Neutral Citation Number: [2022] EWCA Civ 1704

Case No: CA-2022-000559 & CA-2022-000559-A

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
Mr Justice Calver
[2022] EWHC 229 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2022

Before:

LORD JUSTICE MALES
LORD JUSTICE POPPLEWELL
and
LORD JUSTICE NUGEE

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Between:

E D & F MAN CAPITAL MARKETS LIMITED	**Respondent /Claimant**
- and -	
1) COME HARVEST HOLDINGS LIMITED	**Defendants**
2) MEGA WEALTH INTERNATIONAL TRADING LIMITED	
3) STEVEN KAI SHING KAO	
4) GENESIS RESOURCES INC.	
5) GENESIS PROPERTIES HOLDING LLC	
6) GENESIS KINGHWA LLC	
7) TRANSCENDENT GLOBAL FINANCE INC.	
8) TRANSCENDENT (SG) PTE LTD	
9) SAMPO INTERNATIONAL LTD	
10) STRAITS (SINGAPORE) PTE LTD	**Appellant**
-and-	
WAI KWOK WONG	**Third Party**

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David Lewis KC, Andrew Dinsmore & Manuel Casas (instructed by **Reed Smith LLP**) for the **Appellant**
Huw Davies KC & Katherine Ratcliffe (instructed by **Clyde & Co LLP**) for the **Respondent**

Hearing dates: 13 & 14 December 2022

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Approved Judgment

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

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Lord Justice Males:

1. The appellant in this case, Straits (Singapore) Pte Ltd ("Straits"), was party to a dishonest conspiracy to injure the respondent, ED&F Man Capital Markets Ltd ("MCM"), by unlawful means, the means in question being the provision of what purported to be (but were not) original warehouse receipts giving MCM the right to acquire title to and possession of quantities of nickel held in warehouses in (mainly) Singapore. MCM paid some US $284 million to acquire these warehouse receipts, which proved to be worthless. It sold them on to another company, ANZ Commodity Trading Pty Ltd ("ANZ"), for some US $291 million and, as a result, incurred a liability to ANZ.

2. In the event MCM was able to settle its liability to ANZ. The terms of the Settlement Agreement are complex and will need to be considered. However, the trial was conducted on the basis that they provide for payment of a sum which is less than the amount of US $291 million which ANZ had paid MCM, and less than the amount of US $284 million which MCM had paid to acquire the receipts. As I shall explain, that is an oversimplification, to the point of being misleading, but it has given rise to an issue as to the damages payable by Straits.

3. That issue is whether (as Mr Justice Calver held and as MCM contends) MCM is entitled to recover from Straits the US $284 million which it paid in order to acquire the worthless receipts, or whether (as Straits contends) the true measure of MCM's loss is the amount of its liability to ANZ, which Straits contends is the lesser sum which it says is payable under MCM's Settlement Agreement with ANZ.

Warehouse receipts and metal trading

4. The judge explained the nature of the trading in which the parties were involved, and the role of warehouse receipts in metal trading, which formed the background to the fraud committed in this case, at [7] to [19] of his judgment. I can summarise this as follows.

5. Nickel repo transactions are financing transactions whereby the owner of the nickel raises finance by selling it to a buyer and agreeing to repurchase it at some point in the future at a higher price. The difference between the two prices is akin to the interest that would accrue on the lending of funds for the period between the purchase and the sale.

6. The seller is therefore effectively in the position of a borrower and the buyer is in the position of a lender, with the metal acting as the collateral or security for the financing. Instead of delivering the metal itself to the buyer, the seller will provide a warehouse receipt issued by a metals warehouse certified by the London Metals Exchange, endorsed in favour of the buyer. The repurchase leg of a repo transaction may be contingent, in which case the "borrower" (i.e. the original seller) will be granted an option to purchase from the "lender" (i.e. the original buyer) metal of the same specification, brand, weight, shape and location as was originally sold under the purchase leg. If the call option in a contingent repo transaction is not exercised, the transaction takes effect as a straightforward sale contract. In that event, the buyer may take ownership of the metal by presenting the warrant to the warehouse, or may sell the metal on to another buyer, endorsing the warrant and providing it to that new buyer.

7. The warehouse receipt provided by the seller/borrower to the buyer/lender plays an essential role in such a transaction. Although not a document of title, it has a similar function in that it represents the metal stored at the warehouse. The original hard copy receipt is issued by the warehouse to the order of the party who deposited the metal in the warehouse in the first place (the first order party, i.e. the seller/borrower). The seller/borrower will then endorse and deliver the warehouse receipt to the buyer/lender in exchange for payment and the buyer/lender will hold the receipt as collateral for the funds advanced. There may be a chain of such endorsements. However, the first order party remains the owner/bailor of the metal until the endorsed original warehouse receipt is presented to the warehouse by the final endorsee. Until then, the warehouse will act on the instructions of the first order party, who will be shown in its records as the owner of the metal. When the final endorsee presents the receipt to the warehouse, it may either demand delivery of the metal or alternatively a new warehouse receipt will be issued to its order.

The facts in outline

8. Between May and October 2016 MCM entered into 12 purchase contracts with the first defendant, a company called Come Harvest Holdings Ltd ("CH"), and 16 purchase contracts with the second defendant, an associated company of CH called Mega Wealth International Trading Ltd ("MW"). (It is unnecessary to distinguish between these two companies in this judgment; I shall refer to them together as "CH/MW"). These were contracts for the purchase of nickel, to be performed by delivery of original warehouse receipts. They were in each case to constitute the first leg of a repo transaction, although in the event the option to repurchase was never exercised. MCM received a total of 92 purportedly genuine original warehouse receipts from CH/MW in purported fulfilment of the latter's obligations under these contracts.

9. Out of the 92 purported warehouse receipts which it received, and for which it paid a total of some US $284 million, MCM sold on 83 to ANZ for a total of some US $291 million. (The remaining seven were taken by MCM as collateral for margin calls and retained). Thus MCM would have made a profit of about US $7 million if all had gone well. The remaining nine receipts were retained by MCM as collateral for margin payments which had become due from CH/MW.

10. The way in which these contracts came to be concluded was explained in the unchallenged evidence of MCM's witness, Mr Nicholas Riley.

11. First, MCM would receive by email from CH/MW a PDF copy of a warehouse receipt, together with what was referred to at the trial as a "PMA Letter". This was a letter from the warehouse keeper, Pacorini Metals (Asia) Pte Ltd (later renamed Access World), referring to the warehouse receipt and confirming that upon receipt of the original receipt duly endorsed, signed and dated by the order party, and subject to payment of its fees, the warehouse would release the nickel to the endorsee without further written instructions from the order party. On the first occasion when one of these PMA Letters was issued, it was initially addressed to MCM, but MCM requested a revised letter addressed to ANZ and, thereafter, all such letters were addressed to ANZ.

12. MCM would then email these documents to ANZ, with whom it would agree a price and conclude a contract. In this way it could ensure that its purchase contract with CH/MW and its sale contract with ANZ were concluded more or less simultaneously,

on back to back terms, with MCM making a modest profit. The contracts themselves did not identify the particular warehouse receipts which were to be provided to the buyer, but it was implicit in the provision of the PMA Letter that the nickel to be sold by CH/MW to MCM and by MCM to ANZ was the same nickel, namely that which was represented by the warehouse receipt referred to in the PMA Letter.

13. MCM would then receive by courier what it believed to be the original warehouse receipt together with the original PMA Letter which, after endorsing the warehouse receipt, it would send on to ANZ.

14. Once ANZ was in possession of the warehouse receipt, it would pay MCM. MCM would then pay CH/MW.

15. Thus the transaction was structured by MCM so that, although contracting as a principal, it was in effect a middleman (which was how Mr Riley described MCM's role in his evidence), buying and selling the same metal on back to back terms, earning what it characterised as a brokerage fee, without being required to pay CH/MW until it had received funds from ANZ. Moreover, although CH/MW did not know the precise terms on which MCM had contracted with ANZ to sell on the nickel which CH/MW were selling to them, Mr Riley told CH/MW that it had done so. In any case this was apparent from the fact that MCM required the PMA Letter to be addressed to ANZ. Although these letters went no further than confirming the way in which the warehouse receipts worked, as described above, they were intended to and did provide additional reassurance, not only to MCM but also to ANZ, that by entering into the transaction ANZ would obtain the right to acquire title to and possession of the nickel represented by the warehouse receipt. Such letters would have been pointless if MCM was free to perform its contract with ANZ by supplying warehouse receipts relating to other nickel which might, for example, be held in a different warehouse.

16. In fact the purported warehouse receipts which MCM received from CH/MW and passed on to ANZ were not original warehouse receipts, but colour-scanned copies of the original receipts which Straits had provided to CH/MW. At all material times the true owner of the nickel and the holder of the original warehouse receipts was Straits, although some of the receipts had been pledged to its own financiers. The colour-scanned copies were no more than worthless pieces of paper which gave their holder no rights in respect of the nickel in question.

17. The true position came to light in early 2017.

MCM's claims

18. In these circumstances MCM brought a number of claims, including claims in deceit against the first to fourth defendants (CH, MW, their agent Genesis Resources Inc, and Genesis' director and shareholder Mr Steven Kao) and claims for conspiracy to injure by unlawful means against the first to fourth defendants and Straits.

19. It also brought claims against the fifth to eighth defendants, but these claims were settled before trial for a total of US $1.8 million.

20. The conspiracy claim against Straits, which was the only defendant to take part in the trial, was that there was an agreement between Straits and the first to fourth defendants

that Straits should: (1) supply the 92 colour-scanned copies of blank endorsed original warehouse receipts, (2) supply the PMA Letters addressed to MCM's sub-buyer, ANZ, (3) enter into sham contracts for the sale of nickel to CH/MW and issue invoices accordingly, (4) refer to the colour-scanned copies as warehouse receipts in correspondence, when they were no such thing, and (5) hold the corresponding original warehouse receipts for as long as dictated by CH/MW. This allowed CH/MW and Genesis, using the colour-scanned copies, to purport to sell to third-party financiers, including MCM, the nickel which was represented by the warehouse receipts held by Straits or which had been pledged by Straits to its own financiers.

21. The judge found that this conspiracy was proved and that Straits was liable to pay damages to MCM. In particular, he found that individuals whose knowledge was to be attributed to Straits knew that MCM was financing CH/MW; that from February 2016 or even earlier Straits knew that the colour-scanned copies which it had supplied to CH/MW in exchange for payment were being used for the fraudulent purpose of obtaining finance from western financiers; that Straits knew that MCM was an intended victim of fraudulent conduct by CH/MW from April 2016 at the latest; that Straits knew or strongly suspected that the means by which MCM was being defrauded was the use of the colour-scanned copies of warehouse receipts supplied by Straits to Mr Kao, which caused MCM and others to have the false belief that they had acquired or would be able to acquire title to the metal covered by warehouse receipts corresponding to those colour scanned copies; and that the individuals at Straits involved in this fraud were motivated by the substantial payments made to Straits by CH/MW, which would be reflected in the bonuses paid to them by Straits.

22. Straits sought permission to appeal against the finding of liability, but permission was refused.

23. Although there was no claim made by ANZ, which is not a party to this action, the judge's findings mean that, as well as deceiving MCM, CH/MW was also deceiving ANZ and Straits was aware of this. This came sharply into focus in July 2016, when ANZ asked to inspect the metal over which it believed that it had rights as a result of holding what it understood to be original warehouse receipts. CH/MW and Straits succeeded in concealing from ANZ when this inspection took place the fact that the documents which it held were not the original warehouse receipts and that those original receipts had in fact been pledged to Straits' bank. The judge referred to contemporary exchanges referring to this successful concealment, saying "there is no doubt in my mind and I find as a fact that in these exchanges she [Ms Tan Hui Ying, a senior Straits executive] is congratulating herself and Ms Li in suppressing the truth from ANZ, which was that it did not own the metal because Straits had itself pledged it to its own bank".

The Settlement Agreement between MCM and ANZ

24. As a result of the fraud, MCM was in breach of its contracts with ANZ. Instead of supplying ANZ with original warehouse receipts, it had (albeit innocently) supplied worthless forgeries which gave ANZ no rights over the nickel which the documents purported to represent.

25. MCM and ANZ entered into a Settlement Agreement on 7th February 2017, very soon after the fraud was discovered and well before these proceedings were commenced,

which occurred in December 2017. That agreement has been amended from time to time and was amended and restated on 11th September 2020 ("the 2020 version"). That was the version which was current at the date of the trial. It was further amended and restated on 31st March 2022 ("the 2022 version"), which was after the judgment in this action and is the version currently in force.

26. For reasons which are not readily apparent, initially MCM only disclosed a heavily redacted version of the Settlement Agreement. The document was plainly relevant in view of the way in which some of the defendants were putting their case and, if there were concerns about confidentiality, those concerns could have been managed. The Agreement expressly permitted disclosure for the purpose of any court action by MCM to recover losses incurred as a result of the fraud.

27. This redacted disclosure was made in October 2020, almost a year before the trial. From this redacted version it was apparent that a "Payment Amount" was to be made by MCM's parent company ED&F Man Holdings Ltd ("EDFM"), which was a party to the agreement together with MCM; that this payment was to be made on the "Maturity Date"; and that this would settle ANZ's claim against MCM. However, the definitions of the "Payment Amount" and the "Maturity Date" were redacted, as were other important provisions, which rendered the Settlement Agreement largely incomprehensible. However, although MCM was reluctant to disclose the "Payment Amount" for reasons of commercial confidentiality, it was prepared to admit that the "Payment Amount" was less than US $284 million.

28. Somewhat surprisingly, Straits did not request disclosure of an unredacted version of the Settlement Agreement until September 2021, during the period of immediate pre-trial preparations. After some resistance, MCM disclosed an unredacted copy of the then current version of the Agreement, but it only did so on Saturday 9th October 2021, when the trial was due to commence on Monday 11th October.

29. The unredacted version reveals that the "Payment Amount" is a figure from which various deductions fall to be made. The figure is confidential and there is no need to disclose it in a public judgment unless Straits' appeal succeeds. I shall refer to it as US $X million, which is a figure considerably less than US $284 million. Straits' position, at the trial and on appeal, has been that, in order to avoid unnecessary complexity, it is prepared to ignore the deductions, which after all can only reduce the figure, and to treat the "Payment Amount" as if it provided simply for the payment of US $X million. As I shall explain, however, that apparent concession obscures the true nature of the Settlement Agreement.

The rival cases on damages

30. MCM's case, at trial and on appeal, is that the total loss which it suffered was the amount which it had paid to CH/MW (US $284 million), for which it obtained no benefit, only worthless pieces of paper, and that Straits as a conspirator with CH/MW was liable in this amount. It accepted that it would give credit for payments received from the other defendants with which it has settled, amounting to US $1.8 million, but submitted that its sub-sales to ANZ and the Settlement Agreement which it had reached with ANZ were irrelevant as *res inter alios acta* – a phrase which might be loosely translated as "none of your business".

31. In contrast, Straits submitted that the sub-sales to ANZ were intimately connected to the circumstances giving rise to the loss: the sub-sales were structured so that MCM only paid CH/MW after it had been paid by ANZ; the PMA letters were addressed to ANZ; the forged warehouse receipts were passed on to ANZ; and the result of the transaction overall was that MCM would make a profit of some US $7 million. Accordingly the true measure of MCM's loss consisted of its liability to ANZ, which MCM had succeeded in reducing under the Settlement Agreement which it had reached with ANZ to the amount of the "Payment Amount", so that Straits' liability was limited to US $X million less its profit of US $7 million.

32. It was common ground that the applicable measure of damages was that which applies to a claim in deceit, as established by the decision of the House of Lords in *Smith New Court Securities Ltd v Citibank NA* [1996] UKHL 3, [1997] AC 254 at 266H to 267D. Although the claim against Straits was for unlawful means conspiracy rather than deceit, the unlawful means in question consisted of deceiving MCM. Lord Browne-Wilkinson described the applicable principles in this way:

> "In sum, in my judgment the following principles apply in assessing the damages payable where the plaintiff has been induced by a fraudulent misrepresentation to buy property:
>
> (1) The defendant is bound to make reparation for all the damage directly flowing from the transaction;
>
> (2) Although such damage need not have been foreseeable, it must have been directly caused by the transaction;
>
> (3) In assessing such damage, the plaintiff is entitled to recover by way of damages the full price paid by him, but he must give credit for any benefits which he has received as a result of the transaction;
>
> (4) As a general rule, the benefits received by him include the market value of the property acquired as at the date of acquisition; but such general rule is not to be inflexibly applied where to do so would prevent him obtaining full compensation for the wrong suffered;
>
> (5) Although the circumstances in which the general rule should not apply cannot be comprehensively stated, it will normally not apply where either (a) the misrepresentation has continued to operate after the date of the acquisition of the asset so as to induce the plaintiff to retain the asset or (b) the circumstances of the case are such that the plaintiff is, by reason of the fraud, locked into the property.
>
> (6) In addition, the plaintiff is entitled to recover consequential losses caused by the transaction;
>
> (7) The plaintiff must take all reasonable steps to mitigate his loss once he has discovered the fraud."

33. In relation to quantum the essential issue between the parties in the court below concerned the identification of the "transaction" to which these principles should be applied. The judge identified the rival candidates for which the parties contended as follows:

> "561. Two distinct models of the 'transaction' were advanced by the parties as follows:
>
> i) **Model A** (MCM's conceptualisation): MCM entered into optional repo contracts for the sale and purchase of nickel (WHRs) with Come Harvest and Mega Wealth (the ***MCM-CH/MW Transactions***). Come Harvest and Mega Wealth had an option under the same contracts to repurchase the nickel at a fixed price by a set date.
>
> At the same time, MCM entered into optional repo contracts with ANZ (the ***MCM-ANZ Transactions***). MCM were the sellers to ANZ who were buyers of the nickel with an option for MCM to buy back the equivalent stock by a future date at a fixed price. That option would be exercised by MCM only if the option to repurchase was exercised by Come Harvest and Mega Wealth.
>
> ii) **Model B** (Straits' conceptualisation): Straits notes that the (i) MCM-CH/MW Transactions and the (ii) MCM-ANZ Transactions were structured so that MCM received the WHRs from Come Harvest and Mega Wealth and would then pass them on to ANZ. Only once the WHRs were with ANZ, would ANZ pay MCM who would then in turn pay Come Harvest and Mega Wealth. Given title to the metal only passed on payment at no point did MCM hold the metal with title to it – it therefore effectively functioned as no more than a conduit for the transaction. In Straits' words, MCM was never 'out of pocket' during the transactions. Straits therefore asserts that the MCM-ANZ Transactions were interlinked with the MCM-CH/MW Transactions and that it is therefore inaccurate to consider them as discrete sets of transactions; rather, they should be viewed as coordinated parts of one broader finance transaction."

34. In the event the judge was presented with what the parties described as a "menu" with only two choices available. MCM sought damages (in round figures) of US $284 million (less the US $1.8 million recovered from other defendants) on the basis of Model A, while Straits contended that the appropriate figure for damages on the basis of Model B was US $X million less US $7 million as the profit made by MCM on the transactions and less the US $1.8 million recovered from other defendants.

The judgment

35. Mr Justice Calver held that Model A was the correct analysis. It reflected the legal reality of the transactions, which were structured as separate principal to principal

contracts: MCM acted as a principal and was not merely an agent or intermediary. The two transactions were related, but separate; for example, if ANZ had become insolvent while holding the warehouse receipts and CH/MW had exercised their option to repurchase the metal, MCM would have been liable to provide it to them. In contrast, Model B failed to acknowledge the legal structure of the transactions and the consequences which flowed from the fact that they were principal to principal. Accordingly the Settlement Agreement was not a benefit making good part of the loss suffered by MCM under its contracts with CH/MW, but an independent agreement settling liability under the separate transaction with ANZ.

36. Once the contracts with ANZ were properly understood to be separate sub-sales and not merely a part of one broader financing transaction, the judge considered that the legal principles to be applied were clear, as laid down by the Court of Appeal in *OMV Petrom SA v Glencore International AG* [2016] EWCA Civ 778, [2017] 3 All ER 157, which dealt directly with tortious damages for deceit. In short, as Lord Justice Christopher Clarke said in that case:

> "38. … the basic measure of damages is the price paid less the benefits received as a result of the transaction which will, in a case where property is acquired, be or include its value at the date of acquisition …"

37. There were, moreover, strong policy reasons why a fraudster should not have the benefit of any onward sub-sale in a claim for deceit.

38. Accordingly the price paid was US $284 million and, because the forged warehouse receipts received were worthless, the benefit received was nil.

Submissions on appeal

39. Mr David Lewis KC for Straits challenged the judge's analysis. He submitted, in summary, that damages should be assessed by reference to MCM's liability to ANZ. The guiding principle in assessing damages is to put the claimant into the position in which it would have been if the tort had not been committed. Here, if there had been no tort, MCM would not have paid US $284 million to CH/MW, but would not have received US $291 million from ANZ either. But the result of the Settlement Agreement is that MCM's liability to ANZ is limited to US $X million. If MCM is to be put in the position as if no tort had been committed, it cannot recover US $284 million from Straits while keeping the difference between the US $291 million which it received from ANZ and the US $X million which it is obliged to pay to ANZ; that would provide it with a windfall. Instead, the correct analysis is that MCM's loss is its liability to ANZ for passing on the forged warehouse receipts in breach of its contractual obligations to ANZ; that liability was subsequently compromised by the Settlement Agreement; accordingly MCM's loss is whatever it had to pay to ANZ under that Settlement Agreement, i.e. US $X million less US $7 million less US $1.8 million.

40. Mr Lewis submitted that the contracts between CH/MW and MCM on the one hand and between MCM and ANZ on the other were inter-related and, correctly analysed, formed part of the same transaction for the purposes of the *res inter alios acta* principle. Alternatively, even if not so analysed, the US $291 million received from ANZ before MCM paid CH/MW was received as a result of MCM's "transaction" with CH/MW,

such that MCM suffered no loss at the time of its transaction with CH/MW. The principles set out by Lord Sumption in *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32, [2018] AC 313 and reiterated in *Tiuta International Ltd v De Villiers Surveyors Ltd* [2017] UKSC 77, [2017] 1 WLR 4627 apply, with the consequence that the benefits received from ANZ (i.e. the US $291 million paid by ANZ to MCM) do not arise independently of the circumstances giving rise to the loss, but from the way in which MCM had structured the business so that performance of its contracts with ANZ depended on performance under its contract with CH/MW; the fact that the contracts were principal to principal was a mere technicality.

41. Mr Huw Davies KC for MCM supported the judge's analysis. He submitted that, applying the *Smith New Court* and *OMV Petrom* principles, MCM had suffered a loss of US $284 million at the point when it paid CH/MW and received only worthless pieces of paper in return. Its contracts with ANZ constituted a separate transaction which should be disregarded in assessing MCM's damages. The fact that the contracts were principal to principal was not a mere technicality, but was critical to the analysis. Likewise, the fact that MCM received payment of US $291 million from ANZ which it would not have received "but for" its contracts with CH/MW was irrelevant: "but for" causation is not sufficient when considering whether a benefit has been received as a result of a transaction; and at the same time as it received payment from ANZ, MCM incurred an equal and opposite liability to pay damages to ANZ which effectively cancelled out any "benefit" from receipt of the price. The fact that MCM had then succeeded in negotiating a settlement with ANZ under which it did not have to pay back the full amount which it had received was not a benefit which arose from its transaction with CH/MW: it would be an affront to common sense to permit a fraudster to benefit from whatever accommodation had been reached between innocent parties who had suffered loss as a result of the fraud.

42. In oral submissions, and in response to some questioning from the court, Mr Davies submitted also that, when properly understood, the Settlement Agreement had not actually reduced or avoided MCM's liability to ANZ.

Analysis

Legal principles

43. As Mr Lewis emphasised, and as Lord Steyn pointed out in *Smith New Court* at pages 283 and 284, the overriding rule is that damages are intended to compensate the victim for the defendant's wrongdoing, "the orthodox and settled rule [being] that the plaintiff is entitled to all losses directly flowing from the transaction caused by the deceit". Thus:

> "There is in truth only one legal measure of assessing damages in an action for deceit: the plaintiff is entitled to recover as damages a sum representing the financial loss flowing directly from his alteration of position under the inducement of the fraudulent representations of the defendants."

44. The principles stated by Lord Browne-Wilkinson in the same case, which I have already set out, give effect to this overriding compensatory rule in cases where the alteration of position consists of the acquisition of property. In particular, they are sufficiently flexible to accommodate cases where assessing damages at the date of acquisition

would fail to do so. They are not, however, an exhaustive statement of the law of damages applicable when a fraudulent statement has caused a claimant to acquire property which it would not otherwise have acquired. Other principles, for example as to mitigation of damages, including the principle that damages cannot be recovered for a loss which has been avoided (e.g. *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Company of London Ltd* [1912] AC 673, 679), may also have a role to play.

45. A structured approach would first require the court to identify "the transaction" which has caused the claimant to acquire the property in question. Only then is it possible to identify any benefits received as a result of that transaction, as distinct, for example, from benefits received as a result of some other transaction. Benefits received as a result of some other transaction may be regarded as *res inter alios acta* or, to adopt the term used in the modern cases, collateral, although that term has generally been used in the context of avoided loss, which I would regard as a distinct matter. The next step is to identify any benefits received as a result of the transaction, which may require a decision to be made as to the date at which any benefits should be valued. In most cases those first two steps will be sufficient to assess the loss which the claimant has suffered and thus to arrive at the damages figure which it is entitled to recover. However, a further question may sometimes arise, whether the claimant has avoided that loss, either in whole or in part. When considering that last question, no account will be taken of benefits which are *res inter alios acta* or collateral. Broadly speaking, a key test for whether a benefit is collateral is whether its receipt arose independently of the circumstances giving rise to the loss.

46. This approach can be seen in the cases cited to us. I propose to concentrate on the tort cases concerned with deceit. Although a number of cases were mentioned to us which are concerned with whether sub-sales should be brought into account in assessing damages for breach of contract, I do not find these cases of assistance: the measure of damages in contract is different, as Lord Steyn pointed out in *Smith New Court* itself at pages 281G-282A:

> "The logic of the decision in *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158 justifies the following propositions.
>
> (1) The plaintiff in an action for deceit is not entitled to be compensated in accordance with the contractual nature of damage, i.e. the benefit of the bargain measure. He is not entitled to be protected in respect of his positive interest in the bargain.
>
> (2) The plaintiff in an action for deceit is, however, entitled to be compensated in respect of his negative interest. The aim is to put the plaintiff into the position he would have been in if no false representation had been made.
>
> (3) The practical difference between the two measures was lucidly explained in a contemporary case note on *Doyle v Olby (Ironmongers) Ltd*: G.H. Treitel, 'Damages for Deceit' (1969) 32 MLR 556, 558-559. The author said:

> 'If the plaintiff's bargain would have been a bad one, even on the assumption that the representation was true, he will do best under the tortious measure. If, on the assumption that the representation was true, his bargain would have been a good one, he will do best under the first contractual measure (under which he may recover something even if the actual value of what he has recovered is greater than the price)'."

47. The specific issue in *Smith New Court* concerned the date at which the benefit derived by the claimant from the acquisition of shares should be assessed. By the time the claimant came to sell the shares their value had fallen below their market value at the date of their acquisition. The House of Lords held that to treat the claimant as having obtained the benefit of the value of the shares at the date of acquisition was unrealistic: on the facts of that case, it could not have realised that value by selling the shares in the market at the date of acquisition, because it was "locked in", having bought the shares for a particular purpose and at a price which precluded it from sensibly disposing of them before it had in fact done so. Accordingly, to apply the "date of transaction" rule would not provide full compensation and it was necessary to value the benefit at the later date when the shares had been sold. The position would have been different if the claimant had not been "locked in". In that event, it would have been free to sell the shares in the market and any decision not to do so, for good or ill, would have been its own decision and for its own account. It should be noted that the case was concerned with the first two steps to which I have referred. No question of avoided loss arose for consideration.

48. In *OMV Petrom* the defendant had contracted to supply cargoes of "Iranian Heavy" or "GOSM" crude oil to the claimant, but had in fact supplied a bespoke blend of various crude oils which resembled Iranian Heavy and GOSM, creating a suite of false documents in order to deceive the claimant. It was common ground, for the purpose of Lord Browne-Wilkinson's third principle, that the claimant had received a benefit in the form of the blended oil which it had received. The issue was how that benefit should be valued. The claimant contended that it should be valued by reference to the market value of the blended oil at the date of acquisition, saying that a purchaser of such oil, knowing what it was actually buying, would have obtained a discount (which the judge assessed as US $1 per barrel) to reflect the risk that blends of uncertain characteristics would cause damage to the refinery. The defendant contended that, as such damage had not in fact occurred, this method of valuation was inappropriate and that the valuation should be by reference to the relative yields of refined products obtained from the blends delivered, compared with the yield that would have been derived from Iranian Heavy or GOSM oil.

49. This court accepted the claimant's submission. After setting out Lord Browne-Wilkinson's summary of principles, Lord Justice Christopher Clarke continued:

> "38. As is apparent from that summary the basic measure of damages is the price paid less the benefits received as a result of the transaction which will, in a case where property is acquired, be or include its value at the date of acquisition – which, for present purposes was, by agreement, taken as the bill of lading date.

> 39. In my view there is, in this case, no sufficient reason to take a different date and good reason not to do so. The purpose of the flexibility of approach about the valuation date to which Lord Browne-Wilkinson referred was to ensure that the person duped should not suffer an injustice by failing to recover full compensation in the type of circumstances to which he referred. There is no need to adopt such an approach in order to relieve the fraudster from the general rule as to damages, especially if to do so means that the person defrauded ends up paying more than the cargo was worth at the time that he bought it. This is particularly so in the light of the observations of Lord Blackburn in *Livingston v Rawyards Coal Co* [1880] 5 App.Cas 25 at 39 that when damage is done maliciously or with full knowledge that the person doing it was doing wrong 'you would say everything would be taken into view that would go most against the wilful wrongdoer'.
>
> 40. The crude oil the subject of these proceedings was a commodity bought in the oil trading market. That does not mean that there was a regular market for the sale of the 32 different bespoke blends with a ready supply of buyers and sellers. On the contrary these cargoes were unique and had to be valued by a calculation of the total CIF value of the component crudes discounted on account of the risks and uncertainties involved in buying these odd cargoes which were a mixture of crude oils, condensates and fuel oil. The amount by which the price paid exceeded a price calculated on that basis constitutes the measure of the buyer's loss, representing, as it does, the amount that he has overpaid on account of the seller's deceit. That loss arose when on account of the deceit he acquired the property, for which he had to overpay. The fact, if such it be, that, afterwards, none of the risks to which the discount related materialised cannot alter the fact that the buyer was induced to pay too much when he did so."

50. Accordingly *OMV Petrom* demonstrates that the purpose of adopting a flexible approach to the date on which a benefit should be valued is to ensure that a claimant receives full compensation, and not to benefit a fraudster. The loss which the claimant had suffered was the overpayment which it had made when purchasing the oil. As a matter of fact, that loss had been incurred at the date of the transaction when the claimant overpaid for what it was buying. The loss had not been avoided in any way thereafter and, as a result, no question of avoided loss arose for consideration.

51. Such a question did arise in *Swynson*, although this was not a fraud case and was not concerned with the acquisition of property. Rather, it was a claim by a lending company against a firm of accountants in which the claimant had made three loans to a borrower in reliance on a negligently prepared report. By the time that damages came to be assessed, however, two of the loans had been repaid, so that the loss on these loans (i.e. the amount of funds advanced) had in fact been avoided. The issue was whether that avoidance of the loss should be disregarded as *res inter alios acta* in circumstances

where the repayment had been funded by the claimant's own shareholder as part of a refinancing exercise. These were, therefore, rather special facts, far removed from the present case. The Supreme Court held that the avoidance of the loss should not be disregarded. Lord Sumption stated and applied the relevant principles in these terms:

> "11. The general rule is that loss which has been avoided is not recoverable as damages, although expense reasonably incurred in avoiding it may be recoverable as costs of mitigation. To this there is an exception for collateral payments (*res inter alios acta*), which the law treats as not making good the claimant's loss. It is difficult to identify a single principle underlying every case. In spite of what the latin tag might lead one to expect, the critical factor is not the source of the benefit in a third party but its character. Broadly speaking, collateral benefits are those whose receipt arose independently of the circumstances giving rise to the loss. Thus a gift received by the claimant, even if occasioned by his loss, is regarded as independent of the loss because its gratuitous character means that there is no causal relationship between them. The same is true of a benefit received by right from a third party in respect of the loss, but for which the claimant has given a consideration independent of the legal relationship with the defendant from which the loss arose. Classic cases include loss payments under an indemnity insurance: *Bradburn v Great Western Railway Co* (1874-5) LR 10 Ex 1. Or disability pensions under a contributory scheme: *Parry v Cleaver* [1970] AC 1. In cases such as these, as between the claimant and the wrongdoer, the law treats the receipt of the benefit as tantamount to the claimant making good the loss from his own resources, because they are attributable to his premiums, his contributions or his work. The position may be different if the benefits are not collateral because they are derived from a contract (say, an insurance policy) made for the benefit of the wrongdoer: *Arab Bank Plc v John D Wood Commercial Ltd* [2000] 1 WLR 857 (CA), at paras 92-93 (Mance LJ). Or because the benefit is derived from steps taken by the Claimant in consequence of the breach, which mitigated his loss: *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Ltd* [1912] AC 673, 689, 691 (Viscount Haldane LC). These principles represent a coherent approach to avoided loss. In *Parry v Cleaver* [1970] AC 1, 13, Lord Reid derived them from considerations of 'justice, reasonableness and public policy'. Justice, reasonableness and public policy are, however, the basis on which the law has arrived at the relevant principles. They are not a licence for discarding those principles and deciding each case on what may be regarded as its broader commercial merits.
>
> 12. On the judge's findings, the loss recoverable by Swynson from HMT was that which arose from its inability to recover (i) the 2006 loan which it had made to EMSL on the strength of

> HMT's reports about Evo's financial strength, and (ii) the 2007 and 2008 loans which it made in a reasonable but unsuccessful attempt to mitigate the loss arising from the 2006 loan. So far as the 2006 and 2007 loans were concerned, that loss was made good when EMSL repaid them. The fact that the money with which it did so was borrowed from Mr Hunt was no more relevant than it would have been if it had been borrowed from a bank or obtained from some other unconnected third party. There was nothing special about the fact that Mr Hunt provided the funds, once one discards the idea that HMT owed any relevant duty to him. The short point is that the repayment of the 2006 and 2007 loans cannot be treated as discharging them as between Swynson and EMSL, but not as between Swynson and HMT.
>
> 13. If, in December 2008, Mr Hunt had lent the money to Swynson to strengthen its financial position in the light of EMSL's default, the payment would indeed have had no effect on the damages recoverable from HMT. The payment would not have discharged EMSL's debt. It would also have been collateral. But the payments made by Mr Hunt to EMSL and by EMSL to Swynson to pay off the 2006 and 2007 loans could not possibly be regarded as collateral. In the first place, the transaction discharged the very liability whose existence represented Swynson's loss. Secondly, the money which Mr Hunt lent to EMSL in December 2008 was not an indirect payment to Swynson, even though it ultimately reached them, as the terms of the loan required. Mr Hunt's agreement to make that loan and the earlier agreements of Swynson to lend money to EMSL were distinct transactions between different parties, each of which was made for valuable consideration in the form of the respective covenants to repay. Thirdly, as the Court of Appeal correctly held, the consequences of the refinancing could not be recoverable as the cost of mitigation, because the loan to EMSL was not an act of Swynson and was not attributable to HMT's breach of duty."

52. There is a danger in picking out isolated sentences from this passage, as both counsel sought to do to some extent in argument before us. What emerges clearly, however, is the principle that collateral benefits (*res inter alios acta*) must be treated as not making good the claimant's loss, and that there is no single principle underlying every case. The broad principle ("Broadly speaking …") is that collateral benefits are those whose receipt arose independently of the circumstances giving rise to the loss, and the critical factor is the character of the benefit, but these are criteria which will sometimes be easier to state than to apply to the facts of any particular case. It is apparent, however, that it is no bar to treating a benefit as one arising out of the transaction, and therefore making good the claimant's loss, that the benefit was obtained after the transaction in question: inevitably, the repayment of the loan which made good the claimant's loss was made after the funds had been advanced, which is when the loss was suffered. This principle of the law of mitigation is distinct from the application of Lord Browne-

Wilkinson's statement of the principles concerning the valuation of benefit at the date of the transaction in fraud cases concerning the acquisition of property.

53. Avoided loss was also considered in *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC* [2020] UKSC 24, [2020] Bus LR 1196. This was a competition law case where the relevant issue was whether the overcharging by the credit card company had been avoided as a result of being passed on to customers. It was not, therefore, a case concerned with the acquisition of property. The Supreme Court held that, in principle, a loss which had been passed on to customers had been avoided:

> "215. We are not concerned in these appeals with additional benefits resulting from a victim's response to a wrong which was an independent commercial decision or with any allegation of a failure to take reasonable commercial steps in response to a loss. The issue of mitigation which arises is whether in fact the merchants have avoided all or part of their losses. In the classic case of *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673, 689 Viscount Haldane described the principle that the claimant cannot recover for avoided loss in these terms: 'when in the course of his business [the claimant] has taken action *arising out of the transaction*, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account …' (emphasis added) Here also a question of legal or proximate causation arises as the underlined words show. But the question of legal causation is straightforward in the context of a retail business in which the merchant seeks to recover its costs in its annual or other regular budgeting. The relevant question is a factual question: has the claimant in the course of its business recovered from others the costs of the MSC, including the overcharge contained therein? The merchants, having acted reasonably, are entitled to recover their factual loss. If the court were to conclude on the evidence that the merchant had by reducing the cost of its supplies or by the pass-on of the cost to its customers (options (iii) and (iv) in para 205 above) transferred all or part of its loss to others, its true loss would not be the prima facie measure of the overcharge but a lesser sum."

54. This reasoning shows that the question whether action which diminishes loss "arises out of the transaction" as distinct from being independent or collateral is a question of causation, a point also made by Lord Justice Phillips in another competition case concerned with the passing on of losses, *Allianz Global Investors GmbH v Barclays Bank Plc* [2022] EWCA Civ 353.

Identifying the transaction

55. Mr Davies submitted that it is inherent in Lord Browne-Wilkinson's formulation of the principles applicable in this type of case that the relevant transaction is confined to the transaction between the claimant and the fraudster, that is to say the purchase transaction which the fraudster has induced and which results in the claimant having

acquired the property in question. I do not accept this submission. Identification of the relevant transaction was not an issue in *Smith New Court* and Lord Browne-Wilkinson's principles, including the third principle that the claimant must give credit for any benefits which he has received as a result of the transaction, do not address that issue.

56. In my judgment identification of the relevant transaction must depend on an analysis of all the relevant circumstances in any particular case. Here, the starting point is that the parties chose to conclude contracts principal to principal. That is an important consideration, which cannot be dismissed as a technicality. I would accept that it will often be decisive, but it is capable of being outweighed by other factors.

57. In the present case, when the substance of the parties' dealings is considered, it is so outweighed. In substance this was a single transaction, in effect a package deal, in which, as all parties understood, CH/MW would offer to enter into contingent repo transactions for the nickel represented by a warehouse receipt referred to in a PMA Letter; MCM would offer that warehouse receipt and PMA Letter to ANZ; and if ANZ was willing to finance the transaction, MCM would conclude contracts more or less simultaneously with CH/MW on the one hand and ANZ on the other. The effect of the PMA Letters was that both contracts were in practice for the sale of specific goods, i.e. the nickel represented by the identified warehouse receipts. The fact that those letters were addressed, not to MCM, but to ANZ demonstrates the reality of the situation. Mr Riley was right to regard MCM, although contracting as a principal, as in effect a middleman whose interest in the transaction was to earn its brokerage fee. This was underlined by the fact, although this is not critical, that MCM was able to arrange matters so that it was not required to pay CH/MW until it had received funds from ANZ.

58. Just as there was a single transaction, there was here a single fraud. ANZ was the victim of the fraud by CH/MW in which Straits participated as much as MCM was. But if the "transaction" is confined to the contract between MCM and CH/MW and the involvement of ANZ is ignored, absurd consequences result. MCM would be entitled to recover damages of US $284 million, focusing only on the price it paid to CH/MW for which it received no value and ignoring the US $291 million which it received from ANZ. But ANZ, which has been equally defrauded, would then have its own claim against Straits to recover the US $291 million which it had been induced to pay. Although Mr Davies said that this would not be a problem because in practice ANZ would look to MCM for recovery, ANZ would not necessarily do so. If Straits were good for the money, ANZ would be entitled, and might choose, to sue it. As Mr Davies accepted, there could therefore be a situation, at any rate theoretically, in which Straits found itself liable to pay US $284 million to MCM and a further US $291 million to ANZ.

59. That would indeed be an absurd result. The object of this fraud was to deceive ANZ into paying for the false warehouse receipts, in the knowledge that it would pay MCM, and that MCM (acting innocently, and after deducting its profit) would pass on the proceeds to the fraudsters. The money paid out by ANZ was for all practical purposes the same money as was paid out by MCM. As a matter of legal causation, on each occasion the fraud induced both contracts, the contract between CH/MW and MCM and also the contract between MCM and ANZ. This further way of looking at the matter confirms, in my view, that this was a single transaction involving both MCM and ANZ, in effect what the judge and the parties referred to as Model B.

The benefits received as a result of the transaction

60. The next step is to identify the benefits received by MCM as a result of this composite transaction. At the date of the transaction, MCM paid out US $284 million but received US $291 million. It had, therefore, made its profit of US $7 million from the transaction. However, it had also incurred a liability to reimburse ANZ the US $291 million which it had received. One way of looking at the matter might, therefore, be to treat the money received from ANZ and the concomitant liability to reimburse that money as self-cancelling, leaving MCM with a loss of US $284 million. But that would be too narrow a view. The US $291 million paid by ANZ was money which MCM had actually received. The liability which MCM had incurred was just that, no more than a liability. As any business person will know, there is a world of difference between having money in your bank and having a good (or even unanswerable) claim to recover the same amount of money from a third party.

61. Accordingly the better view is to regard the benefit received by MCM from the transaction as consisting of US $291 million which was subject to a liability to ANZ to reimburse that amount. At the date of the transaction, therefore, and in the absence of the Settlement Agreement, MCM's loss was US $284 million, as Mr Lewis acknowledged, not on the basis simply that that was what it had paid under the CH/MW transaction(s), but because the transaction(s) taken as a whole left it with a liability to ANZ of c. US $291 million against which its profit of US $7 million fell to be offset; but that was subject to the possibility that some or all of that loss might be avoided, depending on how the position developed as between MCM and ANZ.

Was the loss avoided by the Settlement Agreement?

62. Straits' submission is that part of the loss was avoided: by the Settlement Agreement MCM succeeded in reducing its liability to ANZ from US $291 million to US $X million, and therefore avoided the loss which it had suffered to the extent of the difference between these two figures. If the Settlement Agreement had done no more than settle ANZ's claim for US $291 million for the lesser sum of US $X million, I would have accepted that submission. Once the relevant transaction is identified as including ANZ as well as MCM, a settlement of MCM's liability to ANZ for a reduced figure cannot be regarded as *res inter alios acta* or collateral. It would be a settlement between participants in the transaction which reduces, and to that extent avoids, the loss which MCM has suffered because MCM's loss comprised its liability to ANZ. As in *Swynson* (see at [13]) the settlement would "discharge the very liability whose existence represented [MCM's] loss". If MCM were entitled then to recover US $284 million from Straits, it would be left with a profit of US $ (284 – X) million which it would never have achieved if the warehouse receipts had been genuine or if the transaction had not occurred. That would offend the overriding compensatory principle for assessing damages.

63. Further, to award damages of only US $X million to MCM would not mean that Straits had avoided the full consequences of its fraud. ANZ would also have a claim. While it would have to give credit for the US $X million dollars which (on this hypothesis) it had recovered from MCM, there would be no reason why it should not sue Straits for the balance of its loss.

64. However, it is quite clear from the Settlement Agreement that this is not a fair analysis of what that agreement did. Although the Settlement Agreement did provide for payment of US $X million by EDFM and for the release of ANZ's claim to recover the "Relevant Loss" (i.e. the US $291 million which it had paid to MCM), this was in two respects only a long stop provision. First, the payment would only be made at some time a considerable way in the future, referred to as the "Maturity Date". In the 2020 version of the Settlement Agreement the Maturity Date was defined by reference to a formula which made it difficult or impossible to know when the payment would have to be made, save that it would not be made for at least two years from the date of the agreement. That formula was replaced in the 2022 version by a calendar date, 30th September 2025. Second, the "Payment Amount" was not US $X million, but US $X million less a number of deductions. One of these deductions consisted of recoveries made by MCM against third parties, including but not limited to CH, MW and individuals associated with them. These third parties therefore included Straits.

65. Even pausing here, it is apparent that any attempt to assess damages by reference to what is payable under the Settlement Agreement would be hopelessly circular. In order to put a figure on the "Payment Amount" it is necessary to know what recoveries have been made by MCM against Straits; but if the measure of Straits' liability is the "Payment Amount", the exercise becomes impossible.

66. Other provisions of the Settlement Agreement, in both its 2020 and 2022 versions, make provision for the pursuit of litigation against the fraudsters and the sharing of recoveries. Thus clause 9.1 provided:

> "9.1 **Collective interest**
>
> It is in the collective interest of the Parties to maximise the recovery of money in respect of the Relevant Loss from litigation recoveries which to the extent received will constitute Recoveries, and the Party shall act accordingly. To the extent permitted by law and the extent that documents are subject to common interest privilege, the Parties shall cooperate with each other and shall provide all necessary documents and information as the Parties may reasonably request from each other in order to be able to pursue the ANZ Litigation Recoveries and the MCM Litigation Recoveries (as defined below)."

67. Clause 10 imposed a contractual obligation on MCM to pursue litigation:

> "**Recovery against Third Parties by MCM**
>
> 10.1 **Recovery**
>
> MCM will use best endeavours to pursue recovery of the Relevant Loss, including but not limited to recovery from the following:
>
> (a) Come Harvest;
>
> (b) Mega Wealth; and

> (c) the directors, employees, agents and ultimate beneficial owners of the persons referred to in Clauses 10.1(a) and 10.1(b),
>
> (the ***MCM Litigation Recoveries***).
>
> 10.2 **Action**
>
> The actions to be taken by MCM will include but not be limited to direct claims for money against the above referenced entities. The obligation to bring proceedings is subject to obtaining legal advice that the intended proceedings have good prospects of success on the balance of probabilities. …"

68. Clause 13.7 dealt with the treatment of "EDFM Recoveries", a term which included the "MCM Litigation Recoveries" referred to in clause 10.1. Its effect was that for any such recovery received prior to the Maturity Date, EDFM would pay the amount received to ANZ after deducting its reasonable costs; for any recovery received on or after the Maturity Date, EDFM would deduct its reasonable costs and pay ANZ 50% of the balance. Accordingly the Settlement Agreement incentivised MCM to achieve maximum recovery before the Maturity Date as any recovery achieved would effect a dollar for dollar reduction in the "Payment Amount" which would be payable when the Maturity Date arrived. Indeed, if MCM were able to make a full recovery, nothing would be payable on the Maturity Date. After the Maturity Date, in contrast, recoveries received would be shared equally between EDFM and ANZ, although by that time of course the "Payment Amount" would have been paid.

69. The Settlement Agreement dealt also with wider issues between the ANZ group and the ED&F Man group, but it is unnecessary to describe these.

70. The drafting of the Settlement Agreement is complex, perhaps necessarily so, but on any view it is far removed from a simple release of ANZ's claim in return for payment. It is better regarded, to borrow and adapt what Lord Justice Rix said in *Mobil North Sea Ltd v PJ Pipe & Valve Co* [2001] EWCA Civ 741[1], as a reorganisation of the terms upon which the parties to the agreement were going to conduct litigation against the fraudsters. Here, MCM undertook a contractual obligation to pursue the fraudsters for the full amount of the loss suffered by ANZ.

71. The defendant in *Mobil* was a subcontractor under a contract for the supply of valves for a North Sea gas project. The project was operated by Mobil, who entered into a head contract with Fluor Enterprises, and Fluor in turn subcontracted with the defendant. The valves supplied were defective and had to be replaced. Claims were brought against the defendant for the cost of replacement by both Mobil and Fluor, but the defendant sought the dismissal of Fluor's claim on the grounds that it had made a settlement agreement with Mobil under which it avoided all the loss which it claimed.

72. The application to dismiss Fluor's claim failed on a number of grounds, one of which was that the settlement agreement had not avoided the loss at all. After referring to textbook and case law dealing with the principle that there can be no claim for loss

[1] I am indebted to my Judicial Assistant, Eloise Hewson, for drawing my attention to this case.

which has been avoided, Lord Justice Rix (with whom Lord Justice Aldous and Lord Justice May agreed) said:

> "32. … In the present case the act of mitigation of the alleged breach by PJ Pipe was the replacement of the pipes. That was all done by March 1998. The later settlement agreement was not an attempt at mitigation; it was merely a reformulation of the relations between Mobil and Fluor and, once the compromise of Fluor's TIC claim is excluded, it could well be referred to – as my Lord, Lord Justice Aldous, did in the course of argument – as being simply a reorganisation of the terms upon which those two parties were (or were not) going to conduct litigation against PJ Pipe."

73. In my judgment the same reasoning applies here.

74. Mr Lewis objected that this analysis of the Settlement Agreement is not open to MCM on this appeal. He pointed out, correctly, that there is no Respondent's Notice seeking to support the judge's decision on other grounds and that in the court below the judge was offered a limited "menu" (see [34] above) which did not include this particular dish. While that is true, it does not follow that this point is not open to MCM. Rather, the true position is that it is Straits which needs to show, as part of its own case, that the loss of US $284 million suffered by MCM as at the date of the transaction was subsequently avoided. This court must be entitled to evaluate that submission in the light of what the Settlement Agreement actually provides and cannot, in my judgment, be constrained to assess damages on the basis of an artificial and erroneous view of its purpose and effect.

The EDFM point

75. The conclusion that the Settlement Agreement did not avoid or reduce MCM's loss makes it unnecessary to decide whether Straits should be permitted to withdraw a concession made below and to amend its grounds of appeal to contend that the Settlement Agreement avoided MCM's loss in its entirety because the "Payment Amount" for which it provided was to be made by its parent company, EDFM, and not by MCM itself. If the Settlement Agreement did not avoid or reduce MCM's loss, it does not matter whether the "Payment Amount" was to be paid by MCM or EDFM. I will therefore deal with the point briefly.

76. While it is unsatisfactory that the unredacted 2020 version of the Settlement Agreement was only disclosed on the eve of trial, it is apparent that over the course of the five week trial the Straits legal team had an opportunity to and did analyse the document. That enabled them to advance their case that the damages should be limited to US $X million, and to make the apparent concession that the deductions from the figure of US $X million required in order to arrive at the "Payment Amount" could be ignored. But they did not at any stage suggest that MCM's claim for damages should fail altogether on the ground that the loss had been avoided because the "Payment Amount" was an obligation of EDFM and not of MCM and, in the course of closing submissions, it was conceded that no point was taken on any distinction between EDFM and MCM. Mr Lewis submitted that the concession at that stage made no difference to the way in which the trial was conducted, as by then it was too late for MCM to adduce evidence

to meet the point. Accordingly, he submitted, the point was one of law on which Straits should be permitted to withdraw its concession and advance the submission on appeal, in accordance with the approach taken in cases such as *Notting Hill Finance Ltd v Sheikh* [2019] EWCA Civ 1337, [2019] 4 WLR 146.

77. I would reject that submission. It is clear that the trial was conducted on the basis that there was no significance attached to the fact that the "Payment Amount" was to be paid by EDFM. If there was such significance, particularly for what would have been a potential "killer point" knocking out the entire claim, I would expect it at least to have been notified to MCM and the judge and not saved as a trump card to be played only in closing submissions. If it had been notified, it may well be that MCM would have had an answer to it which could have been explained by evidence. Moreover, I would not accept the premise that, by closing submissions, it was too late for MCM to adduce evidence. If the point had been raised by Straits in its closing submissions, even at that late stage I would have expected the judge to give MCM an opportunity to meet it rather than to dismiss the entire claim (especially a claim against a participant in a fraud) on this ground. This is especially so in the light of the fact that it was evident from the redacted version of the Settlement Agreement, disclosed a year before trial, that the settlement payment was to be made by EDFM, not MCM, albeit that with the redactions it was difficult to understand the structure of the payment obligation. I would therefore refuse permission to appeal on this new ground.

78. I note in passing that Mr Lewis did suggest, logically as his primary submission, that the point was already open to Straits on the basis of its existing ground of appeal, but in my view that submission was hopeless. The existing ground, even if in somewhat general language, must be understood together with the skeleton argument which accompanied it (which did not mention this point), on the basis of which permission to appeal was given, and in any event could not reasonably have been understood as going back on a concession expressly made in the court below.

79. As it is, however, the point does not matter in view of my conclusion on avoided loss.

Conclusion:

80. For these reasons, which differ from those of the judge, I would dismiss the appeal. In doing so, however, I would observe that the issue of quantum with which we have been concerned, and on which the submissions made to us have been somewhat different from those made to the judge, took up no more than one relatively small part of the trial. I would pay tribute to the judge's thorough and impressive judgment, in particular on the liability issues on which permission to appeal was refused.

Lord Justice Popplewell:

81. I agree.

Lord Justice Nugee:

82. I also agree.