Neutral Citation Number: [2022] EWCA Civ 23

Case No: A4/2021/0422

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT
MR JUSTICE JACOBS
[2021] EWHC 74 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/01/2022

Before :

LORD JUSTICE COULSON
LORD JUSTICE BAKER
and
LADY JUSTICE ANDREWS

- -

Between :

MICHAEL ANTHONY TUKE	**Claimant/ Respondent**
- and -	
DEREK HOOD	**Defendant/ Appellant**

- -
- -

The Appellant appeared in person
Alexander Wright and **Edward Jones** (instructed by **Wilmot & Co Solicitors LLP**) for the **Respondent**

Hearing date: 15 December 2021

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Approved Judgment

This judgment was handed down remotely at 10.00am on 14th January 2022 by circulation to the parties or their representatives by email and by release to BAILII and the National Archives

Lady Justice Andrews:

INTRODUCTION

1. A person is deceived by a fraudster into selling to him, at an under-value, a valuable and appreciating chattel which he bought as an investment and which, but for the deceit, he would otherwise have retained for himself (and thus benefited from any appreciation in its value). The issue raised in this appeal is whether, in the computation of damages for deceit, and specifically, the head of damages compensating the victim for the loss of that investment opportunity, the victim is obliged to give credit to the fraudster not only for the cash he received as part of the fraudulently induced sale transaction, but also for the "time value" of that money in the period between that transaction and the trial.

2. Irrespective of whether any benefit was actually obtained by the victim, Mr Tuke, from the use of the money, it is contended by the wrongdoer, Mr Hood, that such a credit should be given. Mr Hood submits that the "time value" should be calculated either in the same way as Mr Tuke was awarded compound interest on the equitable compensation for Mr Hood's dishonest assistance in breaches of fiduciary duty by Mr Hood's company, or in the same manner as discretionary interest under statute.

3. The suggestion that, unless the victim gives credit to the fraudster for the time value of the money, he will be overcompensated, is a novel one. It was not pleaded in the defence, which was settled by experienced counsel. Nor was it raised in argument at trial by Mr Hood, then acting in person, nor by counsel acting for his then trustees in bankruptcy, who were joined as interested parties. Rather, it appears to have had its genesis in a concern expressed by the trial judge, Mr Justice Jacobs, ("the Judge") which only arose if he adopted an approach to calculation of the damages for the lost investment opportunity which he had indicated in the judgment he was minded to follow, but which, following submissions at a further hearing to deal with consequential matters ("the post-judgment hearing") he decided was wrong in principle.

4. By the time of that hearing, Mr Hood had successfully appealed against the bankruptcy order which was operative at the time of trial, and therefore instructed counsel to represent him. It is not suggested by Mr Hood that the approach to quantification which the Judge eventually adopted was incorrect. This is unsurprising, since it was the approach that his own counsel advocated at the post-judgment hearing.

5. As is recorded in the further reserved judgment delivered by the Judge on 18 January 2021 following that hearing, Mr Hood's then counsel successfully argued that the approach originally taken by the Judge to quantification of the loss of investment opportunity claim involved an element of double-counting. Mr Wright, who appeared on this appeal on behalf of Mr Tuke, as he did at all the hearings below, confirmed to us that it was not submitted to the Judge that credit should be given for the "time value" of the money even if he adopted the different approach to quantification that was then being advanced on behalf of Mr Hood.

6. The argument that, even on the Judge's revised approach, credit should have been given for the time value of the money received from the fraudulently induced sale transactions, was raised for the first time in the appellant's notice and accompanying skeleton argument settled by fresh counsel (leading and junior) from leading Chancery

chambers, who had appeared neither at trial nor at the post-judgment hearing. They ceased to act when Mr Hood was once again made bankrupt. The fact that the argument was neither pleaded nor raised in the court below is not immediately apparent from those documents. Whilst those factors in and of themselves might have justified the dismissal of the appeal, I am mindful that permission to appeal was granted. Moreover, the point is one of potentially wider significance. In those circumstances, it seems to me that the better course is to address the argument on its merits, such as they are.

7. Mr Hood appeared in person at the remote hearing of his appeal. Quite understandably, he was unable to add anything of substance to the written submissions of his former counsel. I have considered those submissions with care, but on closer examination their veneer of plausibility proved to be illusory.

8. For the reasons which will appear, I consider the suggestion that credit should be given for the time value of the money, measured as notional interest, to be fundamentally misconceived and contrary to principle. Moreover, there are very strong public policy reasons why it should be rejected. The upshot of requiring such credit to be given would be to reduce the recoverable damages the longer the fraud went undetected, and thus to allow a dishonest defendant to benefit from the concealment of his fraud or dishonest assistance in a breach of fiduciary duty. It would also be contrary to the fundamental aim of fully compensating a victim of fraud for all the loss directly flowing from the fraudulent transaction, including consequential loss. Far from being overcompensated, Mr Tuke would not be fully compensated if he were to be required to give any credit for the time value of the money he received.

FACTUAL BACKGROUND

9. In December 2009, having recently sold his business for around £60 million, Mr Tuke identified classic cars as a potential investment which would achieve returns greater than other types of investment which were then available in the aftermath of the global financial crisis. The market in classic cars did indeed prove to have strong growth potential, and Mr Tuke had an eye for a bargain. Between December 2009 and September 2010 he invested around £20 million in classic cars, 7 of which ("the Investment Cars") each cost in excess of £1 million, some of them in excess of £3 million. He bought the first 4 vehicles from an apparently reputable specialist classic car dealership named JD Classics Ltd ("JDC"), which was founded and run by Mr Hood. Mr Hood was also the sole or majority owner of JDC at all material times. Thereafter, Mr Tuke purchased another 17 cars through JDC acting as his agent.

10. There are no doubt many honest and reputable second-hand car dealers plying their trade in this country. Unfortunately for Mr Tuke, Mr Hood was not among their number. Following a 3-week trial in the Commercial Court, in a comprehensive judgment running to some 156 pages, the Judge found that Mr Hood had deceived Mr Tuke on a very large number of occasions over many years, in flagrant breach of the trust that had been placed in him. He also found that Mr Hood was a mendacious witness who had attempted to mislead the court in earlier proceedings (tried by Mr Justice Lavender) to prevent disclosure of damaging internal records which were subsequently used to prove the frauds on Mr Tuke (judgment [26]-[32]). He had even fabricated and backdated a letter in an attempt to deceive the court in these proceedings as to the nature of the agency relationship between Mr Tuke and JDC (judgment [66]–[89]). He held Mr Hood liable in both deceit and dishonest assistance in JDC's breaches of trust in respect of 8

transactions, and deceit alone in respect of a further 2 transactions. A claim in respect of a further transaction (which did not involve allegations of fraud) was dismissed.

11. It is unnecessary to rehearse the full detail of Mr Hood's dishonesty, because only one of the fraudulently induced transactions is of significance for the purposes of this appeal, namely, the transaction which caused the loss of business opportunity. That was known as the "Group C transaction".

12. There came a time when Mr Tuke was seeking to sell some of the classic cars in order to raise money to pay a substantial tax bill, and to reacquire an interest in the business which he had sold. In September 2010 he appointed JDC as his agent to negotiate and conclude the sale of cars and receive payments on his behalf, in return for a 10% commission. He told Mr Hood which of the cars he particularly wished to keep.

13. In January 2011, Mr Hood presented Mr Tuke with the Group C transaction. This involved Mr Tuke selling 4 of his existing cars for £4 million, and at the same time, agreeing to purchase 5 Jaguar "Group C" racing cars for £10 million. Mr Hood told Mr Tuke that he had persuaded 4 individual owners to part with their vehicles so that Mr Tuke would be able to acquire a valuable collection of his own, which would appreciate in value, and that the 4 cars sold by Mr Tuke were going to the owners of the 5 Group C cars in part-exchange. He also told Mr Tuke that the racing cars had been valued at £10 million.

14. The deposit of £2 million for the purchase of the Group C cars was financed from the sale price of £4 million ascribed to the 4 cars, and Mr Tuke borrowed the balance of £8 million from a finance company ("Close"). This left Mr Tuke with £2 million in cash (less certain commissions and charges). However, he was also left with a liability to repay the loan to Close, together with interest of around £47,000 per month. The first capital lumpsum repayment of £3 million fell due later in 2011.

15. It transpired that Mr Tuke had been deceived into buying the 5 Group C racing cars for far more than they were worth, having been provided by Mr Hood with bogus valuations. The Judge accepted expert evidence that they were collectively worth only £7.5 million at the time. In addition, the "four individual owners" were fictional and the racing cars were JDC's old stock. The Judge rejected the defence case, adopted by the trustees in bankruptcy, that Mr Tuke would have entered into the Group C transaction even if he had known the truth.

16. The value of the racing cars provided insufficient collateral for the borrowing from Close, and Mr Tuke discovered that they were very difficult to sell (he eventually sold them for only £4,441,000). He was forced to pledge many of his other valuable cars to Close as security, including some of the Investment Cars. As the Judge put it at [105]:

> "… not only did these arrangements place Mr Tuke under financial strain, but when other parts of Mr Tuke's collection were eventually sold, the proceeds of sale needed to be paid to Close, rather than being released for Mr Tuke's own use."

17. The Group C transaction deprived Mr Tuke of cashflow, which led him to sell nearly all of the most expensive (i.e. £1 million plus) cars he had acquired during the acquisition phase, including those he wished to retain as investments, in order to repay

the loan. All but one of those subsequent sales transactions were with JDC. They were made on terms which were highly unfavourable to Mr Tuke, and which gave rise to further proven allegations of fraud or dishonest assistance by Mr Hood in JDC's breaches of trust. In summary, Mr Tuke was induced to sell all but one of his valuable Investment Cars to JDC at an undervalue, in transactions usually involving the provision of overvalued cars in part-exchange.

18. The relevant sales of the Investment Cars mostly took place in 2011-2012. In the period from 2011-2015, Mr Tuke realised around £13.8 million by way of sales, £12.5 million via JDC in 2011-2013, and £1.33 million via a different agent in 2013 and 2015. Of this total, in round terms, £8.5 million, including interest, was paid to Close. The market in classic cars increased substantially during that period, and by 2015 it was twice the level that it was at the time when the Investment Cars were acquired in 2009 and 2010.

19. The Judge described the Group C transaction as "pivotal" in the claim for loss of investment opportunity. He found that the Group C transaction and the need to make payments to Close was a "very significant driver" of the subsequent sales and the sequence in which the cars were sold. The financial obligations to Close produced particular pressure on Mr Tuke in 2011 and 2012, when payments of nearly £8 million were made to Close, in circumstances where sales of the Group C racing cars were not achieved. He held that, but for the fraud, Mr Tuke would have been able to keep many of the cars that he wished to keep, certainly during the period 2011-2015: judgment [658]. He could have realised the net sum of around £5.6 million that he retained after paying off Close, by selling other cars in his collection. The Judge rejected the defence case, again adopted by Mr Hood's trustees in bankruptcy, that Mr Tuke would have had to sell the Investment Cars in any event.

QUANTIFICATION OF THE LOSS OF INVESTMENT OPPORTUNITY

20. The Judge quantified the "base claims" in respect of the loss made on the sales at an undervalue in the normal way, by comparing what Mr Tuke gave up with what he received: i.e. the market value of the car(s) at the date of sale, less the true value of the consideration received for it (or them). He awarded interest only in respect of 5 transactions, all involving non-Investment Cars, on the basis that the claim for the loss of investment opportunity was a true alternative to a claim for interest. Of those 5 transactions, the Judge awarded compound interest on the 3 successful claims for equitable compensation, and simple interest on the 2 claims that succeeded only in deceit.

21. Turning to the claim for the consequential loss of investment opportunity, the Judge decided that, taking the various contingencies and uncertainties that he identified into account, it was appropriate to award damages on the basis of 75% of the value of that claim, which he said at [668] appeared fairly to reflect:

> "the strong probability that Mr Tuke would, but for the frauds, have been able to retain at least the majority of the investment cars in his collection until 2020, or at least until 2015/2016 by which time the market had risen significantly."

22. The Judge's initial approach to the calculation of damages for the loss of investment opportunity was to award the difference between (i) the 2020 value of the Investment

Cars and (ii) the total consideration received by Mr Tuke when he sold each of those cars (i.e. cash plus the true value of the part-exchanged cars) – see the judgment at [677]. However, he had some concerns about whether this would over-compensate Mr Tuke. Therefore, at [676] he invited further submissions on the appropriateness of an allowance for the time value of money (effectively interest) and the amount of such allowance if appropriate. He explained his concerns in these terms:

> "The possible need for such an allowance is highlighted by the claim which Mr Tuke makes for a significant amount of compound interest on the losses suffered on the individual transactions. An anomaly may arise if such interest is awarded in respect of those transactions, but no allowance is made for interest in the context of the loss of investment opportunity claim."

23. However, following written and oral submissions at the post-judgment hearing, the Judge was persuaded that his initial approach to valuation of the loss of investment opportunity involved an element of double-counting (for reasons he set out at [10]–[13] of his judgment of 18 January 2021). He decided that the correct approach was to compare the market value for each car (as determined in the context of each base claim) with its 2020 value, which would reflect the subsequent enhancement in value of the investment, before applying the 25% discount for uncertainties. This produced a figure of £6,879.480. As I have already mentioned, he did not award interest in respect of any of the transactions involving Investment Cars, and so the potential "anomaly" he had identified did not arise in any event.

24. As the Judge pointed out at [20] of the 18 January 2021 judgment, his revised approach meant that any argument in favour of giving any credit for receipts of cash or cars no longer arose; the value received by Mr Tuke at the time of sale had already been taken into account in the calculation of the base claims for damages. He said, at [21]:

> "There is no logical basis on which it can be said that the monies which Mr Tuke received – whether for the investment cars or indeed for the non-investment cars – diminished the loss of investment opportunity represented by the difference between the market value of the cars which he was defrauded into selling, and the present value of those cars."

25. The Judge rejected a specific argument that credit should be given for the time value of 25% of the "base claim". He said, at [33]:

> "The loss of investment opportunity claim which has succeeded is not, in my view, looking at the time value of money in the way that a claim for interest does. Rather, it is a specific claim made on the basis that a particular investment would have been retained, so that compensation by reference to the time value of the money lost on the transaction itself (i.e. the amount of the undervalue and interest thereon) *was not the right way to measure loss."* [Emphasis supplied].

26. It is now contended by Mr Hood that even so, the Judge was wrong in principle, when assessing loss of investment opportunity, not to take into account the [notional] benefit that Mr Tuke received over time from the cash element of the consideration he received

for the Investment Cars, and that this resulted in Mr Tuke being overcompensated. However (no doubt in recognition of the fact that no questions were put to Mr Tuke in cross-examination to establish that he did in fact receive any benefit from the money, most of which was paid to Close) it was submitted in the appellant's skeleton argument that "any use to which Mr Tuke put the cash receipts from the disposal of the Investment Cars has no bearing on the time value of such receipts or on the principle that he ought to give credit for them".

27. The alleged "time value", computed on a basis akin to compound interest, is alleged to be £4,197,029.66, which would wipe out the lion's share of the award under this head of £6,879,480.

DISCUSSION

28. The aim of an award of damages for deceit is to put the claimant in the position in which he would have been if no dishonest representations had been made to him. In this case, on the Judge's findings, but for a series of fraudulent misrepresentations, the Group C transaction would not have happened. Consequently, Mr Tuke would never have been saddled with the onerous liability to Close which was an integral part of that transaction and which precipitated the further sales of all but one of the Investment Cars to JDC at an undervalue. Matters were complicated by the fact that those sales were independently tainted by Mr Hood's further dishonesty.

29. The starting point for consideration of the submissions made on behalf of Mr Hood is the classic modern statement of the applicable principles when assessing damages for deceit inducing a sale and purchase transaction, made by Lord Browne-Wilkinson in *Smith New Court Ltd v Scrimgeour Vickers* [1997] AC 254 at 267A-C:

> " (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 at the date of acquisition, but such general rule is not to be inflexibly applied, *where to do so would prevent him from 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." [Emphasis supplied].

30. In the same case, Lord Steyn explored the policy justification for differentiating between the extent of liability for civil wrongs in general, and those involving

intentional dishonesty. He said, at 279F, that it was a "rational and defensible strategy to impose wider liability on an intentional wrongdoer". At 280 E-F, Lord Steyn confirmed that there had been "no retreat from" the policy spelt out by Lord Blackburn in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39:

> "There could be no doubt that there you would say that everything which would be taken into view that would go most against the wilful wrongdoer – many things which you would properly allow in favour of an innocent mistaken trespasser would be disallowed as against a wilful and intentional trespasser on the ground that he must not qualify his own wrong, and various things of that sort."

31. The time at which credit is to be given for the benefits received by the innocent party is normally the date of the fraudulently induced transaction, but in *Smith New Court*, the House of Lords made it clear that this was not an inflexible rule. A different date may be adopted if taking the date of the transaction would under-compensate the victim (as on the facts of that case, it would have done). Moreover, the normal approach will only apply *where the appropriate measure of damages involves comparing what the victim gave up with what he received.* As Lord Steyn explained, in an action for deceit where the innocent party is the purchaser, the price paid, less the valuation at the transaction date is simply a method for measuring loss which will satisfactorily solve many cases. However:

> " If that method is inapposite, the court is entitled simply to assess the loss flowing directly from the transaction without any reference to the date of transaction or indeed any particular date. Such a course will be appropriate whenever the overriding compensatory rule requires it." (284 B-C).

32. Perhaps unsurprisingly, given the explanation for the flexible approach to the date of valuation of the benefit, there is no reported case in which a date other than the date of the transaction has been adopted in order to alleviate any perceived hardship on the fraudster. Indeed, such an approach would appear to be contrary to principle. There are, however, good examples of cases where the dishonest defendant has sought and failed to persuade the court to adopt a different date. As Christopher Clarke LJ made plain in one such case, *Petrom v Glencore* [2016] EWCA Civ 778, [2017] 3 All ER 15, at [39]:

> "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 *Livingstone v Rawyards Coal Co…*" [Emphasis supplied].

33. In that case, Glencore sold cargoes of crude oil to Petrom which were falsely represented to be particular brands, but which had been blended using cheaper oil to make them resemble those brands. Petrom refined and then sold on the bespoke blends

to third parties, with limited adverse financial consequences. Glencore did not plead that Petrom mitigated its loss by refining the oil, nor did it put in issue the actual circumstances of the refining. Flaux J and the Court of Appeal rejected Glencore's submission that the market value should not have been assessed at the bill of lading date, when Petrom acquired the cargoes, but at the later date when the refined products were sold at a higher price.

34. A similar approach was taken by Lightman J in the earlier case of *Great Future International Ltd v Sealand Housing Corporation* [2002] EWHC 2454, where subscription shares were purchased as an investment at a dishonestly inflated price, but retained by the claimant, and subsequently increased in value. The defendant argued that the appropriate date on which to value the benefit that the claimant received under the fraudulently induced transaction was the date of the inquiry into damages and not the closing date of the purchase transaction. Lightman J held that, in principle, the claimants were entitled to limit the credit to be afforded in respect of the shares to their value at the closing date, unless justice required that credit should be afforded for the value of the shares at the date of the inquiry into damages. As to what justice required, after setting out a catalogue of the defendants' bad behaviour, he pithily observed at [29]:

> "I cannot see why the foreseeable consequence of the Defendants' fraud on the value of the Subscription Shares should disentitle the Claimants to a valuation at the Closing Date or entitle the fraudsters to some anticipated advantage arising from the postponement of the date of valuation to the date of the Inquiry".

35. Whilst the rejection of the substantive argument in *Petrom v Glencore* made it unnecessary for the Court of Appeal to determine whether the argument was open to Glencore on the pleadings, Christopher Clarke LJ made it plain at [80] that a defendant who wishes to assert that post-breach events have reduced a recoverable loss must plead as well as prove it. In the present case, Mr Hood did neither of these things. The uniform approach taken in all the authorities is that a dishonest wrongdoer cannot expect the court to make "tender presumptions" or to exercise discretions in his favour. He must strictly establish an entitlement to the credit which he claims.

36. When he assessed the "base claims", the Judge took the standard approach of comparing the true market value of the cars sold by Mr Tuke with the value of what he received for them in cash or part-exchanged vehicles *at the time of each sale transaction*. As I shall explain, it would have been as inappropriate for the Judge to have any regard to the "time value" of any money received by Mr Tuke in consideration for the sales, as it would have been for him to have assessed the value of the part-exchanged vehicles at the time of the trial, if they had appreciated in value after their acquisition (although there would have been a respectable argument in favour of treating a *depreciation* in value of those vehicles as part of the consequential losses flowing from the fraud).

37. In the appellant's skeleton argument at [30] and [31] any argument that further credit in respect of the enhancement in value of the six cars received by Mr Tuke in part-exchange (inferred because the market went up) is expressly eschewed -but only, it appears, because of the absence of direct evidence as to their actual valuation at the date of trial. Lightman J's judgment in *Great Future* and the approach of the Court of Appeal

in *Petrom v Glencore* make it quite clear that giving such a credit would be wrong in principle. If that is so, there would appear to be no reason to differentiate between the approach to be taken to cash and non-cash consideration.

38. In the present case, no complaint has been made about the quantification of the "base claims", because the argument focuses upon the quantification of the "loss of investment opportunity". But that head of damages concerns a claim for consequential loss – a feature that appears to have been overlooked in the appellant's skeleton argument. Lord Browne-Wilkinson said nothing in *Smith New Court* about the innocent party having to give credit for benefits received against claims for consequential losses (nor indeed about how such losses should be computed). In each of the relevant transactions, Mr Tuke parted with the valuable asset when he sold it; during the years between the sale and trial in which, on the counterfactual hypothesis, he would have kept it and benefited from its appreciating capital value, he received nothing further from Mr Hood or JDC which would counterbalance or ameliorate that additional loss. Besides, anything that happened in that period would not be referable to the fraudulently induced sale transaction. Meanwhile it was JDC that benefited from the appreciating value of the cars they had bought from Mr Tuke at an undervalue.

39. The Judge took the view that once the value of the cash benefit was taken into account in the basic computation of loss, there was no justification for taking into account its value over time. In the appellant's skeleton argument it is contended that this "overlooks that the capital value received has a continuing time value which provides a benefit that is not reflected in the "base claim" damages calculation." Even if that analysis is correct (though I am not persuaded that it is) it does not follow that the "continuing time value" *ought* to be reflected in the calculation of consequential loss. I see no reason in principle why, if credit is <u>not</u> to be given for the "time value" of the cash or other benefit received when that benefit is taken into account in computing the basic loss, it should have to be given when assessing the further loss of the chance of making a capital gain from keeping an appreciating asset instead of selling it.

40. If the aim is to put the injured party in the position that he would have been in if the fraud had not occurred, that aim is generally achieved by ensuring he gets back the value, in money terms, of what he parted with. So, for example, if he is fraudulently induced to sell an asset worth £10,000 for £4,000, he is compensated by an award of £6,000 because, by keeping the £4,000, he has received £10,000 in total. If he also had to give credit for interest notionally (or even actually) earned on the £4,000 he would be under-compensated, because he would receive less than the full £10,000 that the asset was worth at the time of sale. The notional interest to be earned in future is not part of the value he receives for the asset from the purchaser, nor is it properly described as a benefit conferred on him by the sale transaction.

41. The longer the delay in the award of the £6,000, the greater the amount of that under-compensation would be. The difference would not be eliminated by an award of interest on the £6,000 because that reflects the loss of use of <u>that</u> sum from the date on which it should have been paid to the injured party. It is not difficult to envisage circumstances in which the supposed "benefit" might wipe out the loss altogether. There is no difficulty in concluding, therefore, that a claim for credit for the "time value" of the money received as consideration for the sale should not be allowed as part of the basic award of damages.

42. Now suppose that the asset sold at an undervalue was bought as an investment, and by the time the balance of the £10,000 (i.e. the £6,000) is awarded, the asset is worth £25,000 and the injured party proves that he would have kept it (for the sake of simplicity, assume that there is no discount for uncertainty about that). The consequential loss is £15,000, which is the difference between the £25,000 (i.e. what the asset would now be worth if he had not sold it to the fraudster) and the £10,000, which is what it was worth when he did sell it to the fraudster. If he receives the £15,000 on top of the £6,000 basic damages, he is put in the position in which he would have been but for the fraud (i.e. when the £4,000 paid to him for the asset is taken into account, he has received in total £25,000).

43. The fact the claimant gets the base value of the asset *at the time of sale* restored to him by a combination of the £4,000 he retained plus the £6,000 damages, has nothing to do with the further £15,000, which measures the lost capital appreciation of the asset between the date of the sale and the value at the time when it would otherwise have been sold (or value at trial). There is, as the Judge said, no logical basis for suggesting that the claimant would be over-compensated if he receives that additional £15,000 without credit being given for the "time value" of the £4,000, because that £4,000 has already been subsumed in the valuation of £10,000 which forms the starting point for the claim for lost capital appreciation. If there is no principled reason for requiring interest on the £4,000 to be offset against the £10,000 valuation when that is calculated, there is even less justification for requiring it to be offset against the £15,000. Any such offsetting will result in the injured party receiving less than the £25,000 which puts him in the position he would have been in but for the fraud.

44. Further, and as a matter of first principle, a claimant is only required to give credit for a benefit that results from and is intrinsic to a transaction, in the sense that it belongs naturally to it, rather than being collateral. A useful illustration in the context of this case is *Komercni Bank AS v Stone & Rolls Ltd* [2002] EWHC 2263 (Comm) [2003]1 Lloyd's Rep 383. The bank was deceived into paying out on a series of letters of credit issued in respect of sham sales transactions, under which the defendants were the purported sellers. Their accomplice, BCL, the instigator of the fraud, was a customer of the bank who had requested the issue of the letters of credit in favour of the defendants. The bank's damages were assessed as the amount it paid out under the letters of credit, less the sums it received in fees and commission. The defendants unsuccessfully contended that the bank should give credit for sums used from the proceeds of the letters of credit to repay certain liabilities owed to the bank by BCL and its associated companies.

45. Toulson J rejected this argument at [167], stating that the question whether an alleged benefit should or should not be taken into account cannot be determined by mere application of the "but for" test. The question to be asked was not whether the receipt of the benefit was merely a result of the venture or transaction, in a historical sense, but was part of the complex of obligations and benefits intrinsic to the venture or transaction. He illustrated why the defendants' argument was wrong in principle by giving the example of the fraudulently induced sale of an artwork at an undervalue:

> "S must give credit for the price which he received from B, because that was a benefit which was part of the transaction. But what S did with the purchase money is another matter. He may have used it in

some highly successful investment, but, if so, the benefit which accrued to him would be the product of his independent decision."

46. He went on to say that what happened to the artwork itself after the sale was also irrelevant. So, if the seller managed to buy the artwork back at a later date for less than the price he had received from the buyer, the profit he made would be irrelevant, as it would not be a benefit of the original sale.

47. Therefore what Mr Tuke did, or may have done, with the cash he received after he received it, is irrelevant. If he had used the money to gamble, and had won a further £1 million, those winnings would not be brought into account in the computation of damages, any more than a loss of £1 million would increase the recoverable damages. The gain or loss would not be a result of the transaction but of his own independent acts and decisions. The position would be no different if he had used the money to purchase another investment vehicle which rose in value to a far higher level than the car which was sold would have done.

48. Applying those principles to the assessment of the loss suffered by Mr Tuke in the present case, there is no basis upon which it can be contended that credit should be given for the time value of the cash received as part of the consideration for the sales at an undervalue necessitated by the Group C transaction. The time value of the cash received has insufficient nexus with the fraudulent transactions. It is not a benefit received under those transactions. What Mr Tuke did or did not do with the cash once he got it has no bearing on the computation of what he lost in consequence of selling the Investment Cars. Still less does some notional value to him of the cash at the date of trial, when several years have passed and the money has long since been spent.

49. I also have considerable sympathy with Mr Wright's submission that in any event the "time value" of cash lacks a sufficient quality of tangibility to qualify as a benefit for which credit must be given. Cash is fungible. By its very nature the time value of cash is transitory. Measuring its value over time is not straightforward, particularly if it is accepted that the use to which it is actually put is irrelevant (the position adopted in the appellant's skeleton argument). If the cash has not in fact been invested, any measure of its value over time has to be based upon hypothesis or speculation about how long it would have been invested and/or the uses to which it would have been put over the time concerned. A court will not usually embark upon that type of complex exercise in the absence of hard evidence. This is a point to which I shall return when considering the argument based on the supposed analogy with awards of interest. I note that the appellant's skeleton argument is also silent on the question of how inflation would be taken into consideration in measuring the updated value of the money.

50. In *Sacher Barker v Richard Winter* [2018] EWHC 1785 (QB) expenditure by the innocent party of cash on a "lavish lifestyle" which she and the fraudster both enjoyed, and to which he also made some financial contribution, was held by Judge Rawlings not to amount to a tangible benefit for which credit had to be given to the fraudster whose deceit had encouraged the expenditure.

51. In fact, as the Judge in the present case found in various passages in his judgment, including at [118] and [185], Mr Tuke used most of the money he received from JDC for the Investment Cars to pay back Close, a liability which itself was the direct consequence of Mr Hood's dishonesty. It is difficult to say that a claimant has derived

any tangible benefit from cash which he has used to defray outgoings - particularly so if, as in this case, he uses it to settle liabilities directly caused by the initial fraud. It is that factor which makes Mr Hood's argument particularly invidious.

52. The submission by Mr Hood's former counsel that it was "proper to infer" that this saved Mr Tuke the cost of further borrowing was not only speculative, and generally contradicted by the Judge's findings about Mr Tuke's antipathy to borrowing on the security of his home, but glosses over the fact that the fraudulently induced Group C transaction was the root of all the ensuing problems. The aim of the award of damages was to put Mr Tuke in the position as if he had never entered into that transaction. In my view, that could never be achieved by treating the adverse consequences of the integral finance arrangements as if they had conveyed a benefit on him. To do so would be to add insult to the already considerable injury he had suffered at the hands of Mr Hood.

53. In any event, as Mr Wright pointed out, and as the Judge rightly acknowledged in his Judgment of 18 January 2021, at [33], the loss of investment opportunity was not an award calculated by reference to the passage of time as such. It was not a claim for the loss of use of the Investment Cars, but a claim for the loss of their appreciation in capital value, reflecting the fact that the market had peaked at the earliest time when the Judge decided Mr Tuke would have sold the cars had he retained them (2015-2016). What he actually received in cash when he sold them as a result of Mr Hood's dishonesty was irrelevant to the calculation of that loss, *a fortiori* any "time value" of that money.

54. Finally, before turning to the policy considerations, I should explain why I consider that the analogy with awards of interest is deeply flawed. First, and fundamentally, Mr Hood's arguments overlook the fact that the loss of investment opportunity claim was seen as an *alternative* to a claim for interest on the base damages awarded in respect of each relevant transaction involving an Investment Car. Therefore there was no award of interest that might arguably need to be counterbalanced by a requirement to give credit for a corresponding benefit to the injured party from the receipt of the cash part of the sale price.

55. Secondly, as Mr Wright pointed out, the discretionary award of interest on a debt or damages under s.35A of the Senior Courts Act 1981 is purely the creature of statute. There is no discretion at common law to make such an award to a claimant for the loss of use of money over time, if the claim is not a claim for "debt or damages" within the meaning of s.35A, see e.g. *Odyssey Aviation Ltd v GFG 373 Ltd* [2019] EWHC 1980 (Comm). Thirdly, if interest is claimed at common law as damages for late payment of a debt, the actual losses must be pleaded and proven, see *Sempra Metals Ltd v Inland Revenue Commissioners and another* [2007] UKHL 34, [2008] 1 AC 561.

56. If there is no general common law power to award interest to a claimant, akin to the statutory discretion to award interest, and a *Sempra Metals* claim must be pleaded and supported by evidence, then it is difficult to see how there could be any power to compute the supposed "time value" of a cash receipt by the innocent party and credit it to the dishonest defendant, especially in an evidential vacuum. The analogy with compound interest is even more difficult to maintain, given that compound interest is an award in equity and an adjunct to dishonest behaviour, designed as a means of discouragement of such behaviour; why then should the innocent victim of the fraud have to be put on the same footing as the fraudster and treated as if he had received

compound interest on any cash that he received as part of the fraudulent transaction? There is no good reason why the consequences for the fraudster of having to pay compound interest should be ameliorated in that way.

57. In my judgment, all that the innocent party is required to do, in order to reflect the position as it would have been if the deceit had not occurred, in a case where the measure of damages is reflected by comparing the value of what was sold with the value of what was received, is to give credit for the money (or money's worth) he received under the transaction itself. This does no injustice to the fraudster, who only pays interest on the difference between the market value of the item sold and what the innocent party received for it. No further credit has to be given for a notional amount of interest on that money even if there is a claim for consequential losses in which the starting point for the assessment is the market value of the item at the date of the sale.

58. Last, but not least, there are the policy considerations. These strongly militate against requiring credit to be given by the injured party for the notional time value of the money, even if all the other objections articulated above could be overcome. The authorities to which I have referred all speak with one voice; a deliberate wrongdoer is not to be rewarded for the fruits of his own deceit. He is certainly not to be encouraged to prevaricate or to conceal his wrongdoing. Requiring the innocent party to give credit for the time value of the benefit of the money he received under the fraudulent transaction would be an incentive to the fraudster to do everything in his power to lengthen the time between that transaction and the award of damages, because the longer that period, the higher the credit.

59. Like the dishonest defendants in *Great Future*, Mr Hood tried to conceal his dishonesty, and did his best to impede Mr Tuke's claim. He even went to the additional lengths of attempting to mislead the court by falsifying a document. Such a defendant deserves no sympathy from the court. He should not be rewarded for that behaviour by the reduction of his liability, especially if to do so would result in Mr Tuke not receiving the full value of his loss. Requiring Mr Tuke to give credit for the hypothetical "time value" of the cash he received from JDC under the relevant transactions would result in his not receiving full credit for the loss of investment opportunity. That would be directly contrary to the policy of seeking to award the innocent party full compensation for the wrong suffered in cases of dishonesty.

CONCLUSION

60. For any and all of the above reasons, I would dismiss this appeal.

Lord Justice Baker:

61. I agree.

Lord Justice Coulson:

62. I also agree that, for the clear reasons given by Andrews LJ, this appeal should be dismissed. As she makes plain, the alleged credit due to Mr Hood was not pleaded; it was not the subject of any evidence; it is not supported by any authority; and it is contrary to both principle and policy. On that last point, as my Lady notes at [8] and [58] above, the suggestion that a fraudster could reduce his or her ultimate liability to

the victim by obtaining credit for the "time value" of the money, would only encourage the fraudster to hide the deception for as long as possible. That is not the law.