Neutral Citation Number: [2022] EWHC 368 (Ch)

Case No: BL-2021-000731

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

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

Date: 28 February 2022

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

1. LUCY BURNFORD **2. OLIVER ASTLEY** **3. GILES FITZPATRICK** **4. MICHAEL SYMONS** **5. KEVIN GASKELL**	**Claimants/ Respondents**
- and -	
AUTOMOBILE ASSOCIATION DEVELOPMENTS LIMITED	**Defendant/ Applicant**

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- -

Andrew Thompson QC and Ben Griffiths (instructed by **Reynolds Porter Chamberlain LLP**) for the **Applicant**
Stephen Auld QC and KV Krishnaprasad (instructed by **Stewarts Law LLP**) for the **Respondents**

Hearing dates: 2 February 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

HHJ Paul Matthews :

INTRODUCTION

1. This is my judgment on an application by the defendant by notice dated 8 October 2021 to strike out the claim or for reverse summary judgment on the claim against the claimants. The application is made in a claim whose claim form was issued on 7 May 2021, by which the five claimants claim damages against the defendant for fraudulent or negligent misrepresentation and/or for breach of contract by the defendant. The claimants claim as the former shareholders in a company called Motoriety (UK) Ltd, which was incorporated in 2013, entered into certain arrangements with the defendant in 2015, but went into administration on 5 May 2017, and was finally dissolved on 5 June 2019.

2. The application notice dated 8 October 2021 asks for the following order:

> "An order that:
>
> (1) the Claim (or parts thereof) be struck out under CPR rule 3.4(2)(a) or (b), alternatively the Claim or (or parts thereof) be dismissed under CPR rule 24.2; and
>
> (2) the Claimants pay the Defendant's costs of the application and of the claim
>
> because (1) the particulars of claim disclosed no reasonable grounds for bringing or defending the claim, alternatively (2) the particulars of claim are an abuse of the court's process, alternatively (3) the claimants have no real prospect of succeeding on the claim or issue and there is no other compelling reason why the case should be disposed of at trial."

3. The evidence in support of the application is contained in a witness statement dated 8 October 2021 of Simon Goldring, who is a partner in the defendant's solicitors, together with one exhibit. The evidence in opposition consists mainly of a witness statement dated 14 December 2021 by Zachary Sananes, a partner in the claimants' solicitors, together with one exhibit. But there is also another, short witness statement dated the same day by the second claimant, which is intended to deal with a particular point in this application which arises only in relation to him.

4. As I have said, the claim form was issued on 7 May 2021. The particulars of claim were served on 3 June 2021. The defence was served on 27 August 2021, and a reply was served on 1 October 2021. In addition to the statements of case, a draft amended particulars of claim has also been prepared on behalf of the claimants, but as yet no application for permission to amend the particulars of claim has been made. The parties have agreed that this application should be determined on the assumption (for the purposes of this application only) that such permission would be given by the court, and that therefore the draft amended particulars of claim represent the current form of the claim being advanced.

BACKGROUND

5. I turn now to set out the factual background to the current proceedings and the application. I base this on the parties' statements of case (including the draft amended particulars of claim) and the written evidence filed. There was no tendering or cross-examination of any witnesses of fact. In this connection, I bear in mind what Rimer LJ (with whom Ward and Jacob LJJ agreed) said in *Coyne v DRC Distribution Ltd* [2008] EWCA Civ 488:

> "58. As regards the need for oral evidence, Mr Ashworth reminded us that it is well-settled practice that if a court finds itself faced with conflicting statements on affidavit evidence, it is usually in no position to resolve them, and to make findings as to the disputed facts, without first having the benefit of the cross-examination of the witnesses. Nor will it ordinarily attempt to do so. The basic principle is that, until there has been such cross-examination, it is ordinarily not possible for the court to disbelieve the word of the witness in his affidavit and it will not do so. This is not an inflexible principle: it may in certain circumstances be open to the court to reject an untested piece of such evidence on the basis that it is manifestly incredible, either because it is inherently so or because it is shown to be so by other facts that are admitted or by reliable documents. Mr Ashworth referred us in support to *Re Hopes (Heathrow) Ltd, Secretary of State for Trade and Industry v. Dyer and others* [2001] 1 BCLC 575, at 581 to 582 (Neuberger J). He also referred us to paragraphs 17 and 18 of the judgment of Mummery LJ in *Doncaster Pharmaceuticals Group Ltd and Others v. The Bolton Pharmaceutical Company 100 Ltd* [2006] EWCA Civ 661, which provides a reminder of the caution the court should exercise in granting summary judgment in cases in which there are conflicts of fact which have to be resolved before judgment can be given. Mr Ashworth said that these principles apply equally to the case in which the evidence is given by witness statement rather than by affidavit, and I agree. I said as much in my summary of the principles in *Long v. Farrer & Co and Farrer* [2004] EWHC 1774 (Ch); [2004] BPIR 1218, at paragraphs 57 to 61."

Motoriety (UK) Ltd

6. As I have said, the claimants are all former shareholders in Motoriety (UK) Ltd. The first and second claimants were founding shareholders, and were also directors. The remaining claimants acquired their shareholdings later, by investment, and were not directors. The defendant is a limited company which at the time was a subsidiary of the Automobile Association plc ("the AA"), the well-known motorists' organisation. Motoriety (UK) Ltd's business consisted in the exploitation of two software-based products for the motoring industry, designed to assist motorists in obtaining the servicing of their motor vehicles. One product created a personal motoring administrative hub and digital garage service, and was called "Automyze". The other was for use by garages and the public, as an online garage directory and booking platform, and was known as "Garage Guide".

The negotiations and the alleged representations

7. The company wished to expand its customer base, and entered into negotiations with the AA, on the basis that the AA could invest in the company and also provide access to its members as potential customers. The claimants plead that they had also entered into negotiations with at least one other potential investor, Solera Holdings Inc. However, heads of terms were agreed between the company and the AA on 18 May 2015. The claimant's case is that these heads of terms were preceded by a number of significant representations made by the defendant (as the appropriate subsidiary of the AA) to the claimants. These representations form the basis of a claim in misrepresentation.

8. One of them was a representation that the defendant would provide the company with immediate access to the AA's customer base of 4 million personal members and 9 million business to business customers ("the Immediate Access Representation"). The claimants plead that in making this representation the defendant impliedly represented that it honestly and reasonably believed that representation to be true ("the Honesty Representation"). The claimants further allege that, in a business plan prepared by the claimants on the basis of information provided by the defendant, the defendant represented that, over a 12 month period, approximately 5 million of the AA's customers would receive a reminder that the MOT test on their vehicle was due and that, of those, 50,000 customers a month would register to use the company's services ("the Business Plan Representations").

The investment agreement

9. On 28 August 2015, the company, the claimants and the defendant entered into an investment agreement, under which (amongst other things) the defendant agreed to subscribe for 50% of the share capital of the company for £400,000, the defendant would obtain representation on the board of directors of the company, and the defendant would have a call option for the remaining 50% of the company for the consideration produced by a formula contained in the agreement, consisting of what were called the Initial Option Payment and the Earn-out Consideration. On the same day, the company granted the defendant a licence to use its software and associated intellectual property rights. This licence in schedule 1 contained a list of services for which the company and the defendant were each responsible. It is pleaded that it was identical to schedule 1 to the heads of terms of 18 May 2015. The claimants say that, in these circumstances, the defendant represented to them that it would provide the company with the services referred to in schedule 1 to the licence agreement ("the Services Representation"). (For myself, I should have thought that that, if anything, would be a promise rather than a representation, but nothing turns on that now.)

10. The claimants say that they entered into the investment agreement of 28 August 2015 relying on the four "representations" that I have referred to above. They also say that each of these representations was intentionally false or made with recklessness as to their truth or falsity. Alternatively, they say that each of the representations was false and made negligently. They claim damages by way of compensation.

11. The claimants have a second string to their bow. They further claim that the defendant, having entered into the investment agreement, then breached implied terms in that agreement. It allegedly did this by

> "pursuing a course of conduct that undermined the basis of the arrangements between the claimants, Motoriety and the defendant. From late 2016, the defendant adopted a deliberate strategy of creating obstacles to Motoriety's business with a view to acquiring Motoriety without having to pay the Claimants Earn-Out Consideration under the Investment Agreement."

They further say that this led to the company going into administration. On 25 April 2017, another company in the AA group, Automobile Association Travel Services Ltd, purchased the company and its business from its administrators for £20,004. The claimants say that the business has been very successful since then, with revenue growing approximately four times in the year ended 31 January 2019.

The settlement agreement with the second claimant

12. There is a further factual matter which I must mention, but which relates only to the position of the second claimant, Mr Astley. Both he and the first claimant, having been directors of the company, were employed by the defendant and other companies in the AA Group. Both subsequently brought proceedings in 2019 in the Employment Tribunal, but those proceedings were settled after conciliation action. Under the settlement agreement made between the second claimant and the respondents to the tribunal proceedings, dated 22 December 2020, Mr Astley received £60,000, defined as the "Settlement Monies". Clause 4 of the settlement agreement provided as follows:

> "The Claimant accepts the Settlement Monies in full and final settlement of the Claims and of all and any other claims, whether statutory, contractual and at common law which the Claimant has or may have against the Respondents and/or any associated or subsidiary company, business, partnership or undertaking; their directors, officers or employees, whether arising out of the Claimant's employment with the Respondents, its termination or otherwise excluding claims of personal injury of which he is unaware of [sic] at the date of this settlement, accrued pension rights and claims to enforce the terms of the agreement and any High Court claim in relation to the claims specifically referenced in the letter from Stewarts LLP to AA PLC on 27 August 2020 ('the Excluded Claims')."

13. The letter from Stewarts LLP to AA PLC on 27 August 2020 was a lengthy letter before claim. It consisted of three parts: (1) an introduction, (2) a section dealing with "The relevant factual background which applies to the Claimants' legal claims", and (3) a final section containing "A detailed summary of the Claimants' legal claims". Neither of the first two parts sets out any legal claims, and therefore does not "specifically reference" any for the purposes of the settlement agreement with Mr Astley. However, the factual background in the second part does include reference to express representations said to have

been made by the defendant to the claimants, including what are called the "Member Marketing Representation" and the "Immediate Access Representation", and further implied representations by the representors of their authority to provide the company with the rights to market to the AA group's member base and that they held the honest beliefs that the earlier representations were true.

14. On the other hand, the third section does make specific reference to legal claims. It begins with a paragraph stating as follows:

> "48. In light of the facts and circumstances set out above, the Claimants have actionable claims for fraudulent and/or negligent misrepresentation and/or pursuant to section 2 of the Misrepresentation Act 1967. The Claimants reserve the right to plead any additional cause of action in due course."

It is then asserted in paragraph 49 that the "Member Marketing Representation" and the "Immediate Access Representation" were false. It is asserted in paragraph 53 that the representatives of the defendant either knew or were reckless as to whether those representations were false, and that therefore they were made fraudulently. In paragraph 58 it is asserted that the claimants entered into the investment agreement in reliance on those representations. Paragraph 60 says that, but for those misrepresentations, the claimants would not have entered into the investment agreement, or at any rate not on those terms. Paragraphs 61 and 62 give details of the loss said to have been suffered by the claimants, which focuses on what is said to have been "a detrimental financial impact on Motoriety's business such that it subsequently went into administration".

15. It is therefore clear that this letter specifically references claims in fraudulent or negligent misrepresentation (or under section 2 of the 1967 Act) based on the four misrepresentations referred to. There is no reference in this letter to any claim for breach of contract. For the sake of completeness, I add that I was told that the form of the settlement agreement entered into by the first claimant is different, and that therefore the same issue does not arise in relation to her.

THE CLAIM AS PLEADED (INCLUDING DRAFT AMENDMENTS)

16. For the purposes of this application, the relevant parts of the draft amended particulars of claim are as follows:

> "3.1 … AA Developments expressly represented to the Claimants and Motoriety inter alia that upon the conclusion of AA Developments' proposed investment agreement, AA Developments would be in a position to, and would, provide Motoriety with immediate access to the AA's customer base of 4 million personal members and 9 million B2B customers ('the Immediate Access Representation').
>
> 3.2 Further, in making the Immediate Access Representation, AA Developments also impliedly represented that AA Developments (in particular through Ms. Lloyd-Jukes and Mr. Bruce) honestly and

reasonably believed the Immediate Access Representation to be true ("the Honesty Representation").

[…]

3.4 These representations were made by AA Developments with the intention that the Claimants and Motoriety would rely upon them in (1) preferring the AA Developments' investment proposal to that of Solera, (2) concluding the proposed Agreements with AA Developments and (3) procuring that Motoriety would conclude the proposed Agreements with AA Developments. As more particularly set out below, the Heads of Terms, the Investment Agreement and the Licence Agreement were concluded by the Claimants and Motoriety in specific and intended reliance upon the Immediate Access Representation and the Honesty Representation.

[…]

4.5. In the premises, AA Developments represented:

(1) That the Claimants and Motoriety could realistically expect that over a 12-month period (or Year 1 in the Business Plan) approximately 5,000,000 of the AA's customers would receive an email reminder that the MOT on their vehicle was due.

(2) That it was reasonable and realistic to expect that, of those 5,000,000 customers, 600,000 customers a year (i.e. 50,000 customers a month) would sign-up to Motoriety's Automyze product in response to the MOT reminder email referred to in paragraph 4.5(1) above. (together 'the Business Plan Representations'). The Business Plan Representations reflected an annual customer sign-up conversion rate of 12%.

4.6. The Business Plan Representations and the Customer Forecast remained in the final version of the Business Plan which as intended formed part of the Investment Agreement (as to which see further paragraph 7 below). It was consistent with the other representations made to the Claimants by AA Developments and continued at the date of the Heads of Terms being adopted and confirmed by AA Developments in each subsequent iteration of the Business Plan.

4.7. The Business Plan was prepared, contributed to and accepted by the Claimants and Motoriety in specific and intended reliance upon the Immediate Access Representation and the Honesty Representation.

5. THE HEADS OF TERMS

5.1. The Agreement

On or about 19 May 2015, pursuant to the discussions between the Claimants/Motoriety and AA Developments and the other events referred to above, Heads of Terms were concluded between (1) Motoriety and (2)

the AA ("the Heads of Terms"). The Heads of Terms took the form of a letter dated 18 May 2015 addressed to the directors of Motoriety, signed on behalf of AA Developments by Rob Scott and signed by Ms. Burnford confirming Motoriety's agreement.

6. RELEVANT EVENTS BETWEEN THE HEADS OF TERMS AND THE AGREEMENTS

6.1. Further Discussions

6.1.1. Following conclusion of the Heads of Terms on 18/19 May 2015 and pursuant to its terms, discussions continued between AA Developments and the Claimants/Motoriety for the purpose of concluding the envisaged formal Agreements. In relation to these discussions, the parties were represented as set out in paragraph 1.5 above.

6.1.2. These discussions were in substance a continuation of the discussions referred to in paragraph 2 above which had continued between February and 18 May 2015 and involved AA Developments on numerous occasions confirming the Immediate Access Representation and associated implied representations with the intention that the Claimants and Motoriety would rely upon them in concluding the intended Agreements.

[…]

6.3. Further Drafts of the Business Plan

During the same period, between May and August 2015, at no time did AA Developments seek to correct the Business Plan Representations, the Honesty Representation or the Customer Forecast. As far as the Claimants and Motoriety are concerned, the Business Plan was prepared in good faith and on the basis of the Immediate Access Representation and the Honesty Representation. By 28 August 2015, the parties had produced a final agreed form of the Business Plan to be included as part of the Investment Agreement.

6.4. Failure to Correct Representations

Throughout the period from 11 May to 28 August 2015, AA Developments failed to correct or revise the Immediate Access Representation, the Honesty Representation, the Business Plan Representations or the Customer Forecast. On the contrary, these were either expressly or impliedly confirmed, repeated and adopted during all of the parties' discussions.

7. THE INVESTMENT AGREEMENT

7.1. The Agreement

7.1.1. Pursuant to the discussions referred to above, the Heads of Terms and having agreed a final version of the Business Plan, an agreement was

concluded on 28 August 2015 between (1) Ms. Burnford and Mr. Astley as the Managers (2) Mr. Fitzpatrick, Mr. Symons, Mr. Gaskell, Mr. Ramsden, Mr. Vohra, Mr. Knox and Mr. Nash (as Shareholders), (3) Motoriety and (4) AA Developments providing for the basis upon which the AA would be allowed to invest in Motoriety ('the Investment Agreement').

7.1.2. The Investment Agreement was written and included a number of agreed and attached Schedules (described on page 2 of the Agreement as 'agreed form documents') which included the Business Plan (in its final agreed form) and the proposed Licence Agreement. It will be referred to hereinafter as 'the Investment Agreement' and the Claimants will rely upon it as necessary for its full meaning, terms and effect.

[…]

7.5. Services Representation

7.5.1. The Claimants concluded the Investment Agreement in reliance upon an express or implied representation by AA Developments that it would provide to Motoriety the agreed services referred to in the Licence Agreement, which was also attached to the Investment Agreement and which services had (as above) already been referred to in the Heads of Terms ('the Services Representation').

7.6. Reliance Upon Representations

The Claimants and Motoriety concluded the Investment Agreement in intended and specific reliance on the Immediate Access Representation, the Honesty Representation, the Business Plan Representations and the Services Representation.

8. THE LICENCE AGREEMENT

8.1. The Agreement

Also on 28 August 2015, the same date as the Investment Agreement, a licence agreement was signed by (1) Motoriety and (2) AA Developments pursuant to which Motoriety granted to AA Developments a licence to use software applications and IP rights relating to the Hub ('the Licence Agreement'). The Licence Agreement was written and reflected the draft version which was appended as an agreed form document to the Investment Agreement. The Claimants will rely upon the Licence Agreement as necessary for its full meaning, terms and effect.

[…]

8.2.3. Schedule 1 to the Licence Agreement (referred to in Clause 9.1 as set out above) was similar to the annexure to Heads of Terms referred to above and provided expressly inter alia that AA Developments had

responsibility for 'the marketing of the website to AA members and customers …'.

8.2.4. In the premises, as provided for in the Heads of Terms and intended by both parties throughout the discussions, AA Developments was responsible for the marketing to its own members and customers and information provided by AA Developments was to be accurate in all respects. This reflected the representations made by AA Developments prior to the Licence Agreement, and reflected the subject matter of the Investment Agreement including the Business Plan.

[…]

8.4. Reliance Upon Representations

The Claimants and Motoriety concluded the Licence Agreement in intended and specific reliance on the Immediate Access Representation, the Honesty Representation, the Business Plan Representations and the Services Representation.

[…]

16. LOSS, DAMAGE AND REMEDY

16.1. Misrepresentation/Deceit

16.1.1. But for the misrepresentations referred to above, the Claimants would not have entered into the Investment Agreement (and Motoriety would not have entered into the Heads of Terms or the Licence Agreement) but would have concluded the envisaged venture with Solera on the terms of Solera's proposal on 11 May 2015 or substantially similar terms. As a result of entering into the Investment Agreement, the Claimants have suffered loss and damage.

16.1.2. Solera is a renowned global automotive data and software company and an expert in digital services. Through its HPI brand, Solera had a database of about 1 million customers and the proposed customer acquisition for Motoriety would have been to this customer base and also through pay-per-click marketing and third party partnerships. Solera also offered considerable operational costs savings and the potential to become part of its SAAS offering to garages and dealerships in the UK. The proposed venture involving Solera was in some respects similar to that with AA Developments and, under the Solera venture, Motoriety's product would have retained its two key elements of (1) digital car ownership portal for drivers/consumers and (2) an online garage network/ portal.

16.1.3. In relation to the claim for deceit, the Claimants' case is that, but for the wrongdoing of AA Developments, the Claimants and Motoriety would have proceeded to conclude with Solera the transaction substantially agreed by 11 May 2015 (or very similar terms). In this

context, Solera had already provided two term sheets in April and May 2015. Solera's proposal was in direct competition to that of AA Developments and was in any event preferred by some of the Motoriety Board, including Chairman Mr. Gaskell. Further, when Motoriety went into administration in 2017, Solera expressed continuing interest in the business. Subsequently, in 2019, Solera launched its own equivalent of Motoriety known as 'My HPI'.

16.1.4. Solera was and remains a very substantial world market leader in its field with a longstanding and proven strategy of acquisition and innovation. Under the proposed venture with Solera:

(1) Motoriety's business would have involved two core products namely a car ownership hub and an online garage booking platform (essentially the same as the Automyze and Garage Guide services under the venture with AA Developments).

(2) Motoriety would have benefitted from significant reduction in headcount/costs relating to building its garage network as Solera had a team in place already and an existing garage network which covered 90% of UK garages (building the garage network was a considerable cost to Motoriety under the venture with AA Developments).

(3) The launch of Motoriety's garage subscription product or its integration with one of Solera's existing garage products to enhance both would have materially accelerated the development of Motoriety's business.

(4) There would have been no or very little delay in launch to consumers because inter alia rebranding was not required, access to Solera/HPI's database would have been immediate and Google pay-per-click marketing would have continued.

16.1.5. The value of the Claimants' shareholdings in Motoriety will be the subject of expert evidence as necessary and pursuant to the Court's Directions. Without prejudice to this, the adjusted EBITDA for Motoriety for the relevant period is likely to have been in the region of at least £5.45 million and the appropriate multiple range is at least 7.5 to 9.7 producing an approximate enterprise value for Motoriety at the relevant time of between £40.7 and £53 million and an approximate equity value of between £46.9 and £59.2 million.

16.1.6. In the premises, the value of each Claimant's shareholding, reflecting the multiple range referred to above, is as more particularly set out in Table 1 of Schedule 1A hereto.

16.1.6A. Further or alternatively, Mr Fizpatrick, Mr Symons and Mr Gaskell were unable to recover their investments in Motoriety. Had it not been for AA Developments' misrepresentations, they would have been able to do so. The quantum of such loss is particularised in Table 2 of Schedule 1A hereto.

16.2. Breach of Contract

16.2.1. In relation to the claim for breach of contract, the Claimants are entitled to damages on the basis that the venture would have proceeded in accordance with the intended and agreed terms of the Investment Agreement and Licence Agreement and more particularly the Business Plan, which would have resulted in Motoriety: (1) obtaining immediate access to the AA customer base in the volume and on the basis agreed in the Business Plan, (2) meeting or exceeding forecasts as set out in the agreed Business Plan, (3) becoming cash flow positive by Year 2 at the latest and (4) surpassing the EBITDA threshold of £1.3m at the latest by Year 3 (enabling exercise of the call option).

16.2.2. Further, the agreed performance would have expedited the launch of complementary products and revenue lines, enabled further related business opportunities, allowed for a more streamlined and cost efficient operation ensuring that the earnout period would have exceeded that of the agreed forecast.

16.2.3. In this context, Motoriety's actual performance from May 2017 onwards – after the AA had acquired full ownership and control of the business following the pre-pack administration – itself demonstrates that the business was viable and successful in the absence of the delays, interference and failures resulting from the breaches of contract by AA Developments as more particularly set out above.

16.2.4. Furthermore, Motoriety would not have needed to take up the marketing facility loan at such an early stage and would not have faced any financial distress.

16.2.5. The value of the Claimants' shareholdings in Motoriety will be the subject of expert evidence as necessary and pursuant to the Court's Directions. Without prejudice to this, the adjusted EBITDA for Motoriety for the relevant period is likely to have been at least in the region of ~~£4 million~~ 5 million for the year ended 31 August 2018 and 14 million for the year ended 31 August 2021, the future maintainable earnings are likely to have been around £9 million and the appropriate multiple range is 7.0x and 10.6x ~~6 x 50% of the mean average EBITDA~~ producing an approximate enterprise value for Motoriety between £67 million and £100 million and an approximate equity value between £98 million and £132 million ~~of around £31.5 million~~.

16.2.6. In the premises, the value each Claimant's shareholding, reflecting the multiple range referred to above, is as more particularly set out in ~~Schedule 1B~~ Table 1 of Schedule 1B hereto.

16.2.6A Alternatively, had it not been for AA Developments' breach of contract, it would have exercised the call option under clause 12 of the Investment Agreement and paid the Claimants the Initial Option Payment and the Earn-out Consideration as defined therein. Due to AA Developments' breach of contract, the Claimants suffered loss consisting

> of the Initial Option Payment and the Earn-Out Consideration (alternatively, they lost the chance to earn these amounts). Pending expert evidence, the quantum of such loss is particularised in Table 2 of Schedule 1B hereto."

LAW

Striking out and summary judgment

Procedural rules

17. I turn now to consider the law. First of all, the relevant rules of procedure are CPR rule 3.4(2) and CPR rule 24.2. The former rule provides:

> "(2) The court may strike out a statement of case if it appears to the court—
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
>
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
>
> (c) that there has been a failure to comply with a rule, practice direction or court order."

18. In addition, CPR Practice Direction 3A relevantly provides:

> "1.4 The following are examples of cases where the court may conclude that particulars of claim (whether contained in a claim form or filed separately) fall within rule 3.4(2)(a):
>
>> (1) those which set out no facts indicating what the claim is about, for example 'Money owed £5,000',
>>
>> (2) those which are incoherent and make no sense,
>>
>> (3) those which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the defendant.
>
> 1.5 A claim may fall within rule 3.4(2)(b) where it is vexatious, scurrilous or obviously ill-founded."

19. The latter rule provides:

> "The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if—
>
>> (a) it considers that—

(i) that claimant has no real prospect of succeeding on the claim or issue; or

(ii) that defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial."

On an application for summary judgment, the burden of proof rests on the applicant: *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472, [9].

Caselaw

20. These two methods of summarily disposing of a claim without a trial are frequently combined in the same application, as in this case. But it is clear that an application under rule 3.4 is not one for summary judgment: see *eg Dellal v Dellal* [2015] EWHC 907 (Fam). It is generally concerned with matters of law or practice, rather than with the strength or weakness of the evidence. So on an application to strike out, the court usually approaches the question on the assumption (but it *is* only an assumption, for the sake of the argument) that the respondent will be able at the trial in due course to prove its factual allegations. On the other hand, on an application for summary judgment, the court is concerned to assess the strength of the case put forward: does the respondent's case get over the (low) threshold of "real prospect of success"? If it does not, then, unless there is some other compelling reason for a trial, the court will give summary judgment for the applicant. However, in the present case the defendant proceeded on the basis that it was not asking court to make an assessment of the strength of the evidence, but instead simply to assess the legal merits of the claim on the assumption that all the facts asserted by the claimants were proved at the trial.

21. The claimants referred me to a recent statement by Coulson LJ on these two means of summary disposal (with which Bean and Males LJJ agreed) in *Begum v Maran (UK) Ltd* [2021] EWCA Civ 326:

"20. The Appellant's application before the judge sought an order pursuant to r.3.4(2)(a) that the particulars of claim disclosed 'no reasonable grounds' for bringing the claim and should be struck out and, in the alternative, a claim for summary judgment pursuant to r.24.2(a)(i) that the Respondent had no real prospect of succeeding on the claim. There can sometimes be procedural consequences if applications are made under the 'wrong' rule (which do not arise here) but, in a case like this (where the striking-out is based on the nature of the pleading, not a failure to comply with an order), there is no difference between the tests to be applied by the court under the two rules.

21. Accordingly, I do not agree with the judge's observation at [4] that somehow the test under r.24.2 is 'less onerous from a defendant's perspective'. In a case of this kind, the rules should be taken together, and

a common test applied. If a defendant is entitled to summary judgment because the claimant has no realistic prospect of success, then the statement of claim discloses no reasonable grounds for bringing the claim and should be struck out: see *Global Asset Capital Inc* v *Aabar Block SARL* [2017] EWCA Civ 37; [2017] 4 WLR 16 at [27].

22. As to the applicable test itself:

(a) The court must consider whether the claimant has a "realistic" as opposed to a 'fanciful' prospect of success: *Swain v Hillman* [2001] 1 All ER 91. A realistic claim is one that carries some degree of conviction: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472. But that should not be carried too far: in essence, the court is determining whether or not the claim is 'bound to fail'": *Altimo Holdings v Kyrgyz Mobil Tel Ltd* [2012] 1WLR 1804 at [80] and [82].

(b) The court must not conduct a mini-trial: *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1, in particular paragraph 95. Although the court should not automatically accept what the claimant says at face value, it will ordinarily do so unless its factual assertions are demonstrably unsupportable: *ED & F Man Liquid Products v Patel; Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3, at paragraph 110. The court should also allow for the possibility that further facts may emerge on discovery or at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550; *Sutradhar v Natural Environmental Research Council* [2006] 4 All ER 490 at [6]; and *Okpabi* at paragraphs 127-128.

23. The other principle relevant to the present appeal is that it is not generally appropriate to strike out a claim on assumed facts in an area of developing jurisprudence. Decisions as to novel points of law should be based on actual findings of fact: see *Farah v British Airways* (The Times 26 January 2000, CA). In that case, the Court of Appeal referred back to the decision of the House of Lords in *Barrett v Enfield DC* [2001] 2 AC 550 where Lord Browne-Wilkinson said at 557e-g:

> 'In my speech in the *Bedfordshire* case [1995] 2 AC 633, 740 – 741 with which the other members of House agreed, I pointed out that unless it was possible to give a certain answer to the question whether the plaintiff's claim would succeed, the case was inappropriate for striking out. I further said that in an area of the law which was uncertain and developing (such as the circumstances in which a person can be held liable in negligence for the exercise of a statutory duty or power) it is not normally appropriate to strike out. In my judgment it is of great importance that such developments should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purposes of the strike out'.

I note that the judge cited this passage and relied on it at [64].

24. The same point arose more recently in *Vedanta Resources PLC & Another v Lungowe &* Others [2019] UKSC 20. That was a case where the underlying duty of care was alleged against a parent company, rather than the company involved in the day–to–day running of the mine said to have caused the pollution. Lord Briggs said:

> '48. It might be thought that an assertion that the claim against Vedanta raised a novel and controversial issue in the common law of negligence made it inherently unsuitable for summary determination. It is well settled that difficult issues of law of that kind are best resolved once all the facts have been ascertained at a trial, rather than upon the necessarily abbreviated and hypothetical basis of pleadings or assumed facts'."

22. The defendant cited a number of other authorities, including the well-known passage in the judgment of Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 329 (Ch), [15], concerned with summary judgment applications. This has been approved by the Court of Appeal on a number of occasions. The passage referred to is too well known to need to be set out once again. Moreover, the emphasis in this case is really on the strike-out on assumed facts, so I do not think I need to spend any more time on this.

Reflective loss

The rule in Foss v Harbottle

23. The other aspect of the law on which I need to spend a little time is that concerned with the so-called "no reflective loss" principle. I was referred to a number of authorities. The first that I need to mention is the decision of Wigram V-C in the well-known case of *Foss v Harbottle* (1843) 2 Hare 461. This concerned the affairs of the Victoria Park Company, which was a business venture which had been incorporated by private Act of Parliament. (It was also organised as a tontine, but that aspect, although historically interesting, does not concern us now.) Two of the shareholders wished to complain of the conduct of the company's directors, who were said to have misappropriated the property of the company. They filed a bill in Chancery on their own behalf and on behalf of all the other shareholders except the defendants. The defendants demurred to the bill, on the basis that any claim belonged to the company, and that the company had organs which were still functioning, including that of the members in general meeting. The judge allowed the demurrer.

24. Amongst other things he said this (at 490-91):

> "The Victoria Park Company is an incorporated body, and the conduct with which the Defendants are charged in this suit is an injury not to the Plaintiffs exclusively; it is an injury to the whole corporation by individuals whom the corporation entrusted with powers to be exercised only for the good of the corporation. … And … it may be stated as

> undoubted law that a bill or information by a corporation will lie to be relieved in respect of injuries which the corporation has suffered at the hands of persons standing in the situation of the directors upon this record. …
>
> It was not, nor could it successfully be, argued that it was a matter of course for any individual members of a corporation thus to assume to themselves the right of suing in the name of the corporation, In law the corporation and the aggregate members of the corporation are not the same thing for purposes like this; and the only question can be whether the facts alleged in this case justify a departure from the rule which, prima facie, would require that the corporation should sue in its own name and in its corporate character, or in the name of someone whom the law has appointed to be its representative."

25. So the judge emphasised the distinction between the claims that the company might have against others, and the claims that a shareholder might have against others, and held that, subject to rare exceptions, no shareholder could bring a claim on behalf of the company (the so-called "derivative claim", nowadays governed by the Companies Act 2006, ss 260-64). The separation between company and shareholder was further underlined by the decisions of the House of Lords in *Saloman v Saloman & Co Ltd* [1897] AC 22 (that a company is a legal person separate from its members), and *Macaura v Northern Assurance Co Ltd* [1925] AC 619 (that a shareholder has no insurable interest in the company's property).

The modern cases: Prudential and Johnson

26. In *Prudential Assurance Co v Newman Industries Ltd* [1982] 1 Ch 204, a shareholder in a public company brought proceedings for a declaration and damages against third parties on behalf of itself, the company and the other shareholders, alleging wrongdoing by those third parties. The judge dismissed an application by the defendants asking for a ruling on whether the plaintiff was entitled to bring a derivative claim. The action proceeded to trial, where it succeeded. However, on appeal, the Court of Appeal overturned some of the findings of fraud against the defendants. The court also held that the judge had been wrong to dismiss the application for a ruling on the derivative claim. In addition, it considered how far the shareholders had separate causes of action from the company.

27. On the last point, the Court of Appeal held that the shareholder's separate claim (which it called "the personal action") was misconceived. The court said this (at 222-24):

> "It is also correct that if directors convene a meeting on the basis of a fraudulent circular, a shareholder will have a right of action to recover any loss which he has been personally caused in consequence of the fraudulent circular; this might include the expense of attending the meeting. But what he cannot do is to recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely

diminution in dividend, because such a 'loss' is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only 'loss' is through the company, in the diminution in the value of the net assets of the company, in which he has (say) a 3 per cent. shareholding. The plaintiff's shares are merely a right of participation in the company on the terms of the articles of association. The shares themselves, his right of participation, are not directly affected by the wrongdoing. The plaintiff still holds all the shares as his own absolutely unencumbered property. The deceit practised upon the plaintiff does not affect the shares; it merely enables the defendant to rob the company. A simple illustration will prove the logic of this approach. Suppose that the sole asset of a company is a cash box containing £100,000. The company has an issued share capital of 100 shares, of which 99 are held by the plaintiff. The plaintiff holds the key of the cash box. The defendant by a fraudulent misrepresentation persuades the plaintiff to part with the key. The defendant then robs the company of all its money. The effect of the fraud and the subsequent robbery, assuming that the defendant successfully flees with his plunder, is (i) to denude the company of all its assets; and (ii) to reduce the sale value of the plaintiff's shares from a figure approaching £100,000 to nil. There are two wrongs, the deceit practised on the plaintiff and the robbery of the company. But the deceit on the plaintiff causes the plaintiff no loss which is separate and distinct from the loss to the company. The deceit was merely a step in the robbery. The plaintiff obviously cannot recover personally some £100,000 damages in addition to the £100,000 damages recoverable by the company.

Counsel for the plaintiffs sought to answer this objection by agreeing that there cannot be double recovery from the defendants, but suggesting that the personal action will lie if the company's remedy is for some reason not pursued. But how can the failure of the company to pursue its remedy against the robber entitle the shareholder to recover for himself? What happens if the robbery takes place in year 1, the shareholder sues in year 2, and the company makes up its mind in year 3 to pursue its remedy? Is the shareholder's action stayed, if still on foot? Supposing judgment has already been recovered by the shareholder and satisfied, what then?

[…]

The plaintiffs in this action were never concerned to recover in the personal action. The plaintiffs were only interested in the personal action as a means of circumventing the rule in *Foss v. Harbottle.* The plaintiffs succeeded. A personal action would subvert the rule in *Foss v. Harbottle* and that rule is not merely a tiresome procedural obstacle placed in the path of a shareholder by a legalistic judiciary. The rule is the consequence of the fact that a corporation is a separate legal entity. Other consequences are limited liability and limited rights. The company is liable for its contracts and torts; the shareholder has no such liability. The company acquires causes of action for breaches of contract and for torts which damage the company. No cause of action vests in the shareholder.

> When the shareholder acquires a share he accepts the fact that the value of his investment follows the fortunes of the company and that he can only exercise his influence over the fortunes of the company by the exercise of his voting rights in general meeting."

28. In *Johnson v Gore Wood & Co* [2002] 2 AC 1, the House of Lords revisited the question of the right of a shareholder to sue for personal losses as a result of a wrong done to the company by a third party. The company, which was in substance owned by the claimant, brought proceedings against its solicitors for professional negligence in connection with a property transaction for that company. That claim was eventually compromised during the trial and a substantial sum paid to the company. The claimant then commenced a separate personal action, claiming damages for alleged personal losses caused by the defendants' negligence. The defendants applied to strike out the claim. The issues raised included abuse of process, estoppel and also the reflective loss principle from the *Prudential* case. The judge dismissed the application. The Court of Appeal reversed the judge in part. The House of Lords likewise reversed the Court of Appeal in part. All five members of the House delivered a separate speech.

29. On the question of reflective loss, Lord Bingham said this (at 35-36, omitting references to authorities relied on):

> "These authorities support the following propositions:
>
> 1) Where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of a shareholder suing in that capacity and no other to make good a diminution in the value of the shareholder's shareholding where that merely reflects the loss suffered by the company. A claim will not lie by a shareholder to make good a loss which would be made good if the company's assets were replenished through action against the party responsible for the loss, even if the company, acting through its constitutional organs, has declined or failed to make good that loss. …
>
> 2) Where a company suffers loss but has no cause of action to sue to recover that loss, the shareholder in the company may sue in respect of it (if the shareholder has a cause of action to do so), even though the loss is a diminution in the value of the shareholding. …
>
> 3) Where a company suffers loss caused by a breach of duty to it, and a shareholder suffers a loss separate and distinct from that suffered by the company caused by breach of a duty independently owed to the shareholder, each may sue to recover the loss caused to it by breach of the duty owed to it but neither may recover loss caused to the other by breach of the duty owed to that other. …
>
> These principles do not resolve the crucial decision which a court must make on a strike-out application, whether on the facts pleaded a shareholder's claim is sustainable in principle, nor the decision which the trial court must make, whether on the facts proved the shareholder's claim

should be upheld. On the one hand the court must respect the principle of company autonomy, ensure that the company's creditors are not prejudiced by the action of individual shareholders and ensure that a party does not recover compensation for a loss which another party has suffered. On the other, the court must be astute to ensure that the party who has in fact suffered loss is not arbitrarily denied fair compensation. The problem can be resolved only by close scrutiny of the pleadings at the strike-out stage and all the proven facts at the trial stage: the object is to ascertain whether the loss claimed appears to be or is one which would be made good if the company had enforced its full rights against the party responsible, and whether (to use the language of *Prudential* at page 223) the loss claimed is 'merely a reflection of the loss suffered by the company.' In some cases the answer will be clear, as where the shareholder claims the loss of dividend or a diminution in the value of a shareholding attributable solely to depletion of the company's assets, or a loss unrelated to the business of the company. In other cases, inevitably, a finer judgment will be called for. At the strike-out stage any reasonable doubt must be resolved in favour of the claimant."

30. The other members of the House expressed themselves in different terms, although (with one exception for a head of loss where Lord Cooke of Thorndon dissented) all agreed in the result, which was that the bulk of the claim should be allowed to go to trial. It is however, not necessary to consider those other formulations of the law, because of the decision of the Supreme Court in *Marex Financial Ltd v Sevilleja* [2021] AC 39. However, it should be noted that reliance on some of these other formulations led to subsequent decisions which were later overruled by *Marex*.

The modern cases: Marex

31. In *Marex*, the claimant had obtained judgment against two BVI companies in respect of debts owed. But the companies were found not to have assets sufficient to satisfy the judgment debts, and they went into liquidation. The creditor then sued the defendant as the ultimate beneficial owner of the two companies, alleging, that after circulation of the draft judgment, he had dishonestly stripped the companies of their assets and moved them overseas to frustrate enforcement of the judgment, and was therefore liable in tort to the creditor. The creditor obtained permission to serve the claim form on the defendant out of the jurisdiction. The defendant applied to set aside the service of the claim form on the basis that the loss was that of the companies, whose liquidator could make the claim, and that therefore the claim was barred by the no-reflective loss principle. The judge refused to set aside service. The Court of Appeal reversed the judge, but the Supreme Court, sitting with a panel of seven judges, unanimously reversed the Court of Appeal, holding that the claim was not barred by the no-reflective loss principle, because that principle did not apply to *creditors* of companies, as opposed to shareholders.

32. Three judgments were given, by Lord Reed (with whom Lady Black and Lord Lloyd-Jones agreed), by Lord Hodge, and by Lord Sales (with whom Lord Kitchen and Lady Hale agreed). However, Lord Hodge also agreed with Lord Reed, so that the latter's judgment represents the view of the majority of the

court. This is important, because, although the judges were unanimous on the non-applicability of the no-reflective loss principle to the immediate case (*ie* where the claimant was merely a *creditor* of the company which suffered damage), they differed as to its applicability otherwise. In particular, the minority would have in effect abolished the no-reflective loss principle even for shareholder claimants. But, for the future, the applicability of the principle is as set out in Lord Reed's judgment.

33. After considering the authorities and the arguments, Lord Reed concluded as follows:

> "79. Summarising the discussion to this point, it is necessary to distinguish between (1) cases where claims are brought by a shareholder in respect of loss which he has suffered in that capacity, in the form of a diminution in share value or in distributions, which is the consequence of loss sustained by the company, in respect of which the company has a cause of action against the same wrongdoer, and (2) cases where claims are brought, whether by a shareholder or by anyone else, in respect of loss which does not fall within that description, but where the company has a right of action in respect of substantially the same loss.
>
> 80. In cases of the first kind, the shareholder cannot bring proceedings in respect of the company's loss, since he has no legal or equitable interest in the company's assets: *Macaura* and *Short v Treasury Comrs*. It is only the company which has a cause of action in respect of its loss: *Foss v Harbottle*. However, depending on the circumstances, it is possible that the company's loss may result (or, at least, may be claimed to result) in a fall in the value of its shares. Its shareholders may therefore claim to have suffered a loss as a consequence of the company's loss. Depending on the circumstances, the company's recovery of its loss may have the effect of restoring the value of the shares. In such circumstances, the only remedy which the law requires to provide, in order to achieve its remedial objectives of compensating both the company and its shareholders, is an award of damages to the company.
>
> 81. There may, however, be circumstances where the company's right of action is not sufficient to ensure that the value of the shares is fully replenished. One example is where the market's valuation of the shares is not a simple reflection of the company's net assets, as discussed at para 32 above. Another is where the company fails to pursue a right of action which, in the opinion of a shareholder, ought to have been pursued, or compromises its claim for an amount which, in the opinion of a shareholder, is less than its full value. But the effect of the rule in *Foss v Harbottle* is that the shareholder has entrusted the management of the company's right of action to its decision-making organs, including, ultimately, the majority of members voting in general meeting. If such a decision is taken otherwise than in the proper exercise of the relevant powers, then the law provides the shareholder with a number of remedies, including a derivative action, and equitable relief from unfairly prejudicial conduct.

82. As explained at paras 34–37 above, the company's control over its own cause of action would be compromised, and the rule in *Foss v Harbottle* could be circumvented, if the shareholder could bring a personal action for a fall in share value consequent on the company's loss, where the company had a concurrent right of action in respect of its loss. The same arguments apply to distributions which a shareholder might have received from the company if it had not sustained the loss (such as the pension contributions in *Johnson*).

83. The critical point is that the shareholder has not suffered a loss which is regarded by the law as being separate and distinct from the company's loss, and therefore has no claim to recover it. As a shareholder (and unlike a creditor or an employee), he does, however, have a variety of other rights which may be relevant in a context of this kind, including the right to bring a derivative claim to enforce the company's rights if the relevant conditions are met, and the right to seek relief in respect of unfairly prejudicial conduct of the company's affairs.

84. The position is different in cases of the second kind. One can take as an example cases where claims are brought in respect of loss suffered in the capacity of a creditor of the company. The arguments which arise in the case of a shareholder have no application. There is no analogous relationship between a creditor and the company. There is no correlation between the value of the company's assets or profits and the ‘value’ of the creditor's debt, analogous to the relationship on which a shareholder bases his claim for a fall in share value. The inverted commas around the word ‘value’, when applied to a debt, reflect the fact that it is a different kind of entity from a share.

85. Where a company suffers a loss, it is possible that its shareholders may also suffer a consequential loss in respect of the value of their shares, but its creditors will not suffer any loss so long as the company remains solvent. Even where a loss causes the company to become insolvent, or occurs while it is insolvent, its shareholders and its creditors are not affected in the same way, either temporally or causally. In an insolvency, the shareholders will recover only a pro rata share of the company's surplus assets, if any. The value of their shares will reflect the value of that interest. The extent to which the company's loss may affect a creditor's recovery of his debt, on the other hand, will depend not only on the company's assets but also on the value of any security possessed by the creditor, on the rules governing the priority of debts, and on the manner in which the liquidation is conducted (for example, whether proceedings are brought by the liquidator against persons from whom funds might be ingathered, and whether such proceedings are successful). Most importantly, even where the company's loss results in the creditor also suffering a loss, he does not suffer the loss in the capacity of a shareholder, and his pursuit of a claim in respect of that loss cannot therefore give rise to any conflict with the rule in *Foss v Harbottle*.

86. The potential concern that arises in relation to claims brought by creditors is not, therefore, the rule in *Foss v Harbottle*. On the other hand,

the principle that double recovery should be avoided may be relevant, although it is not necessarily engaged merely because the company and the creditor have concurrent claims against the same defendant. In *International Leisure Ltd v First National Trustee Co UK Ltd* [2013] Ch 346, for example, the principle was not engaged where the company and a secured creditor had concurrent claims against an administrative receiver whom the creditor had appointed, since the company could only claim in respect of any loss remaining after the secured creditor had been paid in full.

87. Where the risk of double recovery arises, how it should be avoided will depend on the circumstances. It should be borne in mind that the avoidance of double recovery does not entail that the company's claim must be given priority. Nor, contrary to the view expressed in a number of authorities, including the decision of the Court of Appeal in the present case, does the pari passu principle entail that the company's claim must be given priority. That principle requires that, in a winding up, a company's assets must be distributed rateably among its ordinary creditors. The proceeds of its recovery from a wrongdoer will form part of its assets available for distribution (subject to the claims of secured and preferred creditors). But the pari passu principle does not give the company, or its liquidator, a preferential claim on the assets of the wrongdoer, over the claim of any other person with rights against the wrongdoer, even if that claimant is also a creditor of the company. In other words, the pari passu principle may restrict a creditor of an insolvent company to the receipt of a dividend on the amount which the company owes him, but it does not prevent him from enforcing his own right to recover damages from a third party, or confer on the company's right against the third party an automatic priority. In the event that the third party cannot satisfy all the claims made against him, the position will be regulated by the law of (his) insolvency.

88. It is also necessary to consider whether double recovery may properly be avoided by other means than the prioritising of one claim over the other, such as those mentioned in paras 5–7 above. The judgments of Gibbs CJ and Brennan J in *Gould v Vaggelas* 157 CLR 215, at pp 229 and 258–259 respectively, raise the possibility that subrogation, in particular, may provide a solution to issues of double recovery arising in connection with creditors' claims. That question has not, however, been discussed in the present proceedings, and I express no view upon it.

89. I would therefore reaffirm the approach adopted in *Prudential* [1982] Ch 204 and by Lord Bingham in *Johnson* [2002] 2 AC 1, and depart from the reasoning in the other speeches in that case, and in later authorities, so far as it is inconsistent with the foregoing. It follows that *Giles v Rhind* [2003] Ch 618, *Perry v Day* [2005] 2 BCLC 405 and *Gardner v Parker* [2004] 2 BCLC 554 were wrongly decided. The rule in *Prudential* is limited to claims by shareholders that, as a result of actionable loss suffered by their company, the value of their shares, or of the distributions

they receive as shareholders, has been diminished. Other claims, whether by shareholders or anyone else, should be dealt with in the ordinary way."

34. It will be seen from his paragraph [79] that, although Lord Reed agrees with what Lord Bingham said on the subject in *Johnson v Gore Wood & Co*, he has condensed Lord Bingham's three situations to consider into two. Lord Hodge's concurring judgment said this:

> "99. The Court's reasoning [in the *Prudential* case] on p 223, which Lord Reed has quoted at paras 27 and 29 above, has been criticised because the stark assertion, that the shareholder 'does not suffer any personal loss' by the diminution in the value of its shares or of the distributions which it received, cannot be taken at face value - clearly the shareholder suffers economic loss - and because the example of a non-trading company whose only asset was a cash box containing £100,000 is an oversimplification. But the reasoning is nonetheless clear where the Court asserts (a) that the deceit on the shareholder causes the shareholder 'no loss which is separate and distinct from the loss to the company' (p 223), (b) that 'when the shareholder acquires a share he accepts the fact that the value of his investment follows the fortunes of the company and that he can only exercise his influence over the fortunes of the company by the exercise of his voting rights in general meeting' (p 224), and (c) that '[a] personal action would subvert the rule in *Foss v Harbottle'*, a rule which 'operates fairly by preserving the rights of the majority' (p 224). I agree with Lord Reed (para 28 above) that what the Court was saying is that where a company suffers a loss as a result of wrongdoing and that loss is reflected to some extent in a fall in the value of its shares or in its distributions, the fall in the share value or in the distributions is not a loss which the law recognises as being separate and distinct from the loss sustained by the company.
>
> 100. That is the full extent of the 'principle' of reflective loss which the *Prudential* case established. It was not articulated as a general principle to be applied in other contexts; it is a rule of company law arising from the nature of the shareholder's investment and participation in a limited company and excludes a shareholder's claim made in its capacity as shareholder."

The modern cases: Naibu and Nectrus

35. A few months after *Marex*, Bacon J decided the case of *Naibu Global International Co plc v Daniel Stewart & Co plc* [2021] PNLR 4. The two claimants were the ultimate holding company and the parent company respectively of a Chinese sportswear company. The first claimant had been floated on the London Alternative Investment Market. The first defendant had been the nominated advisor in relation to the flotation. The second defendant was a law firm retained to advise both the sportwear company and its parent (the second claimant). It appeared that the founder of the sportwear company had misappropriated the company's assets, leaving the shares in that company without value, and the first claimant delisted from AIM. The claimants alleged negligence and/or breach of duty by the second defendant in preparing the first

claimant for flotation. The second defendant applied (inter alia) to strike out the claim by the first claimant on the basis that any losses caused to it by any wrongdoing by the second defendant were merely a reflection of the losses of the second claimant, and therefore fell foul of the no-reflective loss principle. Although the case was originally argued before the Supreme Court's decision in *Marex*, it was adjourned to permit the parties to make submissions on that decision.

36. In discussing the no-reflective loss principle, Bacon J referred to the majority judgment of Lord Reed in *Marex*, and said:

> "48. The difference between the parties lies in the question of how that rule is applied in the present case. Shortly put, Pinsent Masons' submission is that the loss and damage pleaded by Naibu Jersey turns almost entirely upon the loss suffered by Naibu HK, since the alleged loss consists of a fall in the value of the shares in Naibu HK (to nil) and a consequent diminution (to nil) of the value of Naibu Jersey's investment in Naibu HK. That is, Mr Smith says, a paradigm example of a situation in which the rule against reflective loss will be engaged, as confirmed by the Supreme Court in *Marex*. Mr Smith accepts, however, that this does not encompass the separate losses that are now pleaded in the revised amended Particulars of Claim in respect of the costs of steps taken by Naibu Jersey to assert control over and investigate losses suffered by Naibu HK and Naibu China.
>
> 49. Mr Davidson, in response, acknowledges that the claim as originally pleaded did not distinguish between the losses of Naibu HK and Naibu Jersey, pleading a loss to Naibu HK of RMB 1,649,326,000, "being the value of its shares in Naibu China", and a loss to Naibu Jersey of an identical amount, "being the value of its shares in Naibu HK". That original pleaded position, he acknowledges, reflects the overall position on loss: in total, he accepts that Naibu Jersey has suffered precisely the same loss as Naibu HK, although the revised amended Particulars of Claim no longer seeks to put a precise figure on the quantum of that loss.
>
> 50. His argument is, however, that it is necessary to look at the losses of the two companies as they evolved over time, as now pleaded in the revised amended Particulars of Claim. On the day of the flotation of Naibu Jersey on AIM, the revised draft pleads that "Naibu Jersey suffered loss in that the value of its shareholding in Naibu HK was substantially less than it would have been if appropriate control mechanisms had been in place". Subsequently, it is said, further losses were suffered by Naibu Jersey, namely (1) the cost of steps taken to assert and regain control of Naibu HK, (2) the cost of steps taken to assert and regain control of Naibu China, (3) the cost of steps taken to investigate the depredations against Naibu China, (4) disbursement of the proceeds of flotation, and (5) further diminution (to nil) of the value of the shareholding in Naibu HK consequent upon the depredations against Naibu China. What is required, Mr Davidson says, is an investigation (through expert evidence) of the loss suffered by each of Naibu Jersey and Naibu HK at each of those different stages. To the extent that, at one or more of those stages, that

investigation identifies a loss to Naibu Jersey that is different in nature to and/or more than the loss to Naibu HK, that is a loss that Naibu Jersey can recover. As to why the losses to Naibu Jersey might, at different points in time, be quantified as being different to the losses to Naibu HK, Mr Davidson suggests that this might be the case since the shares were being traded in different markets.

51. As I have already indicated, Pinsent Masons accepts that the costs of steps taken by Naibu Jersey to assert control over and investigate losses suffered by Naibu HK and Naibu China do not constitute reflective losses. In respect of the remainder of the categories of loss claimed, however, I consider that it is wholly artificial to carve up those losses by time in an attempt to circumvent the application of the reflective loss rule. As Mr Davidson rightly concedes, the total losses of Naibu Jersey are ultimately the same as those of Naibu HK. If the application of the rule against reflective loss could be avoided by the simple device of repleading so as to identify different losses occurring at different times, with the submission that the losses of the two companies might not have been precisely contiguous, that would entirely undermine the purpose of the rule.

52. Nor does Mr Davidson's approach find any support in the majority judgments in *Marex*. As set out in the passages that I have cited above, the majority of the Supreme Court considered that the rule against reflective loss is engaged where the loss claimed by the shareholder takes the form of a diminution in the value of its shareholding or its distributions as shareholder. The decisive question is therefore the *nature* of the loss claimed by the shareholder. There is no further requirement that the *amount* of the loss to the company should be identical to the loss to the shareholder. Indeed Lord Reed expressly acknowledged at §§32–33 of his judgment that a company's loss and any fall in its share value may *not* be closely correlated, particularly in cases where the company's shares are traded on a stock market. That is one of the reasons why Lord Reed rejected the avoidance of double recovery as a justification, in itself, of the reflective loss principle.

53. Leaving aside the costs of steps to assert control over and investigate losses suffered by Naibu HK and Naibu China, the loss that is claimed by Naibu Jersey, whether it is pleaded as a single total figure (as in the original Particulars of Claim), or as a series of separate losses suffered at different times (as in the revised amended Particulars of Claim), is entirely composed of the diminution in the value of Naibu Jersey's shareholding in Naibu HK. Mr Smith is, I consider, right to say that the supposedly separate category of losses suffered through disbursement of the proceeds of flotation is, in reality, part of the same loss, representing the investment made by Naibu Jersey in Naibu China, through Naibu HK, the value of which has now been reduced to nil. The claim is therefore a paradigm claim of reflective loss, which is barred by the principle as confirmed and restated in *Marex.*

> 54. It follows that the claim by Naibu Jersey should be struck out save in so far as it relates to the three new categories of alleged losses relating to steps taken by Naibu Jersey to assert control over and investigate losses suffered by Naibu HK and Naibu China. In relation to those three categories of losses, permission to amend the Particulars of Claim can be given."

37. In *Nectrus Ltd v UCP plc* [2021] EWCA Civ 57, Flaux LJ (as he then was) had refused permission to Nectrus to appeal from a decision of Sir Michael Burton GBE, sitting as a High Court judge. UCP held shares in a company called Candor. Nectrus entered into a contract with both Candor and UCP. The claim was by UCP against Nectrus, for breach of that contract. By the time of the claim, however, UCP had sold its shares in Candor (at a reduced price, to reflect Candor's losses from the breach of contract). The judge at first instance had decided that the no reflective loss principle did not apply to a shareholder who (like UCP) had ceased to be a shareholder in the company by the time of the claim. But Nectrus had applied under CPR rule 52.30 for reconsideration of the refusal to grant permission to appeal.

38. There was, unusually, an oral hearing of this application (see CPR rule 52.30(5)), at which both sides were represented, and Flaux LJ handed down a written judgment on 21 January 2021. The main argument put forward on the application (at [30]) was not about the applicability of the principle to an ex-shareholder. Instead, it was a procedural point, which was

> "that the integrity of the appeal process was fatally undermined because my Order of 24 July 2020 was in breach of the principles of natural justice, in that I had made the Order without permitting Nectrus to make submissions as to the consequences of the decision of the Supreme Court in *Marex* on the relevant ground of appeal."

39. As to this, the judge said (at [37]):

> "There is no question of the principles of natural justice having been breached or of there being any procedural unfairness. It cannot be said that the integrity of the litigation process had been fatally undermined, so that an essential precondition for a successful application under CPR 52.30 cannot be satisfied in this case and, *on that ground alone, this application must fail*." (Emphasis supplied.)

I assume that the reference to the "essential precondition for a successful application under CPR 52.30" is to the words of CPR rule 52.30(1)(a), that "it is necessary to [re-open the appeal] in order to avoid real injustice".

40. During his discussion of the authorities on the substantive point, including the decision of the Supreme Court in *Marex*, Flaux LJ observed:

> "44. Mr Davies QC's second point was that the problem which Nectrus' argument faces is that, from the express terms of the judgments in the Supreme Court, it is clear that the rule does not apply to a claim by an ex-shareholder. Despite Mr Butler QC's valiant attempt to argue the contrary,

> that is clearly correct. The passages in the judgments of Lord Reed at [9] and [89] and Lord Hodge at [100] which I underlined in [9] to [11] above make it clear that the general rule as to recoverability of loss is subject to the highly specific exception of the case which falls within the narrow principle of *Prudential*. As the last sentence of [89] makes clear, all other claims (which must include claims by an ex-shareholder) are to be dealt with in the ordinary way, in other words the rule against reflective loss does not apply to such claims. It is quite clear, from all the judgments, that the Supreme Court was intent on limiting the scope of the rule against reflective loss to the narrow principle or rule in *Prudential.* There is simply no warrant for extending the rule in the way for which Nectrus contends."

41. The judge also said this:

> "50. … As Mr Davies QC correctly submitted, the rule in *Foss v Harbottle* manifestly does not apply to an ex-shareholder, so there is no reason for the rule against reflective loss to apply. Although Mr Butler QC sought to argue that, because UCP had voluntarily given up its rights as a shareholder, so that the rule should still apply, I agree that there is nothing in that point. As Mr Davies QC said, why should UCP be penalised for selling its shares at a discount, *a fortiori* where that crystallised the loss it had suffered as a consequence of Nectrus' breach of contract. Once UCP had sold its shares, in my judgment there was no unity of economic interest between UCP and Candor and the claim was not made in the capacity of a shareholder."

42. In concluding his discussion of the substantive point, the judge said:

> "55. In my judgment, despite the eloquence and ingenuity of Mr Butler QC's submissions, the contention that the Supreme Court has left open the possibility that the rule against reflective loss is applicable to an ex-shareholder in the position of UCP is unarguable."

43. Finally, there was a question of delay by the appellant:

> "57. Even if Nectrus had been able to overcome the high hurdles imposed by CPR 52.30, there remains the delay in the making of this application. … The delay in making the application is inimical to the public interest in finality. This would be a factor weighing heavily against allowing the application, even if it otherwise had any merit, which it does not."

And Flaux LJ concluded:

> "58. For all these reasons, this application under CPR 52.30 is dismissed."

44. The ex-shareholder point arose again in *Allianz Global Investors GmbH v Barclays Bank plc* [2021] EWHC 399 (Comm). The facts here were very different, however. A large number of investment funds sued a number of banks for damages for alleged "illegal and anti-competitive manipulation of

the foreign exchange (FX) markets in the period 2003-2013". The banks pleaded *inter alia* that, to the extent that any conduct of theirs of the kind pleaded had reduced the value of the funds, many of the claimant funds had "passed on" the diminution in value to their own investors, by means of redemption or withdrawal by such investors of their investments at the prevailing (*ie* reduced) net asset value. The claimant funds sought to strike out this pleading on several bases. One, referred to as "the company point", was that the underlying investors had no claim against the defendants, because it was only reflective loss, and accordingly only the funds themselves could do so. The defendant banks argued in reply that the investors *did* have their own claims, and that the no-reflective loss principle did not apply, because the investors *would no longer be investors in the funds* by the time any claims were brought.

45. In these circumstances Sir Nigel Teare, sitting as a High Court judge, was referred to the decision of Flaux LJ in *Nectrus*. He said:

> "94. … Normally, remarks made when refusing (or granting) permission to appeal are of no weight because a variety of matters are relevant to such decisions. However, I have been informed that Flaux LJ's intention was that his ruling may be cited and so counsel was entitled to refer to it.
>
> […]
>
> 97. Counsel for the Claimants said that *Nectrus v UCP* was distinguishable because it did not involve a distribution by Candor but a reduced payment by a third party for the shares in Candor. That is of course a distinction on the facts (and may have been the factual circumstances which Lord Sales [in *Marex*] had in mind). But if Flaux LJ is right that the applicability of the rule in *Prudential* is to be determined at the time the claim is made and that a claim made by an ex-shareholder is not made in his capacity as a shareholder then the factual distinction would not appear to be a material distinction. However, Flaux LJ was not dealing with the circumstances of the present case and his decision does not have the authority of a decision by the Court of Appeal determining an appeal which has been fully argued. It was not, I think, said to be binding on me. Nevertheless, it does provide support for the Defendants' argument. Counsel for the Claimants was bold enough to say that Flaux LJ was wrong. I do not think it would be appropriate for me, a first instance judge, to enter into that debate, even if his remarks are not binding upon me. I do not have to consider the facts of *Nectrus v UCP*."

46. The judge went on to conclude:

> "99. In deciding which argument to prefer I think that I must have regard to the justification for the rule in *Prudential*. Lord Reed referred to that at paragraphs 37 and 38 of his judgment. The rule avoids subverting the rule in *Foss v Harbottle* pursuant to which the only person who can seek relief for an injury done to a company, where the company has a cause of action, is the company itself; see paragraph 10. Subversion of that rule would make it difficult for the company to deal with a claim in the best

> interests of the company. Respect for the rule would prevent shareholders acting contrary to the interests of the company. There is no justification for concurrent claims because of the unity of economic interests which bind the shareholder and the company. Concurrent claims would also give rise to the need to avoid double recovery.
>
> 100. The context of the present case is one in which the company has (it is assumed) passed on its loss to the shareholder who has redeemed or withdrawn his investment. The context is therefore not one in which the company would be expected to be dealing with a claim for compensation in respect of that particular loss (although the company of course retains the right of action to sue in respect of damage caused to the remaining property of the company and for the benefit of existing shareholders). In such context the stated justification for the rule in *Prudential* has little, if any, traction. There is no risk of the rule in *Foss v Harbottle* being subverted, there will be no concurrent claims and there will be no risk of double recovery.
>
> 101. I have therefore concluded that in the context of the present case, which concerns loss being passed on or transferred by the company, there is no justification for applying the rule in *Prudential.* That rule does not, in my judgment, bar claims by former shareholders against third parties for damages in respect of the losses transferred or passed on to them by the company.
>
> 102. For these reasons the allegation of pass-on cannot be shown to be impossible or bound in law to fail on account of the company point."

The modern cases: Primeo

47. The final authority to which I need to refer on reflective loss is the decision of the Privy Council in *Primeo Fund v Bank of Bermuda (Cayman) Ltd* [2021] UKPC 22, on appeal from the Court of Appeal of the Cayman Islands. The appellant, Primeo, was a Cayman company operating as an open-ended mutual investment fund, promoted, marketed and managed by Bank Austria AG. The respondents were professional service carrying out both the custodian and the administrator functions. A proportion of the funds were placed with Bernard L Madoff Investment Securities LLC ("BLMIS"), the vehicle by which Mr Madoff carried on his now notorious fraudulent pyramid (or "Ponzi") scheme. By May 2001, the whole of its fund was invested in this way. Most of the investment was made directly into BLMIS, but some was indirect, through two other funds, known as Herald (domiciled in Cayman) and Alpha (domiciled in Bermuda). In May 2007 the appellant's direct investments with BLMIS were restructured, so that the appellant transferred its direct investments in BLMIS to Herald, and in exchange received shares in Herald. Thereafter all the appellant's investments in BLMIS were indirect, 97.5% through Herald and 2.5% through Alpha.

48. The Ponzi scheme collapsed in December 2008. As a result the appellant suffered heavy losses and was put into voluntary liquidation in January 2009. In 2013 the appellant issued proceedings alleging breaches of duty by the

respondents. Those proceedings were tried in 2016-2017. The Cayman Grand Court held that the respondents owed duties to the applicant, and had breached those duties. Yet the claims failed, because they infringed the reflective loss rule. The appellant's losses were attributable to the reduction in value of its shares in Herald and Alpha, who would also have claims against the respondents covering the same losses. (In fact, Herald brought proceedings in Luxembourg against the second respondent, which failed, although there was then an appeal which was still outstanding when the Privy Council gave its decision. Herald also brought further proceedings against the second respondent which was still outstanding at that time. It had not issued any proceedings against the first respondent, with whom it had no contractual relationship. The position in relation to Alpha was broadly similar, though not identical.)

49. Each side appealed certain issues to the Court of Appeal. The judgment of that court was handed down in June 2019, *ie* before the decision of the Supreme Court in *Marex*. Various rulings were given, but, so far as concerns the principle of reflective loss, the Court of Appeal affirmed the decision at first instance that the appellant's claims were barred by the reflective loss rule. The appellant appealed to the Judicial Committee of the Privy Council. The appeal was heard by a panel of five judges, comprising five of the seven judges who had heard the Supreme Court appeal in *Marex*. From the majority there were Lord Reed, Lord Hodge and Lord Lloyd-Jones. From the minority there were Lord Kitchen and Lord Sales. The advice of the board was given jointly by Lord Kitchen and Lord Sales. It contains this comment in paragraph 2:

> "For the present hearing, the parties are agreed that Cayman Islands law regarding the reflective loss rule is the same as English law, which is to say the law as determined by the majority in *Marex Financial Ltd v Sevilleja (All Party Parliamentary Group on Fair Business Banking intervening)* [2020] UKSC 31; [2021] AC 39 ('*Marex*')."

50. For the purposes of resolving the appeal, the Privy Council proceeded on the assumption that, each time the appellant made a direct investment in BLMIS, it suffered a loss, because that company misappropriated the funds. The claim against the respondents was that, but for their breaches of duty, the appellant would not have made some of those investments and suffered those losses, and, insofar as it had already made direct investments, it would have applied to redeem them before the Ponzi scheme was discovered.

51. A number of specific issues arose at the hearing of the appeal. One of them was formulated by the board in the following way:

> "What is the relevant time to determine whether the reflective loss rule applies? Is it the time when the relevant claimant (here, Primeo) issued proceedings against, in particular, R2 - ie 2013, by which time Primeo was a shareholder in Herald, which had its own similar claims against R2 and Primeo's loss could be said to reflect Herald's loss in the limited sense referred to above - or is it the time when Primeo acquired its causes of action against R1 and R2, when it acted on its own behalf and was not a shareholder in any relevant sense in Herald? ('the timing issue')."

52. The argument for the respondents was this. The reflective loss rule, as formulated by the Supreme Court in *Marex*, could not have originally barred the applicant from making a claim in respect of its *direct* investments in BLMIS, However, the entirety of the direct investments had been transferred to Herald in exchange for shares in Herald. When the Ponzi scheme collapsed, Herald could make a claim against the respondents in respect of the entirety of its shareholdings. Therefore, the appellant could no longer claim for its losses in respect of the direct investments, because that claim was subsumed in the claim which Herald now had, and the appellant's loss simply reflected Herald's.

53. The advice of the board contains an analysis of the decision in *Marex*, and applies it to the facts of the present case. It concludes that the reflective loss rule did not apply to bar the appellant from claiming in respect of the losses it suffered each time it made a direct investment in BLMIS, because those losses were not suffered "in its capacity as shareholder" of Herald. The advice says this:

> "54. … On misappropriation of the money by BLMIS, Primeo suffered an immediate loss measured by the value of the money misappropriated, less any money actually recovered (see the judgment of the Court of Appeal, para 217). That loss was suffered by Primeo in its personal capacity and had nothing to do with Herald. It was not loss suffered by Primeo in its capacity as a shareholder in Herald, nor could it be said that it was "merely the result of a loss suffered by [Herald]" (*Marex*, para 39 per Lord Reed), that is as a knock-on consequence of a wrong suffered by the company itself."

54. It goes on to say:

> "55. It is important to note that the reflective loss rule is, as was made clear in the majority judgments in *Marex*, a rule of substantive law associated with the rule in *Foss v Harbottle* and concerned with the recognition in law of particular types of loss. It is not a procedural rule concerned only with the avoidance of double recovery. Applied as a substantive rule of law, whether the reflective loss rule is applicable or not falls to be assessed as at the point in time when the claimant suffers loss arising from some relevant breach of obligation by the relevant wrongdoer. In this case, on each occasion when Primeo suffered loss on placing funds with BLMIS for investment it did so in circumstances where the law recognises its loss as real and of a type which is recoverable. In principle, on each occasion Primeo invested by paying money to BLMIS and had its money misappropriated as set out above, Primeo could have sued R1 and R2 in respect of their breaches of duty which caused such loss, which was of a form recognised in law according to ordinary principles and did not arise in circumstances which brought the exclusionary reflective loss rule into operation.
>
> 56. As Mr Smith submitted, according to the analysis of the majority in *Marex* the focus is on the nature of the loss, which involves consideration of the capacity in which the claimant suffered the loss and

the form of the loss (ie whether it was suffered as a diminution in the value of shares held by the claimant or as a reduction in the dividends payable to them). The issue is one of the characterisation of the loss, which depends upon its status (that is, whether it is recognised or not by the law) at the time it is suffered. The test of whether the substantive rule is engaged or not in relation to a cause of action which arises as property in the hands of a person is to look at the nature of the loss at that time: see *Marex*, paras 79 and 89 per Lord Reed.

57. The same point can also be made in another way. On each occasion when Primeo made a direct investment in BLMIS it suffered loss at a time when it was not subject to any agreement to 'follow the fortunes' of any company (let alone Herald) arising from membership of the company, which is the foundation and justification for the reflective loss rule: see para 52 above. So there is no sound reason to apply the reflective loss rule to preclude Primeo from being recognised in law as being able, in principle, to make recovery in respect of such loss pursuant to usual general legal principles."

55. The respondents sought to rely on the decision of Flaux LJ in *Nectrus*. As to that, the board said this:

"61 … Flaux LJ held that the possibility that the rule was applicable to an ex-shareholder in the position of UCP was unarguable; and the applicability of the rule should be assessed when the claim is made, at a time when the loss claimed has crystallised. But in the Board's view, that case is wrongly decided. Indeed, it serves to illustrate the very odd results to which Mr Gillis's submission would lead. A shareholder which suffers a loss in the form of a diminution in value of its shareholding which is not recoverable as a result of the application of the reflective loss rule cannot later convert that loss into one which is recoverable simply by selling its shareholding. It is necessary to focus on the nature of the loss in respect of which the shareholder's claim is made. It is not enough to consider the position as at the date of the issue of proceedings without regard to the nature of the loss and a consideration of whether it is, in the eyes of the law, separate and distinct from that of the company."

56. The board concluded on this issue:

"63. Overall, to test the application of the reflective loss rule at the time when proceedings are brought rather than when the loss is suffered would have the effect of making the wrongdoer very wary of settling with the company, if the practical outcome of doing so is made uncertain and precarious by the future conduct of the company and shareholder and the vagaries of procedural law. That would undermine the intended effect of the rule (reflecting the rule in *Foss v Harbottle*), which is to ensure that the company has a full opportunity to decide how to pursue its own cause of action, where properly identified as such, and to obtain as good value from it as is possible. It would also undermine the certainty of effect which the reflective loss rule is intended to achieve, as a bright line rule of law: *cf Marex*¸ para 38 (Lord Reed)."

THE DEFENDANT/APPLICANT'S SUBMISSIONS

No reflective loss

57. The defendant/applicant submits that all the losses claimed by the claimants in this action are barred by the "no reflective loss" principle, as set out in the majority judgment in *Marex*. It says they fall within the first of Lord Bingham's three scenarios in *Johnson*, and the first of Lord Reed's in *Marex*. The latter formulation, it will be recalled, is

> "claims are brought by a shareholder in respect of loss which he has suffered in that capacity, in the form of a diminution in share value or in distributions, which is the consequence of loss sustained by the company, in respect of which the company has a cause of action against the same wrongdoer".

For this purpose the defendant points to the relevant parts of the draft amended particulars of claim. There are three different claims to consider, namely, the misrepresentation claim, the original breach of contract claim and the alternative breach of contract claim.

Misrepresentation

58. In relation to the misrepresentation claim, paragraph 3.1 coupled with paragraph 3.2 of the draft amended particulars of claim pleads that the Immediate Access Representation and the Honesty Representation said to have been made by the defendant were made both to the claimants *and to the company*. Then paragraph 3.4 pleads that they were made with the intention that both the claimants *and the company* should rely on them and that indeed the claimants *and the company* did rely on them in entering into the investment agreement (see also paragraph 7.6).

59. So far as concerns the Business Plan Representations and the Services Representation, there is no express pleading that these were made *both* to the claimants *and* to the company. Indeed, the pleadings that they were made at all (paragraphs 4.5 and 7.5.1) do not in fact state *to whom* the representations are alleged to have been made, However, clauses 7.6 and 8.4 say that both the claimants and the company relied on (*inter alia*) the Business Plan Representations and the Services Representation in entering the Investment Agreement and the Licence Agreement. This implies that the allegations are that they were made to both, just as with the other representations alleged. There are other indications to the same effect, such as paragraphs 4.7 and 6.1.2.

60. As to the losses said to have been suffered, paragraphs 16.1.1 to 16.1.4 allege that, if the misrepresentations had not been made, the claimants *and the company* would not have done the deal with the defendant, but instead would have concluded a venture with Solera, and their business would have thrived. Paragraph 16.1.5 expressly pleads that the enterprise value of the company and the equity value of the company would have accordingly reached very high levels, up to £53 million and £59 million respectively. The claimants

expressly assert that the value of their shareholdings would have been increased accordingly. In other words, the loss claimed by the claimants is measured by *the value of the company* as it is alleged that it would have been but for the misrepresentations.

61. So, the defendant says that, on the assumption that the claimants will be able to prove their allegations, the company itself would have the same claim as the claimants say they have. It therefore satisfies the criteria set out by Lord Bingham and Lord Reed, namely loss suffered by a shareholder in that capacity as a diminution in share value consequent on a loss suffered by the company, in respect of which the company also has a claim against the same wrongdoer. Accordingly, the reflective loss principle bars the claim by the claimants.

Original breach of contract

62. In relation to the original breach of contract claim, the relevant contract being the Investment Agreement, the pleading follows a similar pattern. First of all, by paragraph 7.1.1, the company is pleaded to be a party to the contract, so that it has the right to enforce it, and of course the same breaches of contract are pleaded as in relation to the claimants. As for the losses said thereby to be caused, paragraphs 16.2.1-16.2.4 plead that, if the contract had been properly performed without breach, the company's business would again have thrived. Paragraph 16.2.5 pleads that the increased business would have increased the value of the company, and then paragraph 16.2.6 pleads that this in turn would have increased the value of the shares of each of the claimants. That is therefore what each claimant claims to have lost by virtue of the breach of contract. But the loss in total value to the company is also what the company has lost by reason of the breaches of contract. The Bingham/Reed criteria are once again satisfied, and the claim is barred.

Alternative claim for breach of contract

63. I turn then to the alternative claim for breach of contract, contained in paragraph 16.2.6A. This alleges that, if the defendant had properly performed its contract, so that the business of the company thrived the defendant would have exercised its call option contained in clause 12 of the Investment Agreement, so that the claimants would have been entitled to the consideration provided for by that option. But, says the defendant, this is simply a different way of valuing the loss that the claimants suffer by reason of the breach of contract. Instead of the shares being valued at market value, *ie* what they could be sold for to an arms' length third party purchaser, the value is ascertained by resort to a formula contained in the Investment Agreement. But, says the defendant, that does not change the *nature* of the loss. It only changes the ascertainment of the *quantum*.

The "timing" point

64. So far as the "timing" point is concerned, the defendant says that the no reflective loss principle applies even if the shareholder has ceased to be a shareholder in the company by the time the claim is brought. In the present

case, that is because the company was dissolved. The defendant says that the decision of Flaux LJ in *Nectrus* is wrong, and should not be followed. The defendant relies on the contrary decision of the Privy Council in *Primeo*. The defendant also says that in any event the decision in *Nectrus* is not binding upon me, because it is only a decision on permission to appeal and not the decision of a fully argued appeal. Moreover, it says that the present case is distinguishable from *Nectrus*. In that case the claimant had sold its shareholding at a price discounted to reflect the lost investment. So any successful claim by the company could not benefit that shareholder. In the present case the claimants have ceased to be shareholders because the company has been dissolved. If the company were restored to the register (under the Companies Act 2006, sections 1029-1033) the claimants would once again be shareholders, and, by virtue of section 1032(1) of the 2006 Act, they would be deemed to have been shareholders in it throughout, including the time at which these proceedings were commenced.

The second claimant's settlement agreement

65. In addition, there is the particular point as to the claim by the second claimant, based on his settlement agreement of 22 December 2020. The defendant says that, even if the second claimant had a claim which was not barred by the no reflective loss principle, clause 4 of the settlement agreement would apply to his claim. Thus it would operate to bar (i) the breach of contract claim, and also (ii) any claim in respect of what is called the "Services Representation", because neither of these is "specifically referenced" in the letter from Stewarts LLP of 27 August 2020.

The initial investments claim

66. As to the claim by the third to fifth claimants for the loss of their initial investments in Motoriety, the defendant says that this is simply a "less ambitious" version of the same claim. In *Johnson v Gore Wood & Co* [2002] 2 AC 1, which I briefly discussed earlier in this judgment, the claimant made a number of different claims arising out of alleged professional negligence by the defendant solicitors in acting for his company. The company had already made a claim which had been settled by the defendants. Now the claimant was suing for what he claimed to be his personal losses. One of these was for investments made by the claimant personally *in other companies* on the basis of advice by the defendants. Lord Bingham referred to this claim as "unobjectionable in principle": [2002] 2 AC 1, 36F. But, says the defendant, it does not help the claimants here, who are seeking to recover their initial investment in Motoriety itself. If a claim to the loss of the value of your shareholding is barred by the no reflective loss principle, it does not matter whether you measure your loss by what it should have been worth, or (if less) by what you paid for it. The claim is still barred.

THE CLAIMANTS/RESPONDENTS' SUBMISSIONS

Reflective loss

Law in transitional state

67. The claimants say that reflective loss "is a fiendishly complex area of the law". They refer to the decision in *Marex*, and say that the majority "restated and recast the principle, overruling several authorities and radically altering the scope of the rule". They say that, as a result, "this area of law is in a state of transition", and "much uncertainty remains as to the scope of the reflective loss rule". Indeed, they point to the conflict between *Nectrus* and *Primeo* as an example. They say that a decision on the application of the reflective loss principle should be conducted only "once the facts have been determined at trial and not in the context of a strike out application". They say that there are a number of fact sensitive issues in the present case which cannot be determined satisfactorily simply by reference to the pleadings.

68. Notwithstanding this, they say that there are aspects of the rule which appear to be uncontroversial, and that none of the three heads of loss pleaded in this case (loss of share value, loss of consideration in the exercise of the call option, and loss of initial investments) is barred by the rule. In any event, they point out that, as Lord Bingham made clear in *Johnson* (at 36E), at this stage, "any reasonable doubt must be resolved in favour of the claimant".

General

69. As to loss of share value, the claimants give two reasons why the reflective loss rule does not apply. The first is that the losses claimed are not "merely" the result of the loss suffered by the company because of a wrong done to it. Here the word 'merely' is taken from the judgment of the Court of Appeal in Prudential (at 223A), and from the judgment of Lord Reed in *Marex* at [9], [26], [39] and [44]. The claimants say that the word 'merely' also appears in the advice of the Privy Council in *Primeo* at [52], [54] and [60].

70. So, the claimants summarise the rule as that

> "a claimant's loss of share value *is* a recoverable head of loss if such loss was caused by an independent wrong suffered by the claimant and not merely as the 'knock-on consequence of a wrong suffered by the company'."

In support of this formulation, the claimants rely on a number of cases in which the courts "have permitted recovery of damages assessed by reference to a diminution in the value of the claimant's shareholding". These are: *Lee v Sheard* [1956] 1 QB 192, *Gerber Garment Technology v Lectra Systems Ltd* [1997] RPC 443, *RP Howard Ltd v Woodman Matthews and Co* [1983] BCLC 117, and *Percy v Merriman White* [2021] EWHC 22 (Ch).

71. The claimants say that their losses were caused by independent wrongs committed against them by the defendant, and were not merely "the knock-on consequence of" the company's losses caused by wrongs against it. They emphasise that, in receiving the representations made by the defendant, the claimants (or some of them) were acting in different capacities, such as on behalf of the company, themselves, and/or the other shareholders. They also say that the defendant acknowledged that the transaction was not just about the company's business but also about the return the claimant shareholders would

receive on their investments representing the transaction would benefit them. The representations were made to the claimants and not simply to the company, with the intention that the claimants and not simply the company should rely on them, and the claimants *did* rely on them. The claimants say they would not have entered into the investment agreement were it not for the representations of the defendant. They were independent parties to the contract, and therefore have their own rights of action under the contract. The complaints of breach of contract by the defendant were made not only by the company, but also by the claimants.

The "timing" point

72. The second reason relied on why the reflective loss rule does not apply is that the company had been dissolved before the commencement of the claim. The claimants say that reflective loss rule must be applied by reference to the time when the claims commenced, and not when the loss was suffered. They rely on *Nectrus*, which they say is binding on this court, whereas the Privy Council decision to the contrary in *Primeo* is not (relying on *Willers v Joyce* [2018] AC 843). At the time when the claim was commenced, the company had been dissolved, and the claimants were therefore no longer shareholders in it.

Alternative claim for breach of contract

73. The claimants put the claim for loss of consideration for the exercise of the call option as a separate issue. They say that had the defendant complied with the investment agreement it would have exercised the option under clause 12 of the investment agreement and paid the consideration set out there for the other 50% of the shares in the company. The claimants say that this loss falls "clearly" outside the scope of the reflective loss rule (even if the earlier submissions that the rule is otherwise not applicable fail). This is for a number of reasons.

74. The first is that the loss consists of the Initial Option Payment and the Earnout Consideration, which are ascertained by reference to the formula set out in the investment agreement. The second is that only the claimants, and not the company, had rights to the consideration under the call option, and therefore the company never had cause of action to claim compensation in respect of this head of loss. The third is that the defendant's alleged conduct in pursuing a strategy "with a view to acquiring the company without having to pay the earnout consideration" to the claimants amounts to a direct and independent wrong against them, and not against the company.

Initial investments claim

75. In relation to the claim by the third to fifth claimants for the loss of their initial investments, they say that this head of loss too "clearly" falls outside the reflective loss rule. This is because it does not reflect a diminution in the value of their shares. They also rely on the statement of Lord Bingham in *Johnson* that this kind of claim was "unobjectionable in principle".

Second claimant's settlement agreement

76. Lastly there is the question whether the second claimant's claims in respect of breach of contract and misrepresentation in relation to the Services Representation are barred by clause 4 of the settlement agreement of 22 December 2020. The second claimant says they are not. He says first of all that the letter from Stewarts LLP makes clear at paragraph 48 that "the Claimants reserve the right to plead any additional cause of action in due course", and that this forms part of the factual matrix for the construction of the agreement. He also says the words "in relation to" have no fixed meaning and depend on context, but are "invariably words of connection" (relying on a statement of Davies LJ in *Re National Crime Agency* [2020] 1 WLR 3224, [50]). He says that therefore the whole of his claim falls within the scope of the words "any High Court claim in relation to the claims specifically referenced in" the letter from Stewarts LLP. This is because, the second claimant says, the *factual bases* for these allegations are referred to in the letter from Stewarts LLP. He says that, in the context of the settlement agreement, it is only necessary to plead the facts on which he relies for the claims to be "specifically referenced" in the letter.

DISCUSSION

Reflective loss – a developing area of the law?

77. I deal first with the principle of "no reflective loss". The claimants say at the outset that it is inappropriate to deal with that principle on a strike out application, because this is "a fiendishly complex area of the law". I accept, of course, that, as Lord Browne-Wilkinson said in *Barrett v Enfield London Borough Council* [2001] 2 AC 550, 557F:

> "In my speech in the *Bedfordshire* case [1995] 2 AC 633, 740-741 with which the other members of the House agreed, I pointed out that unless it was possible to give a certain answer to the question whether the plaintiff's claim would succeed, the case was inappropriate for striking out. I further said that in an area of the law which [is] uncertain and developing … it is not normally appropriate to strike out. In my judgment it is of great importance that such development should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out".

78. But appearances may be deceptive. In *Vedanta Resources PLC v Lungowe* [2020] AC 1045, a case of a challenge to and decision on jurisdiction, long before any fact-finding could have taken place, Lord Briggs (with whom the other members of the Supreme Court agreed) said:

> "48. It might be thought that an assertion that the claim against Vedanta raised a novel and controversial issue in the common law of negligence made it inherently unsuitable for summary determination. It is well settled that difficult issues of law of that kind are best resolved once all the facts have been ascertained at a trial, rather than upon the necessarily abbreviated and hypothetical basis of pleadings or assumed facts."

79. Yet, as it happens, the Supreme Court in that case decided that the point at issue was *not* novel at all, and could be decided summarily:

> "60. This was not a case of the assertion, for the first time, of a novel and controversial new category of case for the recognition of a common law duty of care, and it therefore required no added level of rigorous analysis beyond that appropriate to any summary judgment application in a relatively complex case."

80. However, in any event, I do not accept that the law of reflective loss is "uncertain and developing" in the sense in which Lord Browne-Wilkinson used that phrase. On the contrary, as the claimants themselves say, in *Marex* the court "restated and recast the principle". If ever an area of the common law can be said to be stable, it is when the highest court in the system – in a specially enlarged court – has considered all the then available jurisprudence and preferred one line of authority to another, overruling the errant decisions. Even the problem about the "timing" issue (limited as it is), which was raised by the decision in *Nectrus*, was quickly resolved by the Privy Council in *Primeo*, which was itself a unanimous decision in a case involving five of the seven judges who sat in *Marex*.

81. Moreover, although the claimants say *initially* that this is a very complex area of law, they *then* go on to submit that the parts of the law that are relevant in this case are in fact "uncontroversial" and "clear", *and in their favour*. They then refer to formulations of the rule which are in fact based on the judgment of the Court of Appeal in *Prudential*, rather than on the subsequent (and now authoritative) decision of the Supreme Court in *Marex*. An example of this arises out of the emphasis the claimants place on the use by Lord Reed in his judgment of the word "merely", as in "not 'merely' the consequence of a wrong suffered by the company". I note however that all four instances cited by the claimants from Lord Reed's judgment are in fact simply references back to the words used in the decision in *Prudential*. The word 'merely' does *not* appear in Lord Reed's summary of the current law and his modern restatement of the principles in paragraphs [79] and following of his judgment.

82. Similarly, the claimants say that the word 'merely' also appears in the advice of the Privy Council in *Primeo* at [52], [54] and [60]. Yet the references in paragraphs [54] and [60] are to Lord Reed's judgment at [39] of *Marex* which, as I have said, were referring back to the decision in *Prudential*. (Incidentally, I cannot find the word 'merely' in [52].) There are similar references in [47] and [49] of *Primeo*, but they are of the same kind, *ie* references back to *Prudential*. In my judgment, it is not to *Prudential*, or indeed to *Johnson*, but to *Marex* that I must have regard, and in particular to the propositions of law set out in the judgment of Lord Reed (at [79] and following), which I set out earlier in this judgment.

Reflective loss - general

83. In particular, Lord Reed makes clear in paragraphs [79]–[83] of his judgment that claims by shareholders against third parties fall foul of the rule where (and only where):

(1) The shareholder suffers loss,

(2) in the capacity of shareholder,

(3) in the form of a diminution in share value or in distributions,

(4) which is the consequence of loss sustained by the company,

(5) in respect of which the company has a cause of action,

(6) against the same wrongdoer.

If *all* of these conditions are satisfied, the claim is barred. Conversely, if *any* of them is not satisfied, the claim is not barred.

Cases relied on by the claimants

84. The claimants rely on a number of cases in which (they say) recovery has been permitted by reference to a diminution in the value of the claimant's shareholding. However, none of these cases falls within Lord Reed's first category, where the "no reflective loss" rule applies. In *Lee v Sheard*, and in *Gerber Garment Technology Inc v Lectra Systems Ltd*, the company did not have a cause of action of its own (condition (5) above). In *RP Howard Ltd v Woodman Matthews* [1983] BCLC 117, the defendant's negligence caused the second claimant (shareholder in the first claimant) a loss not suffered by the first claimant (condition (4) above), and for which the first claimant could not recover. In *Percy v Merriman White*, the claimant, in addition to being a shareholder in the company, was also a creditor of it, and sued in that capacity. So the rule did not apply (condition (2) above).

Independent wrongs

85. The claimants argue that their losses were caused by *independent* wrongs committed against them by the defendant. Their losses did not simply follow on from the loss of the company, reflected through their shareholdings in it. They say that the representations were made to them personally, so that they personally could rely on them (and did), and not just to the company. So they have their own causes of action, directly against the defendant. As for the claim is in breach of contract, they say that they were separate parties to the contract and therefore have their own rights under it, directly against the defendant. What they say is that their loss is "separate and distinct" from that of the company.

86. But in my judgment that expression is not in itself enough to describe a claim for a loss which is not barred by the no reflective loss principle. In *Prudential*, Lord Bingham's third category, which I have already set out, but repeat here for the sake of convenience, was:

> "Where a company suffers loss caused by a breach of duty to it, and a shareholder suffers a loss separate and distinct from that suffered by the company caused by breach of a duty independently owed to the shareholder, each may sue to recover the loss caused to it by breach of

> the duty owed to it *but neither may recover loss caused to the other by breach of the duty owed to that other*. … " (Emphasis supplied.)

87. The last 18 words of this quotation set out an important limitation on the notion of "a loss separate and distinct from that suffered by the company". Here Lord Bingham makes clear that the shareholders may not recover a loss caused to the company by breach of the duty owed to the company. It is not enough to say that the shareholders have their own independent cause of action. It is not enough to say that they have suffered loss as a result of a wrong done by the defendant. It is necessary to go on and show that the company has not suffered the same loss, in respect of which it is (or would otherwise be) entitled to make a claim.

88. In the present case, the misrepresentation claim is that, without the misrepresentations, the company would have been much more valuable (and would not have failed) and therefore the claimants' shareholdings would have been much more valuable. But the claimants' alleged losses are entirely derived from the claimed losses of the company, as indeed paragraphs 16.1.5 and 16.2.5 of the draft amended particulars of claim make clear. The claimants may have a direct *claim*, but they have only an indirect *loss*. The position in relation to the breach of contract claim is similar. If the defendant had performed its contract, the company would have been much more valuable, and so would be the claimants' shareholdings. To say that, merely because the shareholders *also* have a cause of action against the wrongdoer (whether by alleging that the misrepresentations on which they relied were made to them as well as to the company, or whether by alleging that the shareholders were parties to the contract), *therefore* the loss must be "separate and distinct" is in my judgment wrong, and would subvert the rule in *Foss v Harbottle*.

Reflective loss - timing

The precedential status of Privy Council decisions

89. I turn to consider the "timing" point. In precedent terms, my position as a judge sitting at first instance when there is a relevant decision of the Judicial Committee of the Privy Council ("JCPC") is clearly set out in the Supreme Court's decision in *Willers v Joyce* [2018] AC 843, where a panel of nine justices held (in the words of Lord Neuberger) that:

> "5. … High Court Judges are bound by decisions of the Court of Appeal and the Supreme Court …
>
> […]
>
> 16. There is no doubt that, unless there is a decision of a superior court to the contrary effect, a court in England and Wales can normally be expected to follow a decision of the JCPC, but there is no question of it being bound to do so as a matter of precedent. There is also no doubt that a court should not, at least normally, follow a decision of the JCPC, if it is inconsistent with the decision of a court which is binding in accordance with the principles set out in paras 5, 8 and 9 above.

> 17. The difficult question is whether this latter rule is absolute, or whether it is subject to the qualification that it can be disapplied where a first instance judge or the Court of Appeal considers that it is a foregone conclusion that the view taken by the JCPC will be accepted by the Court of Appeal or Supreme Court (as the case may be). … I have concluded that it is more satisfactory if, subject to one important qualification which I deal with in paras 19 and 20 below, the rule is absolute - ie that a judge should never follow a decision of the JCPC, if it is inconsistent with the decision of a court which is otherwise binding on him or her in accordance with the principles set out in paras 5, 8 and 9 above."

90. This strict rule was made subject to a qualification in in paragraphs 19 and 20, where on an appeal to the Privy Council a party wishes to challenge the correctness of a decision of the House of Lords, Supreme Court or Court of Appeal (as the case may be). That is not this case, and it appears it was not applied in *Primeo*, so I need not concern myself further with it.

Nectrus

91. The decision of the Court of Appeal in *Nectrus* is a decision of a single member of the Court of Appeal on an application for permission to appeal (albeit on an application for reconsideration under CPR rule 52.30, but I do not think that that can invest it with any greater precedential significance than any other such application). According to the *Practice Direction (Citation of Authorities)* [2001] 1 WLR 1001, given with the authority of the then Master of the Rolls, President of the Family Division and Vice-Chancellor:

> "6.1 A judgment falling into one of the categories referred to in paragraph 6.2. below may not in future be cited before any court unless it clearly indicates that it purports to establish a new principle or to extend the present law. In respect of judgments delivered after the date of this direction, that indication must take the form of an express statement to that effect. …
>
> 6.2 Paragraph 6.1 applies to the following categories of judgment
>
> […]
>
> Applications for permission to appeal
>
> […]".

92. In the judgment of Flaux LJ in *Nectrus* there is no express statement of the kind referred to in paragraph 6.1 of the Practice Direction. The inference would accordingly be that the judgment was not intended to establish a new principle or to extend the then current law, and therefore should not be cited. And it would be absurd if what could not be cited could still bind. Be that as it may, in the *Allianz* case, Sir Nigel Teare (sitting as a High Court judge) said:

> "94. Counsel for the Defendants pressed upon me the considered and clear remarks of Flaux LJ when refusing permission to appeal in *Nectrus v UCP*. Normally, remarks made when refusing (or granting) permission to appeal are of no weight because a variety of matters are relevant to such decisions. However, I have been informed that Flaux LJ's intention was that his ruling may be cited and so counsel was entitled to refer to it."

93. Unfortunately, Sir Nigel did not state the source of his information. Nevertheless, I proceed on the basis that it is correct, and that therefore I must take notice of it as a decision of the Court of Appeal. Sir Nigel was also unwilling to enter into the debate whether the decision of Flaux LJ was right or wrong, saying "it would not be appropriate" for him to do so (at [97]). He also said that the

> "decision does not have the authority of a decision by the Court of Appeal determining an appeal which has been fully argued. It was not, I think, said to be binding on me."

94. I have not the same luxury as Sir Nigel, because I am faced (as he was not) with *both* a submission that it *is* binding upon me, *and* a subsequent decision of the Privy Council which, having fully considered Flaux LJ's decision on this point, says in terms that it was wrong. And, as an added bonus, the five judges who sat on the appeal in *Primeo all* formed part of the seven judge court in *Marex*. On the other hand, *Willers v Joyce* says that I must follow an otherwise binding decision of the Court of Appeal in preference to a decision of the Privy Council. Given that the Privy Council were at pains to say in their decision (at [2]) that the law was in fact English common law (even though applied in the Cayman Islands) I think I may properly say that the decision of the Court of Appeal has been held to be wrong, but I must still follow it so far as binding on me.

Judgments with multiple reasons

95. The question therefore is, how far is that? There are two points. One is that the judge gave several reasons for his decision, of which the first was that

> "37. … an essential precondition for a successful application under CPR 52.30 cannot be satisfied in this case and, *on that ground alone*, this application must fail"(emphasis supplied).

Does that mean that the other points (including the "timing" point) are merely *obiter dicta*, and hence not strictly binding? At the hearing this point was not addressed, and so I asked for, and received, a Note from each side dealing with it. I am very grateful for this assistance.

96. There are a number of authorities which deal with the situation where a judgment gives multiple reasons for a decision. *Commissioners of Taxation v Palmer* [1907] AC 179 was a decision of the Privy Council on appeal from the Full Court of the Supreme Court of New South Wales. The Full Court had been cited a decision of the English Court of Appeal which was decided on

two different bases. The Full Court treated the second basis as mere dicta, and had not followed it. Lord Macnaghten said (at 184):

> " … it is impossible to treat a proposition which the Court declares to be a distinct and sufficient ground for its decision as a mere dictum, simply because there is also another ground stated upon which, standing alone, the case might have been determined."

97. In *London Jewellers Ltd v Attenborough* [1934] 2 KB 206, a point of commercial law connected with the sale of goods arose, on which there had been considerable diversity of judicial opinion. On an appeal from the decision of the trial judge, one point was raised by the respondents, concerning the status of one particular authority, where two reasons had been given. In the Court of Appeal, only Greer LJ dealt expressly with this point (at 222):

> "In that case two reasons were given by all the members of the Court of Appeal for their decision and we are not entitled to pick out the first reason as the ratio decidendi and neglect the second, or to pick out the second reason as the ratio decidendi and neglect the first; we must take both as forming the ground of the judgment."

98. The same point was made in the House of Lords by Lord Simonds (with whom the rest of the House agreed) in *Jacobs v London County Council* [1950] AC 361, at 369:

> "But, however this may be, there is in my opinion no justification for regarding as obiter dictum a reason given by a judge for his decision, because he has given another reason also. If it were a proper test to ask whether the decision would have been the same apart from the proposition alleged to be obiter, then a case which ex facie decided two things would decide nothing."

99. In *Behrens v Bertram Mills Circus Ltd* [1957] QB 1, Devlin J had to decide whether statements made by judges in a decision of the Court of Appeal, in *Baker v Snell* [1908] 2 KB 825, were part of the *ratio decidendi* (and so binding on him) or *obiter dicta* (and so not). He said (at 24):

> "It is well established that if a judge gives two reasons for his decision, both are binding. It is not permissible to pick out one as being supposedly the better reason and ignore the other one; nor does it matter for this purpose which comes first and which comes second. But the practice of making judicial observations obiter is also well established. A judge may often give additional reasons for his decision without wishing to make them part of the ratio decidendi; he may not be sufficiently convinced of their cogency as to want them to have the full authority of precedent, and yet may wish to state them so that those who later may have the duty of investigating the same point will start with some guidance. This is a matter which the judge himself is alone capable of deciding, and any judge who comes after him must ascertain which course has been adopted from the language used and not by consulting his own preference."

100. In *R (Kadhim) v Brent LBC* [2001] QB 955, the Court of Appeal had to determine the *ratio decidendi* of an earlier decision. Buxton LJ, giving the judgment of the court, said:

> "17. Cases as such do not bind; their *rationes decidendi* do. While there has been much academic discussion of the proper way of determining the *ratio* of a case, we find the clearest and most persuasive guidance, at least in a case such as the present where one is dealing with a single judgment, to be that of Professor Cross, in Cross and Harris, *Precedent in English Law* (4th edition) at p 72:
>
> > 'The *ratio decidendi* of a case is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him'."

(I should say that this statement appears in the same words in the original first edition by Professor Cross.)

101. That same statement was cited with approval by the Court of Appeal in the more recent decision in *R (Youngsam) v Parole Board* [2020] QB 387. All three judges gave separate judgments. Nicola Davies LJ referred to the judgment of Buxton LJ in *Kadhim*, and the approval by the Court in that case of the statement of Professor Cross. She said that the key phrase in the statement was "treated by the judge as a necessary step in reaching his conclusion". Haddon-Cave LJ agreed with Nicola Davies LJ's judgment, but added that the statement was "well-known and time-honoured", and "amply suffices to determine this matter." The third judgment, of Leggatt LJ (as he then was), was both much longer and more nuanced than the other judgments.

102. While Leggatt LJ accepted the statement by Professor Cross as "helpful", he criticised the reference to "a necessary step" as "ambiguous". After some discussion, he concluded (at [51]) that the phrase must:

> "be understood more broadly as indicating that the ratio is (or is regarded by the judge as being) part of the best or preferred justification for the conclusion reached: it is necessary in the sense that the justification for that conclusion would be, if not altogether lacking, then at any rate weaker if a different rule were adopted."

103. He also noted that later courts sometimes interpreted an earlier decision as narrower than the judge deciding it intended. So he also criticised the statement (at [52]) as partly inaccurate, on the basis that it

> "appears to make the question whether a proposition of law constitutes ratio entirely dependent on whether the judge who decided the case intended it to have that status."

After further consideration of the point, Leggatt LJ concluded (at [55]):

> "it seems to me desirable and to accord better with judicial practice to use the term ratio decidendi to refer to a proposition which a lower court is bound to apply."

104. The judgments of the other judges expressed neither agreement with nor dissent from these remarks. But it is clear that, given the reliance of the other judges on the statement as formulated by Professor Cross, those remarks must represent a minority view in precedent terms.

105. The claimants say that the decision of Flaux LJ was based on four independent grounds, one of which was that it was "unarguable" that the no-reflective loss rule applied to a claimant who had ceased to be a shareholder at the date of the claim. They point out that, at the end of his judgment (at [58]), he said that he dismissed the application "[f]or all these reasons". They say that this shows that Flaux LJ intended all the four grounds stated as necessary for his decision.

106. On the other side, the defendant says that the decision as to the non-applicability of the no-reflective loss rule was not *necessary* to his decision. This was because the judge had already decided that the relevant provisions of the CPR (under which the question would arise) did not apply, on the basis that "essential preconditions" were not met. Hence the multiple reasons went to *different* points of law, rather than to the *same* one. Impliedly, therefore, the defendant says that the earlier decisions to which I have referred all concerned multiple reasons for the same ruling, and not rulings on separate matters.

107. However, this is not true of *Behrens v Bertram Mills Circus Ltd*, where the earlier decision creating the difficulty, the Court of Appeal's decision in *Baker v Snell*, concerned two decisions on different points of law. Yet Devlin J nonetheless applied the principle from the earlier cases. It is true that he did not refer to the factual distinction between the cases, but I do not think that can alter its value as a precedent.

108. A judge at first instance in the High Court is not strictly bound by the decision of another such first instance decision, but follows it as a matter of comity unless convinced it is wrong. For myself, I do not see why it should matter whether a judge having to decide a case deals with one point on two or more grounds which lead to the same conclusion, or deals with two or more points, the decisions in both of which lead to the same conclusion. Otherwise there would be differences between cases where the judge (i) deals with both points in one order, (ii) deals with both points in a different order, and (iii) deals with one point but says that, in view of the decision on that, it is unnecessary to deal with the other. Accordingly, I am not convinced that Devlin J was wrong in applying the principle derived from the earlier cases to the case where there are two points and two decisions, leading to the same conclusion.

109. In my judgment the four separate grounds on which Flaux LJ decided *Nectrus* are all part of the ratio decidendi. I am therefore bound by it, unless it can be distinguished.

Is Nectrus distinguishable?

110. However, the second point is that the defendant says that that case is *distinguishable* on the facts from the present case. This is because the shareholder there had sold its shareholding (at a reduced price, to reflect the company's loss) before the claim was brought. So it was no longer a shareholder and (it is said) did not sue *in that capacity*. This strikes me as sophistry. If the ex-shareholder has a claim at all, it is only *because* it was a shareholder, even if it was not one now. The loss was suffered in its capacity as shareholder, and measured by the diminution in value of its shareholding, crystallised on sale. So, in my judgment that is not a sufficient distinction between the two cases.

111. But those particular facts do raise another, narrower, point. That is that, by the sale of the shareholding at a reduced price, the *company's* loss has in effect been "passed on" (pro rata) to the *shareholder*. So the company can no longer claim that share of the loss. It is clear from the decision of Sir Nigel Teare in the *Allianz* case that in such circumstances:

> "100. … There is no risk of the rule in *Foss v Harbottle* being subverted, there will be no concurrent claims and there will be no risk of double recovery."

Hence there was no justification for applying the no-reflective loss rule in that case, and the claim should not be struck out.

112. But, in the present case, there has been no sale of the shares at a reduced price, and no "passing on" of any part of the loss of the company. If the company is hereafter restored to the register, the loss will still be in the company and the members will be treated as having been members throughout. In my judgment, on this basis the decision in *Nectrus* is clearly distinguishable from the facts of this case, and I am not bound to follow it.

Conclusion on timing

113. Since I am therefore free to follow the decision in *Primeo*, I will do so. In my judgment, the reflective loss principle does bar the claimants' original claims.

The additional breach of contract claim

114. The additional claim for breach of contract to be found in the draft amended particulars of claim is made in respect of the call option in clause 12 of the investment agreement. The defendant says that this claim too falls foul of the no reflective loss rule, because it is simply a different way of valuing the loss of the claimants in respect of their shareholdings in the company. Instead of loss being measured by reference to open market value, it is measured by reference to a contractual formula (a kind of "closed market"). The claimants say this claim falls outside the scope of the rule, because (1) the call option consideration is different from market value, (2) the company had no right to the call consideration, and (3) there was a direct wrong against them (rather than the company) in the defendant's pursuing the strategy it did.

115. In my judgment this claim too is barred by the no reflective loss rule. Even if all the claimants' objections are accepted, this claim still satisfies all six of the conditions set out earlier from Lord Reed's judgment in *Marex* (see [82] above). The shareholders have suffered loss, in the capacity of shareholders. Their loss is that the value of their shares has diminished, as a consequence of loss sustained by the company. The company has *a* cause of action against the same wrongdoer in respect of its loss. Here the value of their shares has gone down to zero. This was caused by the wrong done to the company. The fact that the *measure* of the claimants' loss is by reference to a contractual formula, and different to the measure of the loss of the company, is beside the point. And there is no requirement that the company's cause of action be the same as the claimants'.

The initial investments claim

116. The defendant says that this claim (by the third to fifth defendants) is simply a less ambitious version of the original claim. Instead of claiming the difference between the values of their shareholdings as they say they should have been and what they now are, they claim the (much smaller) difference between what they paid for their shareholdings and the values that they now have. The claimants say there is no claim in respect of any diminution in value of their shares. They also rely on a dictum of Lord Bingham in *Johnson* that this kind of claim was unobjectionable.

117. I agree with the defendant. First of all, Lord Bingham was not referring to the shareholder's claim for the cost of his investment in the *same* company which had suffered loss and had a claim for that loss against the same wrongdoer. He was referring to investments in *other* companies, which investments were the consequence of the wrong done by the wrongdoer to the first company. Secondly, even though the claims are limited to the amounts paid for the shares, the loss suffered by the claimants is still the loss of their value. And the loss of their value is still reflective of the loss to the company. This is not some kind of reliance loss, where the shares were acquired *because* of something which the defendant did. Instead, the shares were acquired long before the defendant came on the scene.

The second claimant's settlement agreement

118. I have already set out at [12] above the relevant clause from the settlement agreement. The critical words are those describing the claims to be settled by the agreement. They are:

> "all and any other claims, whether statutory, contractual and at common law which the Claimant has or may have against the Respondents … whether arising out of the Claimant's employment with the Respondents, its termination or otherwise *excluding* … claims to enforce the terms of the agreement and *any High Court claim in relation to the claims specifically referenced in the letter from Stewarts LLP to AA PLC on 27 August 2020*."

119. The words in italics set out the *exception* to the opening words "all and any other claims" which the second claimant has against the defendant. So, everything is settled, other than the "excluded claims". The defendant says that the breach of contract claim and the claim based on the Services Representation are not "specifically referenced" in the Stewarts letter, are not therefore "excluded", and thus *are* compromised by the agreement. The second claimant says that the *facts* on which those claims are based are set out or referred to in the letter, and therefore they are not compromised. He also relies on the words "in relation to" as being words of connection.

120. Again, I agree with the defendant. The letter before claim was sent on 27 August 2020, at a time when the employment proceedings between the second claimant and the defendant were on foot. That letter is part of the factual matrix within which the settlement agreement itself was made, only four months later. The agreement was therefore careful to carve out from the settlement the claims contemplated by the letter, so that they would not be compromised, and could be prosecuted. But those claims did not include specific reference to claims for breach of contract or for misrepresentation based on the Services Representation. It is clear that the second claimant and his advisers *contemplated* the possibility of (unspecified) further claims, as is shown by the reservation at the end of paragraph 48. But that reservation did not *specify* any further claims.

121. The second claimant says, first, that it is enough that the *facts* on which the further claims are based are set out or referred to in the letter. But that is not what paragraph 48 says. It specifically refers to the original misrepresentation claims (other than in respect of the Services Representation). It would have been easy to add something like "and all other claims based on the facts and matters set out above". But the parties did not do so. The defendant no doubt wanted finality as to what it was buying for the settlement monies it was paying. If it had been put to the defendant at the time that this form of words in the agreement did not include compromise of any other claim which the second claimant might think to add in due course, I cannot believe for one moment that the defendant would have agreed. It was buying off *all* claims, except those "specifically referenced".

122. Second, the second claimant says that the words "in relation to" mean that it is only necessary that the claims actually made in the High Court proceedings are *connected to* the claims specifically referenced in the letter. I accept that the words "in relation to" are words of connection, but it does not follow that the connection can be to any degree whatever. The degree of connection intended will depend on the context in which the words operate. Here, in the context of the settlement agreement, it is clear that the words "High Court claim in relation to the claims specifically referenced in the letter" are used to mean a claim issued in the High Court *making* the claims specifically referenced in the letter. For the reasons given in relation to the previous point, it would not have been acceptable to the defendant to leave open, not only the claims specifically referenced in the letter, but also any others which were merely connected, directly or indirectly, to those claims.

123. Accordingly, in my judgment the settlement agreement prevents the second claimant making the breach of contract claims and the claim based on the Services Representation.

CONCLUSION

124. In the result, I strike out the claim. It is not necessary for me to consider the application for summary judgment separately. I am very grateful to both sides for their considerable assistance with this case, and especially to counsel for their clear and cogent arguments. I should be grateful to receive an agreed minute of order for approval.