**

- -

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Dan Oudkerk QC and James Sheehan (instructed by **Stephenson Harwood LLP**) for the **Claimant**
Andrew Hunter QC and Peter Head (instructed by **Paul Hastings (Europe) LLP**) for the **Defendant**

Hearing dates: 5, 6 and 25 June

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JUDGMENT (Approved)

MR JUSTICE ANDREW BAKER Tuesday, 25th June 2019

(10.06 am)

Introduction

1. I gave judgment in November 2018 following the final trial of this Claim: [2018] EWHC 3030 (Comm). Judgment was entered against AIG-FP for damages for breach of contract to be assessed. I ordered that damages were to be assessed at a damages trial to be fixed for the first available date convenient to the parties after 1 October 2019, for which there was to be a directions hearing in February following an exchange of statements of case on *quantum*. For reasons, I assume, of the parties' convenience or availability, the damages trial was in fact fixed for 27 January 2020 and not any earlier.

2. What issues could properly be raised by those statements of case for the future damages trial was not given detailed consideration, let alone final definition, when judgment was handed down. That is unfortunate, speaking now with the benefit of hindsight, for the statements of case on *quantum* as served have revealed a major difference between the parties as to the nature and proper scope of the damages assessment exercise that must now take place.

3. The parties took longer than was originally ordered to file and serve their statements of case as to *quantum* under agreed extensions of time approved by consent orders. The upshot was that the major difference of approach became apparent only two weeks before the date fixed for the directions hearing in February, rendering that hearing ineffective, save for the case management of what is now this application. Following email exchanges as to that, the February hearing was vacated on terms requiring the claimants to issue any application by 25 March, to be heard on 5 and 6 June.

4. Following an agreed extension of time, again formalised by a consent order, the claimants by application notice dated 8 April 2019 now ask the court to strike out or dismiss most of the pleaded *quantum* defence on the basis of issue estoppel, as an abuse of process, or by way of summary judgment. The abuse of process asserted is that of seeking to litigate at a later stage claims or defences that, if they were to be raised, ought to have been raised at an earlier stage, or "*Henderson* abuse" as I shall call it after its ability to trace its modern origins to *Henderson v Henderson* (1843) 3 Hare 100, *per* Wigram V-C at 115.

5. Meanwhile, by order of Gross LJ dated 10 April 2019, the defendants have permission to appeal against the judgment for damages to be assessed. That appeal has been fixed to be heard by the Court of Appeal in November. There is now also before the court an application by the defendants by application notice dated 23 April 2019 for a stay of any further proceedings at first instance (vacating the January 2020 damages trial date) pending the final determination of the appeal. On the papers, I refused an immediate stay pending appeal and directed more generally that the defendants' application be listed to be determined at the hearing of the claimants' application. The thinking in that regard was that the claimants' application was designed to secure clarity as to the nature and scope of the

remaining proceedings at first instance that would sensibly inform any consideration of whether it is appropriate to stay those proceedings pending the appeal.

6. This judgment will deal only with the claimants' application to narrow -- they would say confirm the proper narrowness of -- the remaining first instance process.

Applicable Principles

7. There was no significant difference between the parties' submissions as to the principles applicable.

8. I shall not take up time rehearsing the law as to when summary judgment may be granted. It is right though to emphasise the court's general willingness in principle, by way of summary judgment, to grapple with and decide points of law or the proper construction of a contractual document between the parties. In this case of course that arises in the context of having had a full trial, a very major focus of which was the proper construction, meaning and effect of the Plans as contractual documents. Where appropriate, therefore, I will not shrink from determining, if they will make a difference to the outcome on the claimants' application, any further points that have now emerged as to the meaning and effect of the Plans.

9. As regards issue estoppel, the parties were agreed that AIG-FP is only precluded on that basis from contesting during the damages assessment a point actually decided under the order and judgment upon the trial last year. That includes points necessary to ultimate matters so decided. For example, there was an ultimate decision that AIG-FP had acted in breach of contract. The proper construction of the Plans as determined at trial as far as necessary to that ultimate decision cannot be reopened during the damages assessment, even though the relief granted when judgment was handed down did not include separate declarations about the meaning and effect of the Plans.

10. As regards *Henderson* abuse, the leading modern authority is still *Johnson v Gore Wood & Co (No. 1)* [2002] 2 AC 1. But the argument considered also *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630; *Nokia GmbH v IPCom GmbH & Co KG* [2011] EWCA Civ 6 [2011] FSR 15; *Seele Austria GmbH Co KG v Tokio Marine Europe Insurance Ltd* [2009] EWHC 255 (TCC) [2009] BLR 261; *WWF World Wide Fund for Nature (formerly World Wildlife Fund) v World Wrestling Federation Entertainment Inc* [2007] EWCA Civ 286 [2008] 1 WLR 445; *Aldi Stores Ltd v WSP Group* [2007] EWCA Civ 1260 [2008] 1 WLR 748; *Stuart v Goldberg Linde* [2008] EWCA Civ 2 [2008] 1 WLR 823; *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581; *Clutterbuck v Cleghorn* [2017] EWCA Civ 137; *Tannu v Moosajee* [2003] EWCA Civ 815 and *SAS Institute Inc v World Programming Ltd* [2018] EWHC 3452 (Comm).

11. From that body of authority, I derive the following summary statement of principles that are sufficient for the disposal of the claimants' application in the present case and that I do not pretend or intend to be a comprehensive review:
    a. The public interest promoted by the *Henderson* abuse doctrine, as also the public policy behind the idea of cause of action estoppel and issue estoppel, is that there should be finality in litigation and a party should not be twice vexed by or in the same matter. That public interest is strongly reinforced now by the modern

procedural emphasis on efficiency, economy and the active case management of litigation by the court in the interests of the public as a whole, as much as in the interests of the private litigating parties.

b. The bringing of a claim or raising of a defence in later proceedings can, without more, be an abuse, if the court is satisfied that it ought to have been raised, if the party raising it wished to raise it, in the earlier proceedings. In that regard, the notion of matters that properly belong to the subject of the determined litigation that is part of the famous passage in *Henderson* itself remains in my judgment a helpful notion.

c. It is not necessary before abuse may be found to identify some additional element such as a collateral attack on a previous decision, dishonesty or deliberate gamesmanship.

d. At the same time, the mere fact that a matter could have been raised earlier does not mean it should have been such that the raising of it later is necessarily abusive. It has been said indeed that there will rarely be a finding of abuse unless the later proceeding involves what the court regards as an unjust harassment of a party by the late bringing of the claim or defence in question.

e. It is not possible to formulate a single, or hard and fast, rule to determine whether, on any given facts, there is or is not an abuse. There will ultimately require to be a broad judgment taking account of the public and private interests involved and closely related to the particular facts and circumstances of the individual case.

f. The question then is ultimately whether, in all the circumstances, a party's conduct is abusive because it seeks to raise issues for determination that ought in fairness to have been raised, if that party wished to raise them, at the earlier stage.

g. The doctrine is not restricted to cases where the alleged abuse comes in a separate, later action. It is possible to conclude that a claim or defence not initially raised ought properly, if it was to be raised at all, to have formed part of an earlier stage within a single action at which at least some matters were finally determined.

h. It is a strong thing to shut out pursuit of a point not actually decided previously against the party raising it; and it may be an even stronger thing to do so in relation only to different stages within a single action. I would though add, as to the latter, that much may depend on the nature of the stages involved. Here, the parties had their final trial of all issues, not merely, for example, a decision on preliminary issues or a summary judgment decision on some particular claim or defence or a final determination of an individual point as part of dealing with some other interlocutory application. If the doctrine be available, as indeed it is, in the context of a single set of proceedings, the potential for it to apply on the facts where those are the circumstances plainly may arise more readily than during the interlocutory life of the process.

12. I raised at the hearing the question whether, leaving aside summary judgment or issue estoppel, the claimants have to establish a *Henderson* abuse or whether, as regards defences not precluded by issue estoppel and otherwise arguable, this is really a case about

amendment. For such defences as now raised by the defendants, might the true analysis be that they are not open to the defendants on their case as hitherto pleaded, so that this is really their application to make substantial amendments after trial, not to reflect points that were raised and considered at trial, though not pleaded, but to take points that were not raised or considered at trial, because not pleaded?

13. Mr Oudkerk QC advanced only a submission that one ought to arrive at the same result whatever the analysis. I am not sure that is correct. A refusal of permission to amend does not or does not necessarily require a conclusion that it would be an abuse of the process to pursue the claim or defence proposed. Whether on the facts of this case that would make a difference may be of course a different point. I take those thoughts no further. The hearing proceeded as one in which the claimants had accepted a burden of persuading the court that this is a case of *Henderson* abuse as regards arguable defences not precluded by issue estoppel.

The Starting Point

14. The starting point for a consideration of the *Henderson* abuse claim is that the trial last year was the final trial of all issues in this claim. It was therefore the trial of any and all issues the parties wished to raise as to damages, for example issues of causation or quantification, in respect of any damages claim that might succeed. At a case management conference in October 2016 conducted by Blair J, the claimants sought, and the defendants successfully resisted, an order for certain preliminary issues to be tried. There was no subsequent attempt to split issues off or otherwise limit the scope of the final trial, although (as is not so uncommon) both sides recognised at trial that there were many possible outcomes so that, depending on the court's conclusions, the exact result when judgment was handed down might not have been specifically addressed during the hearing or been the subject of quantifications with assistance from the accountancy experts if required, and so that in turn a possible need for at least some further process after judgment to finalise relief could not be ruled out if the result was not that the claimants' claims all failed.

15. In the normal way, prior to that first CMC before Blair J, the parties had pleaded their cases. As is not at all uncommon, there had been amendments and re-amendments by the time of trial. But the point for this judgment is that both prior to and after amendment, those primary statements of case were, and were supposed to be, the parties' respective cases pleaded out in full raising all issues they wished the court to try, whether as to liability or as to relief.

16. So much, so standard. I emphasise it because the general premise of the claimants' application is that the defendants are seeking abusively to raise a host of positive cases on *quantum* that ought to have been raised at trial if they were to be raised. The general premise of the defendants' response -- that is of their defence of their defence -- is that they could not reasonably have anticipated the outcome under the trial judgment as a possible result to which they might have to respond. Indeed, they say it is an outcome that was not open to the claimants to seek on their claims as pleaded, so that far from it being abusive for the defendants to respond fully as they now seek to do, it would be an injustice to them if any of their proposed new lines of defence, if otherwise arguable, were now shut out.

17. I shall consider those proposed lines of defence individually later in this judgment. The common thread is a desire to contend that if, as the claimants say, under the trial judgment and all things otherwise being equal, AIG-FP should have paid in 2013, having by then restored, balances reduced by 2008 and 2009 Realized Losses, all things would not otherwise have been equal such that the claimants would not have been paid in any event.

18. Where a claimant claims damages alleging a breach of contract by a defendant causing loss by way of a failure to receive payment from the defendant under the contract, it is basic and obvious that no or only nominal damages will be awarded if (a) there was no breach or (b) the claimant would not have been entitled to be paid as alleged and/or (without breach by the defendant) would not in fact have been paid, even in the absence of the breach alleged.

19. Any defendant giving proper attention to pleading a case in response to the claim is bound to consider and plead, if he wishes to and properly can, defences of type (b) as to *quantum*, not only defences of type (a) as to liability. Absent an order for a split trial or some other procedural shortcut, for example summary judgment or a strike-out application, the defendant is properly given one opportunity and one opportunity only -- a trial at the end of the process -- at which to pursue either or both types of defence.

20. In this case the Plans are governed by Connecticut law. That law therefore governs substantive questions as to recoverable damages, for example, the measure of damages allowed by the law as well as questions affecting liability, for example the principles of construction to be applied in determining the meanings and effect of the parties' bargain.

21. But the question of what has to be pleaded, when, if it is to be properly part of any trial, is a matter of procedure for the law of the forum. A positive factual case alleged to lead to nominal damages or materially lower damages than sought by the claimant must be pleaded by the defendant. A counter-factual case averring that if the defendant had not breached its contract, events would have turned out differently than they did in other respects also, in such a way that the claimant would still have suffered loss, is a positive factual case.

22. There is a related but different question in this case as to what a claimant must plead that I can illustrate by reference to one of the aspects the defendants wish to explore. One of the positive counter-factual cases the defendants now wish to pursue is a claim that if AIG-FP owed, as it was held at trial it owed, "*an obligation to restore in full amounts deducted under Section 4.01(b)[1], generating, ultimately, obligations to pay those amounts in full, assuming no formal insolvency process intervenes triggering Section 4.01(b)[7] instead*" (trial judgment at [100]), then AIG-FP would not have continued in business, as in fact it did and still does, but would have ensured that in one form or another it entered a sufficient formal insolvency process to trigger Section 4.01(b)[7] so as to avoid paying the claimants. Any such positive case ought to have been pleaded for and pursued at trial if it was to be raised at all.

23. But if the defendants are not allowed to run that positive case, they wish to argue on the damages assessment that to prove causation, the claimants must negative that possibility; and so the claimants are limited to nominal damages because they did not plead a positive counter-factual claim that AIG-FP would not have pursued bankruptcy in order not to pay

them. That line of defence also should have been pleaded so as to be argued out at trial. If well founded, it is a reason for denying liability for substantial damages on the claim pleaded. Reasons for denials have to be pleaded. That is one of the most important and beneficial aspects of the requirements of the CPR for pleading a defence.

24. It is axiomatic and does not need to be stated in terms that a claimant avers by his particulars of claim that the matters pleaded are sufficient in law, if established, for the grant of the relief sought. To advance a proposition that, to the contrary, proving the matters thus alleged to be sufficient for a claim will not suffice as alleged, is to advance a reasoned denial of the claim. The proposition must be pleaded. The argument in support of the proposition does not have to be pleaded, but the proposition does so that the claimant knows and for case management the court is made aware that it is one line of defence that will need to be determined. Quite apart from fairness to the claimant, in such a case the court may perhaps wish to explore at any first case management conference whether a trial is going to be needed.

25. At the heart of the defendant's submissions on this hearing was a contention that the judgment created a reasonably unanticipated opportunity to raise positive defences as to *quantum* that did not arise before, because it found that AIG-FP acted in breach at or about the time when it reduced Plan balances on account of losses but that any payment of restored balances, had they been restored, should have been in 2013. In that combination, it was said the judgment upheld a claim that had not been pleaded, justifying and fairly requiring that the defendants now have an opportunity to plead and pursue positive counter-factual cases that had not been pleaded for or developed at all at trial.

26. The defendants submitted in that regard that unless it were open to them to pursue the full case on *quantum* now pleaded, something they say was indeed contemplated by the judgment, there would be a clear basis for appealing against the order for damages to be assessed, referring me in that regard to *Al-Medenni v Mars UK Ltd* [2005] EWCA Civ 1041 at [21]*ff*.

27. On that basis, the defendants said it is not abusive to allow them the damages assessment they say they now want even though the hearing would be longer and more complex than was the trial and would come at a cost exceeding the entire cost of the action up to judgment last November. The damages trial on the defendants' approach would involve significant new factual witness evidence, including from witnesses who gave evidence at trial, and five or possibly even six expert disciplines, including all three of the disciplines featured at trial. As regards costs, the agreed costs budgets for the entire proceedings were around £3.8 million on each side. The defendants have estimated their costs of the damages assessment at a little over £4 million.

28. It is therefore necessary to look with some care at how the claimants' relevant claims were pleaded and pursued at trial and the case put up by the defendants in response.

The Cases For Trial

29. I start with the re-amended particulars of claim. Paragraph 10 stated in overall summary form that the claimants' claim was for "*sums due and owing under their contracts of*

employment and/or the relevant plans and/or damages and/or specific performance, and for declarations".

30. Focusing then on the paragraphs that give rise to the claim that succeeded trial, I start at paragraph 25. The claimants there pleaded some of the principal language of Section 4.01 of the DCP. That language was introduced as follows, thus stating the claimants' case to be that:
"*the DCP permitted delay in payment of the Claimants' deferred compensation in the event that Banque AIG and AIGFP sustained realised losses, on the condition that AIGFP adopted a 'repayment plan' with a defined payment schedule.*"
Paragraph 26 pleaded two additional requirements the claimants proposed to contend would be required as regards the nature or content of any such repayment plan.

31. At paragraph 44, the claimants pleaded that as far as they knew prior to disclosure, they all had positive Plan balances as at 31 December 2008 but that AIG calculated losses, and applied them to the claimants' Plan balances, in the spring of 2009, notifying them of the result which at the time was expressed in terms of negative balances in May 2009.

32. Paragraph 45 then pleaded as follows as to the facts:
"*To date, the Defendants have failed to adopt any repayment plan in respect of the sums deducted from the Plans and (accordingly) have failed to establish any payment schedule under which Banque AIG and AIGFP shall restore the amounts deducted [...]. Further, on a date unknown but prior to 26 December 2014, the Defendants renounced any intention to adopt such plan. Such failure and/or renunciation is notwithstanding*" certain particular matters that arose later. Those were: (a) the completion of the unwinding of the financial product business, said to have been in about July 2011 yielding at least $4 billion in operating profit; (b) the repaying of all Federal bailout funding by the end of 2012; and (c) the very large profit, it was said, generated for the US Treasury through the Maiden Lane III transaction and the sale of the AIG stock acquired as part of the bailout arrangements.

33. Then at paragraph 48(c), the claimants alleged breach in that the defendants "*[w]rongfully failed to establish or procure the establishment of any repayment plan in accordance with the principles in paragraph 26 above or at all and/or take or procure the taking of any adequate steps to restore the Claimants' account balances and, latterly, wrongfully renounced the obligation to take such steps.*"

34. Finally, then, the particulars of claim dealt with relief by indicating that the claimants would seek declarations as to their entitlements, specific performance of their employment contracts and/or the Plans so as to compel restoration of Plan balances and/or adoption and implementation of a restoration plan and repayment schedule and, further or alternatively, payment of debts and/or an award of damages. As regards damages, the claim was pleaded at paragraph 54. It was pleaded expressly in the alternative to the claim in debt and it was said that the damages claimed would be assessed in due course "*following specific performance and/or disclosure and/or expert evidence herein*" but that

the loss suffered on any event included "*(a) the sums which would have been paid to them if the Defendants had acted lawfully*".

35. For the purposes of this judgment, it is pertinent to note the following:

a. No particular date was alleged on which AIG-FP first acted in breach by failing to adopt a restoration plan, i.e. a payment schedule for the restoration of amounts deducted. Conversely, no specific date or latest date was alleged on which or by which AIG-FP ought to have restored or ultimately paid out amounts deducted. In both respects, therefore, the claimants' cases as pleaded was unconstrained. That said, the natural reading of the plea at paragraph 25 that AIG-FP was entitled to defer payment, the result achieved by effecting deductions, only on condition that it adopted a repayment plan, is that there was breach when deductions were made without the adoption of such a plan; and the plea at paragraph 44(b) was that deductions were made in the spring of 2009 (at all events, as regards 2008 losses, that is).

b. In the pleading of the claim that succeeded at trial, the damages claimed were, or at all events included, damages equal to sums the claimants would say should have been paid to them if AIG-FP had adopted the contractually required restoration plan. In that regard, there is a slight oddity about the re-amended particulars of claim, namely that it included, as a schedule 3, what appears to be the individual Plan balances per claimant that the claimants would say had ultimately been lost and not been paid. However, schedule 3 is not referred to anywhere in the body of the re-amended particulars of claim and thus it is neither introduced nor explained in the claim. Nonetheless, for these parties and seeing what schedule 3 purported to be, in my judgment it was tolerably clear the claimants' case was that there should have been restoration and payment in full with interest of all deferred bonus amounts credited to them under the DCP, SIP and/or ERP but which had in the event been treated as wiped out by deductions; and that schedule 3 set out the amounts in question claimed per claimant.

c. The plea for specific performance was not inconsistent with the plea that loss of that kind and amount had already been suffered. Seeking specific performance (it may be ambitiously) in the hope that loss might be made good thereby does not mean that loss has not been suffered.

d. Although, had specific performance been ordered and had it been ordered on terms that would, assuming compliance, affect the claimants' ultimate loss suffered, one can see that a final assessment of any damages claimed in that eventuality may have taken place only after a completed trial, that was not the only basis upon which damages were sought. In particular, I do not agree with a submission that was made that the reference to a need for disclosure or expert evidence before the claimants' damages were quantified indicated anything other than that the trial would be a trial amongst other things of any quantification issues that thus arose.

e. The failure to plead a date or latest date on which or by which restoration and payment should have been made was symptomatic of the claimants' pleaded ambivalence towards the December 2008 amendments which required *inter alia* that any restoration plan provide for payment of restored amounts in 2013. The claimants did not plead that contractual rule, let alone rely on it in setting out their claims. In reply to the defendants'

> reliance on those amendments, because of their reference to rights lapsing, the claimants pleaded a denial that all of the amendments were effective. That amounted to or was pregnant with an admission that some were and a positive case that others were not, in each case without particularising which. Ambiguous as that was, I repeat it was a response to the defendants' reliance upon the December 2008 amendments. Thus, it was the defendants' case that if, which they denied, there was a breach in relation to restoration, it was a breach of an obligation for restoration leading to payment if at all in 2013. The defendants did not seek to tie the claimants' case down any further on any of these points by requesting further information.

36. As to paragraph 35(a) above, in my judgment Mr Hunter QC is wrong in his submission that the plea at paragraph 45, to the effect that the breach by way of failing to adopt any restoration or repayment plan continued even to date, i.e. even to the date of the pleading, and continued in that way notwithstanding the specific developments in the winding down of the former financial products business and repayment of the US Government, in some way limited the claimants' claim as pleaded to an allegation that there was, for the first time, a breach of contract only in July 2011, the earliest of the three particular events cited in paragraph 45, or for that matter even December 2012, the latest date specifically identified in paragraph 45.

37. To my mind, the gist of that pleading, explicable no doubt in part by the fact that a claim for relief by way of a specific performance was also made, was that the claimants made particular complaint that even then and notwithstanding those events, AIG-FP remained in breach. A plea of that kind is uninformative, and certainly does not limit the claimants, as to when first, if relevant for the purposes of damages, AIG-FP was said to be in breach. 38. By reference to *Pantelli v Corporate City Developments Number Two Ltd* [2010] EWHC 3189 (TCC), [2012] PNLR 12, Mr Hunter QC advanced criticisms of the open-ended nature and lack of particularity of the claimants' pleaded case. Those criticisms, as it seems to me, had they been raised during the case management of the matter prior to trial, may have found some sympathy with the court, if they mattered to the case. However, the defendants at no stage suggested that they did matter to the case.

39. At the risk, which is present throughout this judgment, of not entirely avoiding the benefit of hindsight, it can be seen that the open-ended nature of the claimants' claim involves, indeed amounts to, the advancing of a case that when precisely there was first a breach was not material, if there was a breach, to the proper measure of damages for that breach. That lack of materiality to the damages assessment of the exact date or time of breach is then, as it seems to me, encouraged and acquiesced in by the defendants by not rendering it material by the pleading of any reasoned denial or positive case rendering it material.

40. If one turns then to the case that was pleaded by the defendants, as far as material, it consisted of a one-sentence paragraph, paragraph 66 of the re-amended defence: "*The claims in debt and damages at Paragraphs 53 and 54 are denied for the reasons given above.*"

41. There were two particular pleas then raised as to whether aspects of what the defendants understood the claimants to be claiming were properly recoverable in damages as a matter of Connecticut law. A first additional specific plea which had said "*the damages claim is defective as there is no plea of causation*" was struck through, i.e. removed, on amendment. The "*reasons given above*" upon which exclusively the claim for damages was denied were the reasons why the defendants asserted they were not in breach in the first place.

42. Whilst it cannot therefore be said that there was an admission by the defendants that if they were in breach as alleged by the claimants, the damages as claimed for that breach would follow, subject only to checking the calculation of the figures, and to that extent the claimants were therefore put to proof, there was nothing of the further reasons for denial, let alone positive counter-factual cases said to lead to nominal damages that it is now sought to plead.

43. As part of pre-trial case management, a sequential exchange of forensic accountants' reports was directed, in part so that the defendants would be better informed as to the quantified cases to be advanced by claimants at trial before responding with their own expert evidence. The report from Mr Wreford served by the claimants identified that he was instructed to assume, for the purposes of quantifying the claims based on a wrongful failure to restore reduced balances, that credit balances wiped out by losses would have been restored so as to be paid in 2013. Mr Wreford's relevant calculation -- his appendix 8.3 -- put the claimants' claims on that basis at c.US$99 million in aggregate. The defendants understandably instructed Mr Imburgia to follow suit, that is to say to prepare amongst other things calculations on the same assumptions, on which basis he calculated loss to the claimants, in his scenario C, of c.$101 million in aggregate.

44. The uncertainty as to the claimant's case on the December 2008 amendments was resolved in line with the way in which the claimants had set the brief to the forensic accountants by their written opening for trial. There, they made clear that indeed they did not challenge the effectiveness of Section 4.01(b)[5], only that of Section 4.01(b)[6], in the numbering I used in the trial judgment. Their case at trial therefore was that there was an unqualified obligation to restore deductions, reduced on account of losses under Section 4.01(b)[1], for which a schedule ought to have been set, and that payment of restored balances should have been made in 2013.

45. In their written opening for trial, having dealt with what they understood to be the defences to their restoration claim, the claimants by counsel concluded as follows: "*69. Accordingly, Ds' defence to Cs' restoration claim must fail. Cs' deferred pay ought to have been restored and paid. It could well be argued that that obligation to restore arose in 2008/2009. But Cs take a conservative approach. They are prepared to accept for the purposes of argument that Ds could permissibly have delayed payment for a short period post bailout. On any view, however, their pay should have been restored and paid by the end of December 2013.*"

46. The written opening concluded at paragraph 96 with a statement that the court would be invited to give judgment for the claimants for declarations as to their entitlements and payments of sums due stating that their loss and interest calculations were those of section 8 of Mr Wreford's report and in particular, therefore, his appendix 8.3 so far as material.

47. The defendants' written opening for trial included the following passages of relevance. In the opening summary of the defendants' defences at paragraph 4, having identified that the massive 2008 losses resulted (on the defendants' case) in negative balances which became more negative in later years as more losses came to be applied, the defendants summarised their understanding of the claimants' case as being this:
"*Despite this, Cs claim that AIGFP was obliged immediately to restore sums deducted from their remuneration accounts when AIGFP suffered these vast losses, so that the accounts returned to their full pre-crash balances by 2013.*"

48. Reflecting and building upon that summary, at paragraphs 70 to 71, the defendants set out their summary, as they understood it, of the parties' arguments for trial, namely that: "*Cs' position is that the obligation to put in place a restoration plan is applicable immediately after a reduction for losses and is unqualified in any way, such that sums must be restored and paid to them even if AIGFP is continuing to incur losses and is balance sheet insolvent*" whereas the defendants' position was that there was no such obligation for various reasons (on all of which they failed at trial).

49. The defendants' understanding of the claimants' position was again identified in developing the argument on one of those points at paragraph 75, where it was said that some wording in the DCP preamble was consistent with the defendants' construction and "*entirely inconsistent with Cs' case that there must be a restoration plan immediately after any reduction irrespective of ongoing losses*".

50. There was no suggestion in the defendants' written opening that any *quantum* issue at all arose on the restoration claim, if it succeeded. That was in contrast to the negative balances claim. As I explain in the trial judgment, the real issue there was, as I saw it, one of accrual and book-keeping dates, rather than an issue of counter-factual events. The important point for present purposes though is that for negative balances but not for restoration, the defendants' written opening identified and explained that *quantum* issues arose and they involved, the defendants said, a question as to what counter-factual was to be adopted on which indeed the defendants advanced a positive case.

51. By the end of the trial, so far as material, the position had not changed. Thus, for example, in their written closing submissions, then developed during oral argument, the defendants' case as to *quantum* on the restoration plan claim was a single paragraph, paragraph 82. It said that for the reasons set out above, that is to say the defendants' various defences on liability that failed, the defendants' submission would be that *quantum* did not arise. It went on:
"*However for completeness it should be noted that Mr Wreford's calculations of Cs' losses cannot be correct.*"
A number of specific points were then made, indicating matters that I would need to consider before simply accepting Mr Wreford's appendix 8.3 as the appropriate calculation and which I can see, looking back at it, included points which might have required at least some further assistance from the parties rather than simply being resolved by me in the

drafting of my judgment. None of those points, however, was, or contained any hint of, the sorts of positive cases now sought to be pleaded.

52. Finally, for this review of how the cases stood and were advanced at trial, or not as the case may be, I mention one other aspect of the defendants' submissions. In their written opening for trial at paragraphs 85 to 86, the defendants asserted that there were discretionary elements to the adoption of terms for a restoration plan such that, for example, "*it would be reasonable and consistent with the scheme of the DCP and SIP for the Board not to provide for any restoration until after AIGFP both returns to profitability and balance sheet solvency*", and/or that any obligation to adopt a restoration plan would not be enforced applying Connecticut law on the grounds of being a futile act. If arguments of that type had been well founded, there would have been a defence to liability, but that failed; and the trial judgment is an enforcement of the obligation to restore that I held to exist, because it granted judgment for damages to be assessed for the breach of that obligation.

53. Of particular relevance for what is now this application, however, I note the claimants' response to that 'discretionary terms' case in the defendants' opening. It was summarised in the claimants' written closing at paragraph 53, in which the claimants submitted that insofar as the defendants had thus sought to advance in opening some additional case as to the exercise of a discretion, no such case was open to them, continuing that: "*Their pleaded position is there was no exercise of discretion. D2 has conspicuously failed to consider, far less exercise, any such discretion. If Ds had wished to advance a positive case as to the shape of any restoration plan, this would have required pleading and evidence which could then have been tested; the trial would have looked quite different.*"
I agree.

54. Subject then to a point that came to prominence at the end of the argument of the present applications, in my judgment it is clear therefore that the claimants' claim was, or included, and was recognised by the defendants to be or to include, a claim that the obligation to adopt a restoration plan arose when Plan balances were reduced (which was in or about May 2009 (2008 losses) and then again in or about May 2010 (2009 losses)). Their claim, further, was that the required restoration plan was a schedule for restoring balances providing for them to be paid in 2013; and the claimants' reliance upon 2013 as the date when restored balances should ultimately have been paid cut down, rather than expanded, any period of interest or possible counter-factual enquiry.

55. The additional point to consider that came to prominence at the end of the argument concerns a hearing before HHJ Waksman QC, as he was then, on 14 October 2015. That was a hearing of applications by two AIG Group companies originally sued, to set aside service on jurisdictional grounds, an application for summary judgment dismissing the claim by another AIG Group company that had been sued, and an application by the claimants to join a further four proposed claimants to the proceedings. The joinder application failed, and in the event the four potential new claimants did not issue their own separate claim. The principal issue on the joinder application was whether allowing those additional claimants to join would or well arguably might prejudice a time-bar defence such that it would be unfair to allow their joinder but they should instead be required, if they wished to sue, to start a fresh claim.

56. Although the hearing was in October 2015, as I understand it, it proceeded upon the basis that the critical date for assessing whether a time-bar was being or might be being prejudiced was a date in May of that year when the joinder application was made. Thus it was relevant to the joinder application to consider whether the cause of action in relation to failure to adopt a restoration plan first arose prior to May 2009.

57. In that context, it was the defendants' submission that on the face of the then pleading (which was in materially similar terms as far as the present arguments are concerned), the obligation as alleged appeared to be one requiring the adoption of a restoration plan as soon as there were deductions made to Plan balances. Mr Leiper QC, then acting for the claimants, advanced to the contrary a submission that the obligation to put forward a restoration plan "*is clearly not one which applies immediately on the decision to make a reduction.*"

58. That submission however was not accepted by the court. It was not accepted by the court therefore, and this was the basis of HHJ Waksman QC's ruling, that the claim as pleaded did not include a claim of breach that would have occurred prior to May 2009. On that basis, the appropriate course, it was decided, was to require the additional claimants to issue a separate claim if they wished to proceed. In my judgment, that is no substantial basis for the submission advanced by Mr Hunter QC that the claimants had in some sense precluded themselves from pursuing a claim for breach including at or about the time of reductions being applied to balances, if indeed that was the claim pleaded or within the claim pleaded.

59. Indeed, in my judgment, it is an odd submission to advance now, that a submission advanced by the claimants for a particular purpose at that hearing but rejected by the ruling of the court was then treated as a definitive statement of the scope of the claims thereafter pleaded and pursued. Quite apart from the fact that, as I have related, most explicitly in several places in the defendant's opening, it is perfectly apparent that the defendants in fact did understand the claim being pursued for and at trial last year to be one which encompassed the claim which succeeded, namely that the obligation to adopt a restoration plan went hand in hand with the entitlement to effect deductions and should have been discharged at or about the same time.

60. In all those circumstances, I am in no doubt that if the defendants wanted to advance any positive case on *quantum* to the effect that if AIG-FP had adopted a restoration plan as required by the Plans, nonetheless and without breach on AIG-FP's part, either the claimants' balances would not have been restored or the claimants' restored balances would not have been paid, with the result that damages would be nominal (if that would follow, which might itself be contentious), then that could and should have been pleaded for trial.

61. This case has its complexity without doubt and the positive cases the defendants now seek to advance are factually complex, but there is nothing complex about when they should have been raised. As I have said already, it is basic, when responding to a pleaded claim for damages for breach of contract, to consider whether there might be a positive case to plead

as to damages, for example as to what could have occurred without breach and/or would in fact have occurred absent the breach alleged, even if the primary line of defence to the claim will be to deny the breach.

62. I am equally clear that the trial judgment did not find for the claimants on a basis that had not been pleaded or to which the defendants had not had every opportunity to respond as regards *quantum*, not just as regards liability. The existence of a substantial gap of time between when AIG-FP should have adopted a plan for restoring balances wiped out by losses and when those restored balances would then fall to be paid was in the case throughout. The defendants understood, and said they understood, that the case against them was or might be that restoration should have been planned when deductions were made, although any payment would or might only fall due to be made years later.

63. The time to consider any positive case rendering that time gap material to causation or quantification of damages was the trial last year. Any such case ought to have been pleaded so that it could be considered then. The late clarification by the claimants that they in fact admitted and averred that any payment of restored balances should have been in 2013, not later, did not give rise to a call for such positive cases, if available, to be raised that did not previously exist.

64. In an important part of his initial summary of the defendants' submissions on this application, Mr Hunter QC, if I may say so very fairly, indicated that if there had been pleaded either originally, or on amendment, or as the case may be, that there was breach in 2008 by failing to adopt a Plan, the nature of the breach being that the Plan should have provided for full restoration and then payment by the end of 2013:

"*... then we would have had the opportunity and I wouldn't be able to make any complaint about it, to plead points like, well, if that is the case, there's a five-year period in which a commercially rational actor would have considered whether some part of the mass of foreseeable losses in 2009 should have been realised at a later date such as 2013. If that had been pleaded, I couldn't make these submissions.*" (That breach, on my conclusions, may first have occurred in fact a little later, say May 2009, rather than in 2008, plainly makes no difference to that concession.)

65. That is to say, taking the timing of later Realized Losses as one of the variables now raised by the positive counter-factual defences pleaded, if -- as I have held it was -- the time gap was there on the pleaded claim, then the defendants had (and could not say otherwise) a fair and sufficient opportunity to raise the sort of positive counter-factual defence that they now seek to raise; and Mr Hunter QC could not make the submissions that he was making to the effect that they had been (as he put it at one point) ‘blind-sided’ by the judgment.

66. In one sense, it is tempting to go almost no further in this judgment. But I will nonetheless review at some length the particular detail of the different positive defences now raised, not least because it would not be right to assume without that detailed analysis that the rejection of a summary statement of that kind in an overview of the defendants' submissions is necessarily fatal on all aspects of the case.

67. Before undertaking that review, however, I would add this. As Mr Oudkerk QC submitted, when precisely AIG-FP ought or ought first to have adopted a restoration plan is in truth

nothing to the point. In reality, the founding and sufficient premise for all (or it may strictly speaking be all but one) of the positive cases that the defendants now seek to advance is that the claimants' claim involved a substantial time gap between when balances were reduced and when, if restored, they would fall to be paid. On any view, that time gap ran from about May 2009 as regards balances accruing at the end of 2008 or carried forward from previous years and from about May 2010 for balances accruing only at the end of 2009.

68. Throughout the life of the action, that time gap ran until at least the end of 2013 on the claimants' claim as pleaded. The confinement of the case for trial by the claimants' assertion that they should have been paid in 2013 was an adoption by them of the defendants' case in that regard, narrowing the issues, and not a basis for a repleading of the defence and a massive widening of the issues. Moreover of course it was a confinement of the case adopted in circumstances where the defendants had not raised any positive case on *quantum* of the type they now wish to introduce.

69. In other words, every aspect of how the case was in this regard considered, pursued and put before the court at trial will inevitably have been influenced by the fact that the claimants' effective assertion that precisely when the breach first occurred was not material to the assessment of damages had not ever been traversed by the defendants, at all events by way of any positive reasons for denying the case or positive counter-factual case of their own.

70. In my judgment, at least stated generally, it is a classic *Henderson* abuse in the face of the full and active case management, costs budgeting, and then full trial process the court has undertaken for the defendants now for the first time to seek to articulate a series of cases that would have made the trial a very different trial.

The Cases Now Pleaded

The Claimant's Case

71. The particulars of claim as to *quantum* set out a long and relatively detailed summary, as the claimants would have it, of the effect of the trial judgment as far as material to the damages assessment. There are then pleas as to the Plan balances, particularised in a replacement schedule 3, that the claimants will say ultimately ought to have come to them if the Plans had been properly operated and a plea that in breach of contract, AIG-FP did not adopt a plan and did not restore or make payment of restored amounts.

72. There are then, at paragraphs 7 to 10, particularised pleas to the effect that in the events as they have actually occurred, from 2010 to 2016 inclusive, referring in each case to Compensation Years under the Plans, reserves have been nil, current year income if calculated in line with the trial judgment has been nil (in fact it has been substantially negative as I identified in the judgment), and that "*relevant losses*" have been as set out in a table at paragraph 7(3).

73. Particular points are made to explain the way in which those figures have been derived at paragraph 8. The plea then at paragraph 9 is that by reference to those actual Realized Losses as have been incurred, Plan balances could not have been reduced under the reduction / restoration scheme of the Plans on account of 2012, 2013, 2014 or 2015 losses.

74. That then leads to the plea at paragraph 10 that proper performance of AIG-FP's Plan obligations should ultimately have led to payment in full by the end of 2013. There are then pleas for damages by reference to Stock-Index Deferral provisions in the ERP and what I think is a new plea in relation to pre-judgment interest, relying on some Connecticut law, which I think have not been previously pleaded. I express no judgment for the moment as to whether that is or is not to be allowed, albeit acknowledging that it has not been the subject of specific objection so far only at a time when the defendants took a much more wide-ranging stance as to what was open to the parties on the damages assessment.

75. Leaving such individual new points to one side, in my judgment the essential damages claim now set out does not involve or raise anything that is new or different in kind from the relevant claim as pleaded by the claimants. It adds to that claim only the particularisation of the Plan balances involved and the correct calculation in the light of the conclusions reached in the judgment of the losses as incurred by AIG-FP in later years as the claimants will say may be relevant.

The Defendants' Case

76. In the remainder of this judgment, all references to paragraphs will be to the defence as to *quantum* unless I say otherwise. The first plea at paragraph 3 notes that the claimants do not plead a case as to the principles of foreign law or foreign legislative provisions applicable to the assessment of *quantum*. That is true but of course the claimants have no obligation to plead any such case. They are entitled to rely, as they always have done, on the default rule that the court will apply principles of English law unless and until a party pleads and proves some contrary case under a foreign applicable law. Paragraph 3 goes on then to say that the relevant applicable principles (as the defendants will say) and legislative provisions are set out later in the pleading.

77. Paragraph 4, leaving aside paragraph 4.8 and the words that introduce that sub-paragraph, alleges principles of Connecticut law on damages for breach of contract that the defendants will say apply. No objection is taken by the claimant to any that further or new pleading. The principles alleged include, at paragraph 4.5, the following: "*Where a claimant's case that he/she has suffered loss is necessarily premised on hypothetical facts which would have occurred if the contract not been breached ('**the counterfactual facts**'), then as part of the claimant's obligation to prove damages with reasonable certainty: (a) the claimant bears the burden of proving that the counterfactual facts would have occurred; and (b) the standard of proof (including for the hypothetical conduct of a third party) is the balance of probabilities (rather than the 'loss of a chance' standard)."*
I shall need to return to paragraph 4.5 and its implications later.

78. I turn next to consider in turn the various positive cases now advanced by the defendants, all for the first time, through the rest of the defence as to *quantum*.

Positive Case 1: Illegality

79. At paragraph 4.8, read with the introductory words for that sub-paragraph, the defendants plead that a contractual obligation will not be enforceable where performance would be contrary to the law of the place of performance or contrary to public policy. However, no case is asserted of illegality by the law of the place of performance. As I shall come on to in a moment, a case is pleaded that payment of restored balances by AIG-FP would be unlawful under Delaware law but it is not alleged nor could it be that Delaware was the place of performance of the posited payment obligation. So as it seems to me, paragraph 4.8 and the introductory words for it neither discloses nor gives rise to any basis for defending the damages assessment and is apt to be struck out.

80. That brings me then to paragraph 5. There, the defendants allege that Delaware law governs the question whether AIG-FP could lawfully pay restored balances to AIG Inc because Delaware law is the law of incorporation of AIG-FP and AIG Inc is AIG-FP's shareholder, but that is irrelevant to whether the claimants should have been paid and so have suffered loss. That is why, with respect, Mr Hunter QC was correct to pursue at trial not this argument as to damages, which could not succeed, but a different argument as to breach, alleging that because payment of restored balances to AIG Inc would be an unlawful preference or distribution, Section 4.01(b) should be construed so as not to require payment. That argument failed on the basis, as I held, that no unlawful preference was involved.

81. Thus, not only would this new pleading as to *quantum* be bound to fail in my judgment if it were open to the defendants to pursue it, in fact it is not open to them to pursue because of issue estoppel. It depends upon a premise that has already been established to be false. For the issue estoppel, it matters not that the defendants did not plead at trial the matters of Delaware law they now wish to plead, so that by definition I did not receive expert evidence separately about them, hear argument about them or make specific findings about them. The point is that it is now established against the defendants that for AIG-FP to pay restored balances to AIG Inc would not be unlawful in the circumstances in which they now wish to say, based on Delaware law, that it would be unlawful.

82. To say now that the issue is or should really have been seen as one of Delaware law rather than Connecticut law does not in my judgment affect that conclusion as to issue estoppel. In the first place, the fact that strictly, if there was a case there at all, it perhaps ought to be considered as one of Delaware law, was raised at trial, Mr Hunter QC's case for trial being that I could and should assume that Delaware law would be the same as or materially similar to Connecticut law, as to which I did have evidence. But in any event, more generally, the suggestion that because the defendants now wish to develop a detailed case on Delaware law they did not develop at trial, therefore there cannot be an issue estoppel precluding them from doing so is analytically unsound. It depends upon what was the issue that was decided and why it is now said that there can be a viable case of Delaware law to be pursued for the damages assessment.

83. Put perhaps another way, I would say the issue estoppel operates at least one level of generality up from a detailed exposition of Connecticut or Delaware law on unlawful distributions. As I said in the trial judgment at [56], the unlawful preference or unlawful distribution element of the defence on liability was but a sophisticated variant of a basic defence alleging that AIG-FP is not liable to pay damages for failing to pay restored balances when balance sheet insolvent or when payment would not come out of profits. But that defence failed. The final decision at trial therefore included a decision that AIG- FP is liable to pay damages for a failure to pay restored balances in those circumstances. The new plea, although presented as a defence for the assessment of damages only, asserts, depends upon and amounts to the proposition that AIG-FP is not liable to pay damages for such a failure.

84. Finally, in those circumstances, and in the light of my general analysis of what should have been pleaded, if at all, for trial, I have no doubt that it is a *Henderson* abuse to run this defence only now even if there is no strict issue estoppel against it. This defence was squarely a matter in my judgment properly the subject of trial if the defendants wished to run it.

85. Indeed, in that regard, firstly, I agree with Mr Oudkerk QC's submission that in substance the defendants now envisage that having previously decided that payment out under the Plans would not involve distribution of capital so as to engage possible considerations of unlawfulness, the court will now decide that it would and that would bring the administration of justice into disrepute, rendering it abusive for the suggestion to be made. Secondly, as Mr Hunter QC in fact accepted in argument, this illegality defence is the exception to his general rule in defending the defence as to *quantum* that said the positive counter-factual defences now asserted were in some way triggered by a gap in time generated by the judgment between breach and the ultimate entitlement to be paid relied on by the claimants as generating loss. This defence, whether presented as affecting the measure of damages or, as originally presented, as going to whether there was a breach at all, is entirely independent of such matters of timing, so long as (which was always the defendants' case and was clear on the facts) AIG-FP has been in the financially denuded state that it has been throughout all periods that might be of interest and is likely to stay in that way for the foreseeable future.

86. It is logical to take next the positive counter-factual case pleaded at paragraphs 19 to 22, leaving aside the second sentence of paragraph 22. That avers that the claimants cannot establish loss because they would not have acquired an enforceable right to payment because Delaware law would render it unlawful for AIG-FP to restore balances to the shareholder AIG Inc. That, in my judgment, is bound to fail for want of relevance of the Delaware law on the point to AIG-FP's obligations to the claimant as held by the judgment and is in any event likewise precluded by issue estoppel or is abusive to be raised only now and not before trial.

87. I would add only that this further trip around this aspect of the case generated by the attempt to resurrect it in another guise to my mind only served to confirm its unsoundness. The suggestion is that AIG-FP would not be allowed to pay accrued entitlement to employees, where doing so would effectively be at AIG Inc's cost, because of laws designed to ensure

that AIG Inc as shareholder is not favoured over non- shareholder creditors such as, for example, employees. That to my mind is an obvious nonsense.

88. More importantly, it shows again, as in truth is the effect of the trial judgment on this aspect of the case, that what the defendants needed, and therefore logically asserted that they had, but did not have upon the conclusions I reached in the judgment, was a provision in the Plans for balance sheet insolvency or non-profitability to extinguish accrued bonuses. That in turn simply takes us back to the conclusions I reached in the trial judgment at, for example, [75] and [96].

89. Finally, although my focus for the moment is primarily the defendants' newly pleaded positive counter-factual defences, in relation to the illegality plea there is a related passive defence pleaded at paragraph 9.3. I shall deal with paragraph 9 more generally later, but it starts by noting that the claimants' case is to the effect that if AIG-FP had acted without breach, the claimants should have received in 2013 payment in full of the Plan balances that were reduced to nil by losses as of 31 December 2008 and 2009. At this stage then it suffices to say that, read together with the first and second sentences of paragraph 10, paragraph 9 goes on to plead that the claimants' case is necessarily premised upon certain counter-factual propositions as to which the defendants will say that (a) the claimants bear the burden of proof, (b) the claimants have not pleaded any or any viable case on the facts, so that (c) the claimants are unable to establish the claim they allege.

90. That brings me to paragraph 9.3. It asserts that one of the counter-factual propositions on which the claimants' case is necessarily premised is that payment in full in 2013 would have been lawful under Delaware law and so not unenforceable under Connecticut law. But it was established at trial that payment in full would not have been unlawful. So paragraph 9.3 cannot now assist the defendants, whatever view I take as to *Henderson* abuse more generally in relation to paragraphs 9 and 10.

91. That also disposes of the second sentence of paragraph 22. I left that to one side in relation to the positive counter-factual defence because it pleads merely that "*if the Claimants cannot establish the Legality premise then they cannot establish any loss*". It is thus a repetition of paragraph 9.3 and adds nothing to it.

Positive Case 2: Managed Bankruptcy

92. Paragraph 6 and 7 plead that under Delaware Law and US Federal Law, a scheme of arrangement approved by the Delaware Court of Chancery, respectively a chapter 11 petition, could have been pursued by AIG-FP or by AIG Inc in respect of AIG-FP. This is part of a positive counter-factual case pleaded in paragraphs 15 to 17 that if AIG-FP had adopted restoration plans, as I held it was obliged to do, then it would have brought about a Bankruptcy/Insolvency Event within Section 4.01(a)[4] rather than paying the claimants, and in order to avoid doing so. This too, upon my general analysis of the case for trial, was properly a subject for trial if it was to be raised at all and is abusive to be raised only now, the defendants having lost at trial.

93. This positive 'managed bankruptcy' defence is all the more abusive in my judgment raised only now, given that:
    a. the impact, if any, of AIG-FP's insolvent condition was a central focus of the trial. Furthermore, a major part of that central focus was the particular conundrum that AIG-FP was in an insolvent state but without there being a Bankruptcy/Insolvency Event.

    b. Because of other aspects of the case that were before the court at trial, and as Mr Oudkerk QC then puts it on this application, in their closing submissions for trial the defendants in substance repudiated the idea that there would ever have been formal bankruptcy such as to trigger the Bankruptcy/Insolvency Event provisions. It is obvious, Mr Hunter QC submitted, that such a course would have been commercially very perilous, because of all of the risks to the wider AIG group of possible cross-default provisions. Self-evidently, it was submitted, it was better for AIG-FP to manage its remaining instruments in the way that it did, so as to incur lower losses rather than seek to deal with multiple events of default. The burden thus of the defendants' case at trial was, or included, that it had been better for AIG-FP to continue as it did as a going concern, even if continuing as such would ultimately mean having to pay claimants. What they now wish to say is that if continuing as a going concern would mean having to pay the claimants, as all things being equal I have held that it would, AIG-FP would have decided that it was better not to continue as a going concern. Thus again, whereas in opening the defendants said that it cannot sensibly be argued and there was no evidence whatsoever that there was some alternative hypothetical wind-down that might have been more beneficial to AIG-FP, now it is to be said that there was a hypothetical wind-down leading to a bankruptcy that AIG-FP would have decided was more beneficial to it, in order to avoid paying the claimants. I agree in the context of this defence that the issue as now proposed to be raised could not be said as such to have been decided against the defendants, but the way in which hypothetical different ways of managing the insolvent estate or condition of AIG- FP were raised as relevant to the issues at trial strongly reinforces the conclusion that the type of defence now raised had its proper home, if it was to be raised, at that trial.

    c. Further, the defendants founded a successful defence of the tort claims against AIG Inc upon the ground that AIG Inc believed AIG-FP to have operated the Plans correctly (or more strictly, upon the ground that the contrary had not been established). I agree with Mr Hunter QC that that is not without more directly and in terms inconsistent with the 'managed bankruptcy' logic now pleaded so that there is no issue estoppel. However, the tenor of the factual case put before the court in support of that successful defence went rather further than its basic narrow logic. To my mind, it is obviously at least well arguable that, properly investigated, as it would and should have been at trial if it was to be raised, inconsistency would have emerged, not least because the defence now sought to be raised that a 'managed bankruptcy' would have been chosen for the purpose of and in order to ensure non-payment to the claimants would have given rise to a serious need to consider the possibility of breaches of duty as employer or the implied duty of good faith under Connecticut law that I was able to say in the trial judgment did not affect the outcome, because such points did not arise on the facts.

d. Further again, and as a stark illustration of the observation I have just made about the extent of the factual case developed, it is suggested that having to that extent made findings favourable to Mr Dooley, and as a result to the defendants, in relation to his approach to these matters, I will be asked to assess him again by reference to what it is proposed that he will now come to court to say about the lengths to which the defendants would have gone to ensure that the claimants were not paid. Again, as Mr Hunter QC submits, there is at one level no complete or immediate inconsistency between the proposition that Mr Dooley (and as I held, by extension probably Mr Liddy), believed that what had actually happened was properly in accordance with the Plans and the case now proposed to be raised as to what steps would have been considered in relation to the operation of the Plans in a different world, but the tenor of Mr Dooley's factual evidence was very much that if, AIG-FP having not in fact become subject to formal bankruptcy processes, the Plans obliged payments to be made, payments would have been resumed. It was not that in those circumstances, he would have expected AIG-FP to seek formal insolvency to avoid paying the claimants. Whether or not ultimately I would be persuaded to accept from him that that is the approach that AIG-FP would have taken, in my judgment it would be a most unseemly process to explore that now with Mr Dooley, having formed views I did about him in part by reference to the absence in the case of any suggestion that AIG-FP had acted or might act in any such way.

94. In that last regard, as Mr Oudkerk QC identified in his submissions on this application, there are a number of areas where on the face of things the suggestion that AIG-FP would have behaved in that way does not sit at all easily with the evidence Mr Dooley gave or the case presented by the defendants on the facts, ultimately with a view successfully to persuading the court not to hold AIG Inc liable in tort. It would be contrary to the interests of justice for those matters now to have to be revisited, the claimants having to that extent lost at a trial influenced by how that part of the case was so presented by the defendants.

Positive Case 3: Plan Amendment

95. Paragraph 8 pleads a new case as to US Federal tax law alleging that the defendants "*will rely on Section 409A and the Treasury regulations and other guidance thereunder which generally came into force no later than 1 January 2009*" and alleging in particular that US Treasury Regulations 1.409A-3(i)(1)(i) and 1.409A-2(b)(1) create certain rules concerning Section 409A that are relevant to these proceedings.

96. The procedural history as regards identifying the meaning and effect of Section 409A so far as it might be relevant to the claimants' claims is described in the trial judgment at [105]. It means that this case was tried upon the basis of common ground as to that. The upshot, without rehearsing the detail from the trial judgment, was that the agreed relevant meaning and effect of Section 409A did not hamper the claimants' claim. I find it difficult to imagine a more obvious case of abuse, then, than this attempt by the defendants to have a second bite at the Section 409A cherry.

97. At paragraphs 24 to 25, leaving aside the first sentence of paragraph 25, the defendants plead positive counter-factual cases concerning Plan amendment. There are several analytically separate cases, unhelpfully not pleaded out separately, but they all proceed from the premise pleaded at paragraphs 24.1 and 24.2, namely that:

    a. Section 4.04(ii) of the DCP provided that unilateral amendment by the Committee with Board approval "*cannot, subject to Section 4.01 hereof, reduce or delay payment of ... benefits accrued up to the date of such amendment*".

    b. The words "*subject to Section 4.01 hereof*" in that provision mean that the Committee could amend Section 4.01 even if the effect was to reduce or delay payment of accrued benefits.

    c. Further or alternatively the claimants had no relevant accrued benefits prior to restoration. So section 4.04(ii) did not constrain the Committee's entitlement to effect amendments before balances had been restored.
    (The equivalent provision in the SIP is materially identically worded so no different issue arises in relation to SIP Account balances.)

98. The first positive counter-factual Plan amendment defence advanced upon that premise then alleges that:

    a. The Committee would have been bound or entitled to amend to avoid illegality (paragraph 24.3).

    b. Therefore the Plans would probably have been amended to provide that payment of restored balances should only have been made where paying AIG Inc would not be unlawful (paragraph 24.5.1, which in fact pleads a more specific case than that, but the specifics do not matter).

99. That assumes and required that Positive Case 1: Illegality is open to the defendants but I have already concluded that it is not.

100. The second positive counter-factual Plan amendment defence alleges that.:

    a. The Committee would have been bound or entitled to amend to prevent Plan failure under Section 409A (paragraph 24.4). In that regard, paragraph 24.4 goes on to plead that there was a Plan failure or risk thereof from 31 December 2008 because the December 2008 Plan amendment rendered the timing of payment of restored benefit impermissibly uncertain or capable of impermissible acceleration or delay.

    b. Therefore the Plans would probably have been amended no later than 1 January 2012 to provide for restoration and payment in full, not in 2013 but at some later date "*significantly in the future*" involving on any view a deferment of at least five years (paragraph 24.5.2).

    c. Alternatively, the Plans would probably have been amended in some other way "*to address plan failure*" (paragraph 24.5.3). One example is suggested, namely an

amendment such that restored benefits should only be paid if a participant was still employed at the payment date.

101. Taking that alternative case first, it is: (i) embarrassing for want of particulars beyond the one example suggested; (ii) obviously unfounded in that example since there is no basis in the meaning and effect of Section 409A agreed at trial, or even in the additional matters pleaded at paragraph 8 were they allowed, for the suggestion that plan failure or avoiding plan failure has anything to do with whether a participant is still an AIG employee when deferred benefits become payable. Paragraph 24.5.3 therefore should be struck out even if more generally it were open to the defendants to pursue a positive Plan amendment counter-factual by reference to plan failure under Section 409A.

102. In any event however and generally, as with the 'managed bankruptcy' defence, in my judgment a positive defence claiming that the Plans needed to be or could have been amended to address Plan failure under Section 409A and would for that reason have been amended in such a way that the claimants would not have been paid the balances affected by the application of losses as of 31 December 2008 and 2009 was properly a subject for trial if it was to be raised at all and is abusive to be raised only now the defendants have lost at trial.

103. A third positive counter-factual Plan amendment exists because paragraph 24.5.2 is not confined to the assertion that Plan amendment was required or allowed and would probably have occurred to deal with Plan failure under Section 409A. The third positive defence in that regard is simply that the Plans would have been amended to put back payment of restored balances to a later date not identified by the pleading but significantly after 2013, so as to avoid paying the claimants in 2013. In my judgment, similarly to the 'managed bankruptcy' positive case, this is abusive and in that regard, I note specifically that in the trial judgment at [7] I recorded that there was no question in the case of the Plans being altered in response to the financial crisis in a way that would be both adverse to the claimants and effective under Connecticut law such as might give rise to a claim against the employer, such as was considered in *Attrill v Dresdner Kleinwort Ltd* [2013] EWCA Civ 394, [2013] 3 AER 607. That again, as with some of my observations in relation to the 'managed bankruptcy' case, is a clear demonstration of why cases of the type now sought to be advanced were, to adopt the phrase I said at the outset remained in my judgment a useful indicator, properly the subject of trial if they were to be raised.

104. Furthermore in my judgment:

a. the cross-reference to Section 4.01 of the DCP in section 4.04(ii) (and the equivalent cross-reference in the SIP) does not convey that the Committee may amend Section 4.01 in such a way as to increase the degree to which benefits accrued prior to the amendment might be reduced or delayed by the operation of Section 4.01. Put another way, it does not convey that Section 4.01 is excepted from the rule against such amendments. Such a reading would in truth deprive that rule of any meaningful content.

b. The cross-reference to Section 4.01 in Section 4.04(ii) conveys rather that whilst the Committee may not amend in such a way as to reduce or delay payment of benefits accrued prior to the amendment, an amendment that does not itself have that effect will be effective even if Section 4.01 (as it stood prior to the amendment in question) might operate to reduce or delay payment of those benefits after the amendment has come into force.

c. If these positive Plan amendment defences were otherwise open to the defendants, I would therefore give summary judgment against them on their primary premise, alleging it was open to the Committee under section 4.04 to amend Section 4.01 so as to reduce or delay payment of accrued benefits.

d. The alternative premise alleging that participants had no accrued benefits prior to actual restoration seems to me likewise plainly wrong. As I discussed in the trial judgment, the legal mechanism by which the Section 4.01 reduction / restoration scheme operates is the discharge of a debt (reduction) and the accrual of a new debt (restoration), the eventual payment of that new debt then being the deferred payment of the Plan benefits that accrued originally when the Plan balances in question were first credited, i.e. the balances that were later -- or it could be simultaneously -- reduced for losses. But the Plan benefits in question did still accrue then and in my judgment that is the accrual to which section 4.04(ii) refers.

105. Those summary judgment conclusions, although not necessary for the striking out of the positive counter-factual defences alleging that there would have been Plan amendments to avoid paying the claims, are also sufficient to dispose of part of paragraph 9 so it is convenient to deal with that now. I have already given a general description of the case now advanced by paragraph 9 and the first two sentences of paragraph 10. By paragraph 9.5, the defendants assert that the claimants' case is necessarily premised upon the counter-factual proposition that the Plans would not have been amended in such a way as to prevent them from being paid in full in 2013. In my judgment, for the reasons I have just given, the Plans did not allow for amendment, reducing or delaying payment of the Plan balances that were reduced to nil by the application of losses under Section 4.01(b) as of 31 December 2008 and 2009.

106. That also disposes of the first sentence of paragraph 25 which I left to the side as regards the positive counter-factual defence. It just reads that, "*If the Claimants cannot establish the No Amendment premise, they cannot establish any loss.*" So it repeats and adds nothing to paragraph 9.5.

Positive Case 4: Plan Suspension

107. Section 4.04(ii) of the DCP, but not section 4.04 of the SIP, provided that the Board might suspend or terminate the DCP, provided that any such suspension or termination could not reduce or delay payment of benefits accrued prior thereto. That again is said to be "*subject to Section 4.01 hereof*" and that cross-reference has in my judgment the same meaning and effect as with Plan amendment. It does not mean, as is now suggested by the defendants, that the DCP could be suspended or terminated so as to avoid the obligation to restore and

in due course pay balances credited but reduced pursuant to Section 4.01(b) prior to the suspension or termination.

108. The Board's right to suspend or terminate is what meant the DCP was not a perpetual scheme. It did not confer an entitlement retrospectively to change the ongoing operation of the DCP, upon its terms as they were for Compensation Years when it was in place. Therefore, the further positive case pleaded at paragraph 26 cannot work. In short, it asserts that because the Board could have suspended or terminated the DCP and the SIP with the result that the claimants' balances would not be restored and paid, the Board would have done so and the claimants have suffered no loss. But as I have just said, a suspension or termination as provided for by section 4.04(ii) of the DCP would not touch the operation of the DCP, or therefore AIG-FP's obligations, in respect of restoration or payment of balances reduced to nil by the 2008 or 2009 Realized Losses.

109. For completeness, the positive case is also hopeless as a defence under the SIP anyway because, as the defendants fairly accepted when I raised this during my preparation for giving this judgment, there is no relevant suspension/termination provision in the SIP at all and it was an error to plead otherwise.

110. As with Plan amendment, so also for Plan suspension/termination, the unarguability of the defendants' new case also defeats their attempt to raise it passively as part of paragraph 9. There, by paragraph 9.6, the assertion is that the claimants' case is necessarily premised upon a counter-factual that AIG-FP would not have terminated or suspended the Plans. But to the extent that AIG-FP had any entitlement to suspend or terminate the Plans, an entitlement limited in fact to the DCP, it was not an entitlement capable of affecting the claimants' rights in respect of their balances reduced on account of losses as of 31 December 2008 and 2009.

111. That also disposes of paragraph 27. It pleads that, "*If the Claimants cannot establish the No Suspension premise, they cannot establish any loss.*" So it merely repeats and adds nothing to paragraph 9.6.

112. Furthermore and also for completeness, as with the positive case as to Plan amendment the positive case as to Plan suspension raises a number of separate strands of argument. Those asserting that there could and would have been suspension or termination to avoid any illegality or plan failure under Section 409A have no viable basis in any event because it is not open to the defendants to raise on the damages assessment the suggestions that there was or may have been illegality or plan failure problem.

Positive Case 5: Timed Losses

113. As I described in the trial judgment, the Maiden Lane III transaction realised massive losses for 2008 and 2009, sufficient to reduce all Plan balances to nil as of 31 December 2008 and to reduce to nil as of 31 December 2009 all new balances as of that date as they accrued. Maiden Lane III was a 'done deal' in every sense before breach of the Plans first occurred

in about May 2009 when losses were applied to DCA and SIP account balances and no restoration plan was adopted. If and insofar as any counter-factual enquiry arises on the damages assessment, on any view it is one in which Maiden Lane III is a given, taken to have been concluded and executed as in fact it was.

114. The penultimate positive counter-factual case now pleaded at paragraph 23 focuses therefore upon the residual AIG-FP book, the orderly winding down of which, continuing at the date of trial (and so far as I am aware still continuing today) has been the sole ongoing business of AIG-FP since Maiden Lane III completed. The counter-factual case now pleaded says that if AIG-FP had adopted a restoration plan for restoring reduced balances with payment thereof in 2013, it would also have managed that wind-down in such a way as to ensure there were Realized Losses in 2013, i.e. realised in the year to November 2013, at least equal to the aggregate balances to be paid in 2013 following restoration. More specifically, the pleaded case says that determination of the non-CDS derivatives in the residual book would have been managed in such a way as to ensure Realized Losses on those transactions were incurred in 2013 sufficient to bring about overall the result I have just stated.

115. The argument is that in that event, (a) there would have been no payment in 2013 as alleged by the claimants; and (b) they have suffered no loss.

116. I am not deciding at this stage in this judgment, or at all today, whether either conclusion would follow from the premise. The issue at this stage in this judgment is whether the defendants are entitled to pursue the positive counter-factual case that they have pleaded, seeking to establish the premise, having pursued no such case at trial.

117. In my judgment, they are not. It is a *Henderson* abuse for the defendants to seek to plead and pursue that case only now. The general points I have made already in the context of a general analysis of what should have been pleaded and as regards, in particular, the 'managed bankruptcy' defence apply also here and I will not lengthen the judgment by repeating them. Further, in this context and similar in kind although different as to its factual detail to one of the points arising in relation to 'managed bankruptcy', this new positive counter-factual case very much runs counter to the tenor of the case advanced by the defendants in order to defend themselves against other allegations raised and dealt with at trial. Thus, it was part of the claimants' case, both as regards improper operation of the Plans and as informing the view the claimants invited the court to take on the tort claims, that the incurring of losses in the book had been manipulated in such a way as to prejudice the claimants. It was as part of responding to allegations of that kind that the defendants robustly insisted at trial through argument and in the person of their factual witnesses, particularly Mr Dooley, that that is not how matters had been, and that to the contrary, and as the broad tenor of the case run at trial, the orderly winding-down of the AIG-FP book following the Maiden Lane III transaction (which itself was, as indeed I held, a necessary by-product of the Federal bailout and not a transaction to prejudice the claimants), was that the book was progressively wound down and operated in the way it has actually been operated. The idea that it should be fair or an appropriate way of conducting this litigation overall for that case to be pursued and then, when on those specific points the defendants have indeed largely succeeded but for other reasons they have nonetheless been held to be in breach, the defendants should, when it comes to assessing damages, now seek to run in

substance a very different sort of case as to how they as a business would have operated with a view to ensuring that the claimants never saw their money.

Positive Case 6: Conditional Restoration Plan

118. The final defence that I would characterise as raising a positive counter-factual case is pleaded at paragraphs 11 to 14. It contends that the Board would have adopted a restoration plan imposing conditions that would not have been fulfilled in the event before restoration or payment. This, with respect, fundamentally misunderstands the view taken in the trial judgment, which in any event I am quite clear is the correct reading of Section 4.01(b)[4], namely that the restoration plan required to be adopted was a schedule setting forth when AIG-FP would restore the amount deducted on account of losses, no more and no less.

119. Prior to the December 2008 Plan amendments, as I noted in the judgment, that was open-ended and a difficulty of construction or perhaps a need for implication arose in that regard, but that was resolved by the requirement that the plan provide for payment in 2013. What I did not have at trial, or was not confident I had had trial, was sufficient argument on whether then the logic of the damages claim advanced by the claimants worked. The preview the present argument has inevitably involved of what the claimants will say on the damages assessment has raised at least a possibility that I may be asked to find, in effect, that I could have gone ahead and finalised a money judgment without more, or perhaps without more than some specific calculation checking. So be it, if so.

120. Again, as with some of the other points I have already considered, the immediate focus has been the defendants' new positive counter-factual cases but my conclusions also render unarguable one of their new passive pleas, this time the plea at paragraph 9.1. There, they suggest that the claimants' *quantum* case is premised upon restoration plans that would have provided unconditionally for payment of deducted amounts in full in 2013. That is indeed what the Plans required; and the damages assessment ordered upon the trial on any view includes an assessment of damages for AIG-FP's failure to adopt such restoration plans when 2008 and 2009 losses were applied to Plan balances.

Paragraph 28

121. Finally as regards the defendants' new positive counter-factual defences, they plead at paragraph 28 as the conclusion of those defences that on the basis thereof, had AIG-FP adopted a plan to restore balances as required by the Plans when making deductions on account of 2008 or 2009 losses, no payment would in fact have been made to the claimants. Six reasons for that conclusion are then set out corresponding to the six positive counter-factual defences I have now considered, although I have taken them in a slightly different order in this judgment. Each stands or falls as a viable or permissible positive case with its respective alleged foundations. I have concluded that in each case the foundations alleged are impermissible or not viable, or in some cases both. So paragraph 28 is also apt to be struck out.

Burden of Proof Defence

122. I turn last to the case pleaded by paragraphs 9 and 10, some individual elements of which are unnecessarily repeated at each of paragraphs 18, 22 (second sentence), 25 (first sentence) and 27. This is the burden of proof defence I have already summarised in general terms as part of concluding that certain elements of paragraph 9 do not survive the views I have already taken as regards the positive counter-factual defences corresponding to them. That is to say, this is the defendants' contention that the claimants' claim for damages equal to the full amount of all Plan balances originally accrued but not in the event paid, plus interest as per the Plans up to the end of 2013, is necessarily premised on various matters the defendants will say it is the claimants' burden to prove but on which the defendants will say the particulars of claim as to *quantum* advance no or no proper case.

123. I should deal first with the final sentence of paragraph 10. That exists only as a place-marker to introduce compendiously the positive counter-factual defences that follow, those in aggregate being therefore strictly the defendant's alternative defence overall. That has no foundation in the absence of those positive counter-factual defences so it should also be struck out.

124. It is impossible to assess the burden of proof defence without first making reference to the pleading at paragraphs 4.1 to 4.7 of principles for the assessment of damages for breach of contract under Connecticut law. As I noted early on in this judgment, no objection is taken to that pleading. That is so notwithstanding the general line taken by the claimants, with which I have agreed, that the trial was supposed to be the trial of all issues, meaning *inter alia* that it was supposed to be the trial of all questions the parties wished to raise as to applicable law or as to the content of any applicable foreign law. Thus any principles of Connecticut law as to an assessment of damages for breach of contract to be advanced by either side should have been pleaded and, if disputed, proved at trial by expert evidence. There is no difficulty in this context about applying the default rule that the principles of English law will be applied by this court except if and to the extent that some principle of applicable foreign law has been pleaded and proved. Furthermore, there could be no basis whatever for a suggestion that the particular result arrived at in the trial judgment somehow rendered one or more of the principles now pleaded relevant for the first time in these proceedings.

125. There was a pleaded case of Connecticut law as to the assessment of damages. The claimants, as I have observed already, pleaded no such case thus relying implicitly as they were entitled to do on the default rule. The defendants though did plead a case. At paragraphs 12 to 14 of schedule 1 to the re-amended defence, they pleaded as follows:

"*12) Damages for breach of contract are intended to place the injured party in the position it would have been in had the contract been performed. Damages may only be recovered for such losses as are foreseeable, measurable with a reasonable degree of certainty and adequately proved.*

13) Damages are generally limited to losses which the parties could reasonably have anticipated at the time of the contract as arising naturally from breach. For damages to be recoverable for losses which do not usually flow from the breach, it must be established

that the special circumstances giving rise to such losses should reasonably have been anticipated at the time that the contract was made.

14) Damages are not recoverable for consequential losses such as those caused by higher tax rates or different rates of foreign exchange or attorney fees."

126. By their amended reply, the claimants pleaded no particular response to any of that. Thus they implicitly required the defendants to prove the case they had pleaded but advanced no relevant contrary case as to the content of Connecticut law.

127. The list of issues for expert evidence agreed between the parties included issue 1(f) which asked entirely generally for a statement of the applicable principles of Connecticut law relevant to the award of damages for breach of contract. However, the expert evidence that the parties chose to adduce at trial was extremely limited. Professor Schwartz's report contained a single sentence stating that under Connecticut law, damages for breach of contract seek to put the promisee in the position in which he would have been if the promisor had performed his contractual obligations. Mr Horton in his report stated the same general principle and also a succinct view as to the recognition by Connecticut law of direct damages, composed of the loss in value to the promisee of the promisor's performance caused by its failure or deficiency, and other loss, including incidental or consequential loss. Damages, he said, will be awarded for any loss that may fairly and reasonably be considered as arising naturally, i.e. according to the usual course of things, from the breach of contract itself.

128. The experts' joint memorandum recorded that each "*broadly agreed*" with what the other's report had said in a range of identified paragraphs which included those I have just summarised on damages for breach of contract. It did not state any area of disagreement between them on that topic.

129. Now, however, but without objection, the defendants allege the following "*relevant principles of Connecticut law as regards damages for breach of contract*":

"4.1 The general object of an award of damages is to place the injured party, so far as can be done by money, in the same position as he/she would have been in had the contract been performed;

4.2 Damages are recoverable only to the extent that the injured party establishes a sufficient evidential basis for estimating their amount in money with reasonable certainty;

4.3 The court must have a sufficient evidential basis on which it can calculate the damages, which is not merely subjective or speculative, but which allows for some objective ascertainment of the amount;

4.4 Connecticut law does not recognise the principle of 'loss of chance' as a method by which a claimant may recover damages for breach of contract;

4.5 [See paragraph 77 above]

4.6 In determining the benefits that the claimant would have received if the contract had been performed, the court will assume, where the defendant had an option as to how to perform the contract, that the defendant would have performed it in accordance with the option that was least onerous to it;

4.7 Damages are to be determined as of the time of the occurrence of the breach."

130. Paragraph 4.1 is established by the expert evidence called at trial. It was not in dispute and is the same as English law anyway. Paragraphs 4.2 to 4.4 take matters nowhere. There is no evidential difficulty, subjectivity or speculation about the calculation of damages proposed by the claimants. The principles, it would seem therefore, that the defendants are saying may have some impact in this case are those at paragraphs 4.5 to 4.7. I do not know to what extent, if at all, they will be in issue as principles of Connecticut law, as opposed to there being room for argument in due course as to whether they actually have any impact when applied to the facts.

131. The burden of proof defence now pleaded is pleaded as flowing from the principle alleged at paragraph 4.5, namely that the claimants must prove on the balance of probabilities that all hypothetical facts would which would have occurred if the contract had not been broken upon which their case as to damages is necessarily premised. Applied to the claimants' case for damages here, the defendants say that such hypothetical facts include that:

a. The restoration plans adopted would have provided for payment of deducted amounts in full in 2013 (paragraph 9.1). As I have already concluded, anything else would not have been due performance so there is in fact no point for the defendants there.

b. No Bankruptcy/Insolvency Event within Section 4.01(a) of the Plans would have occurred (paragraph 9.2).

c. As at 31 December 2013, AIG-FP had sufficient resources to pay in full without triggering such an Event (also paragraph 9.2).

d. Payment of restored balances to the claimants in full in 2013 would have been lawful (paragraph 9.3). It has been decided in favour of the claimants that it would have been.

e. The post-Maiden Lane III book would have been unwound exactly as it has been even though, as the defendants put it, there would have been restored balances available to absorb losses in 2013 but not in previous years (paragraph 9.4). The pleading as it stands is not in fact confined so as to focus solely upon the post- Maiden Lane III book, but Mr Hunter QC accepted in argument that any counter- factual will and must still include Maiden Lane III as actually concluded and completed.

f. The Plans would not have been amended, suspended or terminated such that the claimants would not be paid in 2013 (paragraphs 9.5 and 9.6). As I have already concluded however, the Plans did not allow any such amendment and the suspension or termination of the DCP allowed by its section 4.04(ii) would have no effect relevant to the claimants' damages claim.

g. AIG-FP could and would have paid deducted sums in full on 31 December 2013 (paragraph 9.7). It is not clear to me why the defendants' plea that this is a hypothetical fact upon which the claimants' case is necessarily premised is needed, given that the claimants' only pleaded *quantum* claim asserts it explicitly as an element of their claim. Indeed, in substance, their claim in its entirety is that absent Realized Losses for the year to 30 November 2013, in the facts that occurred, proper performance by AIG-FP of its obligations under the restoration part of the reduction / restoration scheme in the Plans required payment in full on or by 31 December 2013. That is the effect of paragraph 10 of the particulars of claim as to *quantum* read with the claimants' case as to the effect of the trial judgment.

132. Thus, and as was confirmed to my mind by the preview of the intended argument I have now had, the real contention between the parties is whether, upon a proper understanding of AIG-FP's contractual obligations under the Plans concerning restoration and payment of the balances that were reduced on account of 2008 and 2009 losses, the absence of Realized Losses in 2013 as facts actually transpired suffices for damages to be measured as the claimants say they should be, at all events absent a positive counter- factual case raised by the defendants. The claimants will say yes, the defendants will say no.

133. Subject to two points, and as it presently seems to me, there is no need for any further evidence on that. The issue is one for argument. The two points are that, (a) there may now need to be further expert evidence as to Connecticut law depending upon whether, and if so to what extent, paragraphs 4.5 to 4.7 are put in issue when the claimants plead a reply as to *quantum*, and (b) it is not yet clear whether it is in dispute that as facts actually transpired, a proper calculation of Realized Losses for 2013 generates nothing that restored balances standing as at 31 December 2013 might have had to absorb, so I cannot yet say for certain whether or not some further evidence might fairly be permitted for the determination of the damages assessment of any such dispute.

134. The main thrust of this judgment, although other points have also arisen, is that it is far too late fairly to the claimants, and a *Henderson* abuse, for the defendants to seek to pursue the positive counter-factual defences they have only now pleaded for the first time in the alternative, i.e. with a view to avoiding the substantial damages liability the claimants assert if the primary contention I have just described is determined in their favour and they establish, if they need it, the confined further matter of fact they assert concerning Realized Losses for 2013.

135. The defendants took their stand for trial, so far as is now material, on the insufficiency as they will say of the claimants' asserted basis for measuring and assessing damages. The

issue thus arising did not benefit from full or focused attention in argument at the end of a trial hearing that was dominated more by the issues over whether AIG-FP had acted in breach at all and whether if so AIG Inc had liability in tort. But that does not mean the damages assessment is or should become an invitation to reinvent the wheel as regards the approach to damages taken by the pleadings for trial.

136. The burden of proof defence as pleaded by paragraphs 9.2, 9.4 and 9.7 (in the case of paragraph 9.7 if it adds anything anyway), and the first two sentences of paragraph 10, in my judgment does no more than spell out the argument that the defendants will raise on the primary contention between the parties, i.e. to seek to persuade the court that the claimants' asserted basis for measuring and assessing damages is insufficient.

137. Although therefore it also ought to have been pleaded before, being by nature a reasoned denial, I do not regard it a *Henderson* abuse for it to be pleaded now for the purpose of the damages assessment. If there had been fuller argument at trial over how in detail the claimants' damages claim works, or as the defendants will argue does not work, I would not have shut out this line of argument. The only difference now between the argument as explicitly pleaded and the argument there would have been at trial last year is that now I may have to consider expert evidence of Connecticut law and apply what I find to be its relevant rule, rather than treat the matter by default as falling to be determined under English law. But that is the consequence of the additional pleading as to Connecticut law to which no objection has been taken.

The Trial Judgment

138. This application has called for a close and detailed consideration of the cases as to damages pleaded for and pursued at trial and their implications. It goes far beyond anything considered at trial or in the trial judgment. If that means, on reflection and with the benefit of the argument earlier this month, that the proper scope of the damages assessment is not only far narrower than the defendants have sought by their defence as to *quantum*, but narrower than the trial judgment may have contemplated or appeared to contemplate, so be it. Indeed, I wonder whether it might not be rather more confined, at least as to process, than even the claimants have been proposing in relation to case management.

139. It is right to be open about that in any event, but particularly because Mr Hunter QC argued that the positive defences the defendants were seeking now to raise were no more than the working out of the logic of certain observations in the trial judgment. For his part, Mr Oudkerk QC submitted that those observations did no more than identify points in the abstract that might possibly need to be considered, without in any way ruling that they did, and that they certainly did not license a wholesale reinvention of the defendants' case as pleaded for trial and could not have done so. Mr Hunter, being fair, did not suggest that the observations in question somehow gave the defendants permission in advance to introduce new positive cases for the damages assessment if he was wrong in his basic submission that the judgment had found for the claimants on a case not pleaded by them. I should nonetheless deal with the particular observations that Mr Hunter cited because they generated argument on the application and because my views as to that argument may have relevance for further case management.

140. It is convenient to start with my conclusion in the trial judgment at [100]-[101] that AIG-FP owed an unqualified obligation to restore in full amounts deducted under Section 4.01(b)[1], generating an obligation to pay those amounts in full in 2013 assuming no formal insolvency process intervened triggering Section 4.01(b)[7] instead. The overall effect of the reduction / restoration scheme, I concluded, was not ever to extinguish the claimants' entitlement to the deferred part of their bonuses. That entitlement was unqualified and not open to doubt, but the reduction / restoration scheme where it operated affected when the claimants were entitled to be paid such that a Bankruptcy/Insolvency Event could intervene before they had acquired an immediate right to payment, in which eventuality the Plans provided for the claimants to have specially subordinated status as creditors.

141. I also concluded in the trial judgment at [106]-[107], in the claimants' favour, that (a) their contractual rights to have Plan balances did not permanently lapse at the end of 2013 and (b) even if those rights did then lapse, i.e. if the claimants could not say there was any further or continuing obligation to restore balances on or after 1 January 2014, that would have no impact on claims for damages for making wrongful deductions in the first place or for failing when making deductions to adopt a restoration plan.

142. The basis upon which AIG-FP was held to be in breach, then, was that: "*Acting by the Board, AIG-FP was obliged by Section 4.01(b)[4]-[6] to adopt a restoration plan providing a schedule for the restoration in full of amounts deducted (plus interest) and for payment of restored amounts in 2013, and to do so when reductions were applied to balances under Section 4.01(b)[1]. The purpose of doing so was to plan the performance of AIG-FP's obligation under Section 4.01(b)[3]/[5], which was an obligation to restore in full (and with interest) amounts deducted under Section 4.01(b)[1].*" (trial judgment at [108(viii)])

143. I also said at the end of [107], and this is the first of the observations relied on by Mr Hunter QC that: "*The circumstances, if any, in which under the DCP a restoration plan adopted in fulfilment of that obligation could lawfully not be executed were not explored at trial. They would be relevant to questions of causation and quantum that I am not in a position to determine in this judgment.*" As to that observation, firstly, Mr Oudkerk QC is correct that it was made in the abstract, that is to say, without considering the limited nature of the pleaded cases. Secondly, it contemplated expressly the possibility that after further argument the conclusion might be that failure to restore as planned would always be a breach so that in assessing damages restoration as planned would have to be taken as a given. Thirdly, even were that not the final conclusion, it certainly did not suggest as a possibility anything more than further argument over the meaning and effect of the DCP and/or the necessary impact thereof, if any, on the assessment of damages (although, to be completely clear, that in turn does not mean that something beyond mere argument of that kind was being ruled out, if it had properly arisen otherwise on the existing pleadings). Fourthly, and in any event, it did not suggest that there were or could properly be questions of causation or quantification arising beyond whatever such questions the parties had raised by their existing pleadings.

144. Having concluded at [118] that there would be judgment against AIG-FP for damages to be assessed, I said at [119] that there needed to be "*a counterfactual assessment of what should have happened*". That is a statement of the obvious and neither says nor presupposes anything about what that assessment would involve, whether as to substance or as to process.

145. I stated at [120] that there would need to be findings as to what Realized Losses were incurred for the 2010 and subsequent years. That seemed to me relevant to how matters should have worked out because of my conclusion that restored balances would be subject again to the reduction / restoration scheme if there were Realized Losses in those years. Because of that, it was not clear to me whether I was in a position to determine finally without further assistance from the parties the correctness or otherwise of the claimants' pleaded basis for damages as clarified for trial, namely that AIG-FP's breach caused them not to receive payments in 2013 that lawful performance of the Plans would have required to be made.

146. What I said at [120] did not make any assumption let alone any final ruling as to the extent, if at all, that the further assistance I could properly require from the parties would extend beyond further argument, save that on reflection it seems to me it assumed there would be no objection to asking the expert accountants to assist further in assessing on the trial material if they could the Realized Losses for 2010 to 2013. Even that in my judgment could not bind the parties. In other words, if there were in fact objection to any such additional expert assistance, that would need to be considered on its merits in the case management of the damages assessment, the objection would not have been somehow overruled in advance.

147. On no view however did what I said at [120] assume, let alone give permission for, the trial of positive cases that did not exist and had not been hinted at to the effect that absent the breaches of the Plans alleged by the claimants, AIG-FP would have taken steps to adjust how Realized Losses were incurred so as to prevent the claimants from being paid.

148. In the absence of any case at trial that Realized Losses would have been different absent breach than they were in fact, how I expressed myself at [120] seems to me to be natural in retrospect even if I did not support it with detailed analysis of the pleadings. Had such a case been pleaded, it would inevitably have been mentioned, explained and explored at trial, and I would have needed to deal with it and would have done so in the judgment.

149. At [121] I observed, which again in the abstract seemed to me logically correct, that the finding of breach in failing to adopt restoration plans when making deductions for losses was not quite, i.e. was not necessarily and without more, a finding that the claimants must have been paid in 2013 upon a proper discharge of AIG-FP's obligations. That conveys that the question for the damages assessment, given the way the claimants pleaded their damages claim, would be whether upon proper discharge of AIG-FP's obligations the claimants should have been paid in 2013. I then posited that exploring that question might involve the point I had mentioned at [107], perhaps also the Board's entitlement to amend Plans, and perhaps also other variables the parties would identify. I said I therefore envisaged that the assessment of damages might require something more substantial than further calculations from the trial evidence.

150. The way I expressed myself plainly left open the possibility that there would be further evidence over and above additional calculation evidence from the expert accountants, but that does not make what I said a ruling, let alone a final ruling, on what matters could properly be raised on the damages assessment or what process ought then to be allowed for their determination.

Other Points

151. Sadly, if only for the length of this judgment, I have not yet completed the review of the defence as to *quantum* required by the claimants' application. Paragraphs 29 to 44 set out what is described by their heading as the defendants' "*Responsive pleading*". By that, the defendants mean that those paragraphs set out how they plead, paragraph by paragraph, to the particulars of claim as to *quantum*.

152. Two different reviews are called for. Firstly, the claimants say various specific pleas within this responsive pleading stand or fall with allegations in the earlier part of the defence as to *quantum*. Secondly, there are matters raised either by the claimants or by the court of its own motion as being unsatisfactory pleas irrespective of the outcome of the claimants' attack on the earlier sections of the pleading. I shall take those separate aspects in turn.

Consequential Objections

153. The second sentence of paragraph 35 giving the defendants' reasons for denying paragraph 9 of the particulars of claim as to *quantum* appears to rely on the defendants' positive defences that will be struck out. So it will need to be reconsidered. It is not clear to me why the claimants go on to suggest that the first sentence of paragraph 35, stating that the defendants deny paragraph 9 of the particulars claim as to *quantum* ought to be struck out. If the concern is that without the second sentence, an impermissible bare denial will be left, then I can see that it may be appropriate to direct the defendants to reconsider the first sentence as part of amending or re-pleading the defence as to *quantum* as they must now do.

154. Paragraph 36.2 denies any allegation that restoration plans would have been unconditional. That cannot survive my conclusions in relation to the conditional restoration plan defence, whether pleaded as a positive case or as part of the burden of proof defence.

155. Paragraphs 36.3, 36.4 and 37 give rise to the same analysis as does paragraph 35, that is to say that each contains a second sentence giving a reason for a denial that seems to rely on positive defences that have not survived. That may or may not mean that the denial itself should be struck out and it may be the defendants should be directed to reconsider the respective first sentences when amending or re-pleading.

156. Paragraph 38 responds to the claimants' pleaded claim for interest. The primary response is a denial of the claim on the basis that the defendants deny the claimants are entitled to

substantial damages. The alternative response pleads to the particular basis upon which the claimants now say they will ask for interest to be awarded if a claim for interest arises.

157. The claimants propose the striking out of the primary response. I can see no basis for that. The upshot of their application may be that the damages assessment is a much more confined process than the defendants had sought to generate by the defence as to *quantum*, but I have not decided by this judgment that the claimants will definitely recover substantial damages so as to generate a claim for interest.

158. Similarly, there is no basis for striking through as the claimants propose the words "*or at all*" in paragraph 39 by which "*it is denied that the claimants are entitled to interest as alleged or at all*".

159. Also likewise, and finally as regards consequential objections, the claimants ask me to strike out the second sentence of paragraph 43 by which the defendants deny that the claimants are entitled to any sums by way of damages or in debt. But as I understand it that will still be their case after this judgment and I can see no immediate reason why that denial ought to be struck out.

Independent Objections

160. The claimants object to paragraph 44. It is an old-fashioned general traverse that has no place under the CPR, is objectionable as such and should be struck out.

161. The remaining points are matters I raise of my own motion.

162. By paragraph 30, the defendants plead that paragraph 4 of the particulars of claim as to *quantum* is "*not a full or accurate summary of the Judgment [i.e. the trial judgment]. AIGFP will rely on the Judgment at trial for its full terms, true meaning and effect.*" That is, with respect, inadequate and unhelpful. Any denial of accuracy needs, if to be serious, to identify with particularity which aspects of what is pleaded by the claimants at paragraph 4 in the particulars of claim as to *quantum* it is asserted are inaccurate. The denial of material completeness implies that the defendants wish to say that, for a proper understanding of what is the effect of the trial judgment for the purposes of the damages assessment, other propositions not set out by the claimants need to be taken into account. Any such ought to be identified.

163. By paragraph 31.1, the defendants deny that the claimants' figures given in the table at schedule 3 to the particulars of claim as to *quantum* are in every case correct and say the correct figures will be the subject of further accountancy evidence. That is not good enough, with respect, especially at this late stage of the game. The defendants should have been able to admit or plead rival figures by the time the defence as to *quantum* was served and must now do so as soon as possible. I suspect that when they do so, paragraph 31.3 will no longer be required if, which I rather doubt, it does anything at the moment anyway. Whether there should be any further accountancy evidence will be a matter for case management once the defendants have pleaded a proper case, that being the sort of case management that should have occurred in February if the defendants had not caused proceedings to take such a different turn by the nature and extent of the defences they sought to raise more generally.

164. Paragraphs 33 and 34 between them plead that the defendants do not admit the claimants' pleaded case that for each of 2010 to 2015 there was no current year income if calculated in accordance with the trial judgment and Realized Losses were as stated under paragraph 7 of the particulars of claim as to *quantum* as supported, the claimants say, by paragraph 8 thereof and schedule 4 thereto. The defendants say that these matters too will be the subject of further accountancy evidence. That is likewise not good enough. The defendants should be in a position to admit or plead rival figures and ought to do so as soon as possible. What further accountancy evidence should then be allowed, if any, will be for case management once the nature and extent of any disputes are thus identified.

165. I should add for completeness that the claimants' averments in question in fact refer to "*relevant losses*", but when read with paragraph 4.4(a) of the particulars of claim as to *quantum*, it is plain that the claimants mean by that Realized Losses as actually incurred.

166. The point I have just made about the claimants' use of language also applies to paragraph 10(2) of the particulars of claim as to *quantum*. It avers that, "*There were no relevant losses for the compensation year 2012/13.*" The first sentence of paragraph 36.3 denies that claim. Again, with respect, that is not good enough. Once that point on the claimants' use of language is unpicked, the defendants' denial is a denial that there were no 2013 Realized Losses. That is pregnant with a positive case that there were 2013 Realized Losses. That positive case, if the defendants indeed have one, must be pleaded and as with paragraph 7(3) of the particulars of claim as to *quantum*, in fact the defendants should be in a position either to admit or to plead a positive case.

Conclusions

167. By reason of issue estoppel, to give effect to conclusions I have reached by way of summary judgment, and/or because it is a *Henderson* abuse that they are raised only now, in each case to extent that I have sought to indicate in going through the defence as to *quantum* in detail, the following pleas will be struck out:

    a. from paragraph 4, the words "*and as to the enforceability of contractual obligations where performance would violate law or public policy*" in the introductory paragraph together with sub-paragraph 4.8;

    b. paragraphs 5.8 inclusive;

    c. from paragraph 9, sub-paragraphs 9.1, 9.3, 9.5 and 9.6;

    d. the last sentence of paragraph 10;

    e. paragraphs 11 to 28 inclusive;

    f. from paragraph 36, sub-paragraph 36.2.

168. The second sentences of each of paragraph 35, sub-paragraph 36.3, sub-paragraph 36.4 and paragraph 37 therefore cannot stand either and the respective first sentences may need to be reconsidered.

169. Paragraph 44 will also be struck out as an impermissible general traverse.

170. Finally, the defendants will be required to re-plead paragraphs 30, 31.1, 33 and 34, and to consider whether, having repleaded paragraph 31.1, it is necessary or proper to maintain paragraph 31.3.