Neutral Citation Number: [2022] EWCA Civ 353

Case No: CA-2021-000556 (formerly A4/2021/0726)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (COMMERCIAL COURT)
SIR NIGEL TEARE
[2021] EWHC 399 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 March 2022

Before:

LORD JUSTICE PETER JACKSON
LORD JUSTICE PHILLIPS
and
LADY JUSTICE CARR

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Between:

ALLIANZ GLOBAL INVESTORS GMBH AND OTHERS	**1st -19th, 24th-40th, 43rd-172nd & 175th Claimants/Appellants**
- and –	
(1) BARCLAYS BANK PLC **(2) CITIBANK N.A.** **(3) CITIGROUP INC.** **(4) HSBC BANK PLC** **(5) JP MORGAN CHASE BANK N.A.** **(6) JP MORGAN CHASE & CO** **(7) NAT WEST MARKETS PLC** **(8) UBS AG**	**Defendants/ Respondents**

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Marie Demetriou QC, Colin West QC and Richard Howell
(instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Appellants**
Mark Hoskins QC, Sarah Abram, David Heaton and Tom Wood
(instructed by **Latham & Watkins (London) LLP**, **Allen & Overy LLP, Norton Rose Fulbright LLP, Slaughter and May, Macfarlanes LLP and Gibson, Dunn & Crutcher UK LLP**) for the **Respondents**

Hearing dates: 8 and 9 December 2021

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Approved Judgment

This judgment was handed down remotely at 10.30 am on 23 March 2022 by circulation to the parties or their representatives by email and by release to BAILII and the National Archives.

Lord Justice Phillips:

1. On 23 March 2021 Sir Nigel Teare ("the Judge") made an order dismissing an application by the appellants ("the Funds") to strike out the case pleaded by the respondents ("the Banks") that the Funds have avoided or "passed on" all or part of the losses they claim against the Banks in these proceedings. The Funds appeal that decision with permission granted by Males LJ.

Background

2. The Funds are investment funds structured as trusts, companies or limited partnerships, most of them permitting their investors to redeem or withdraw their investment in specified circumstances by reference to the net asset value ("the NAV") of the Fund in question. The Funds comprise most of the claimants[1] in these proceedings, brought against the Banks for damages for the illegal anti-competitive manipulation of foreign exchange ("FX") markets to the claimants' detriment between 2003 and 2013. The claims are for breach of statutory duty in respect of infringements of Article 101 of the Treaty on the Functioning of the European Union and section 2 of the Competition Act 1998, certain infringements being established by decisions of the European Commission addressed to the Banks, the remainder being "stand-alone" allegations.

3. The Banks deny liability (save in so far as they are addressees of the Commission's decisions) and further assert (to the extent that liability is accepted or established), that the Funds have avoided or "passed on" losses incurred as a result of the alleged infringements to the extent that investors in the Funds have subsequently redeemed or withdrawn their investment at a net asset value ("NAV") which was lower than it would have been but for the alleged infringements ("the Redemption Argument"). If sustainable as a matter of law, the Redemption Argument would require the parties (and particularly the Funds) to engage in a very substantial disclosure and evidential exercise, involving an investigation and assessment of every redemption of an investment in each Fund going as far back as 2003 (and continuing right up to trial of the claims) and a determination of the extent (if at all) to which the NAV at which each redemption occurred was lower by reason of such infringements as are ultimately accepted or proved than it would otherwise have been.

The application to strike out

4. On 28 January 2020 the Funds applied to strike out the Redemption Argument pursuant to CPR 3.4(2)(a) as disclosing no reasonable grounds for defending the claim. Following the service of draft Joint Further Particulars of Avoided Loss, Mitigation and Pass-On by the Banks on 30 September 2020, the Redemption Argument under challenge by way of the Funds' application was formulated as follows:

> "15.… If the effect of any less advantageous FX transaction was to lower the NAV of the Investment Fund, and an investor's investment was redeemed or withdrawn in whole or in part at a price affected by the less advantageous FX transaction, that Investment Fund will have

[1] 167 of the 175 claimants.

> avoided all or part of its loss, or alternatively passed on all part of its loss to the investor.
>
> 16. Further or alternatively, any Investment Fund does not have standing to sue in respect of any loss which was avoided by being transferred, or alternatively passed on, from the Investment Fund to a former investor.
>
> 17. Further or alternatively, in such circumstances, it would be necessary to avoid the risk of recovery by both the redeeming or withdrawing investor and the Investment Fund, which would result in double recovery."

5. The application and a cross-application by the Banks for permission to amend their Defences to reflect the draft Joint Particulars were heard by the Judge from 15 to 17 February 2021.

6. The Funds' contention was that it is not arguable that losses suffered by an investment fund are "passed on" to investors who subsequently redeem at a lower value. They contended that the proper claimant in respect of such losses is at all times the investment fund, whether structured as a trust, a company or a partnership. To the extent that an investor suffers a diminution in the value of its investment by virtue of the wrong committed against the fund, the investor does not have standing to sue for such diminution. In the case of a company, it is well established that such loss is treated as merely reflective of the loss of the company and does not give rise to a separate claim.

7. The Banks, in paragraph 4 of their joint skeleton argument for the hearing before the Judge, labelled the Redemption Argument as "pass-on", stating that it "encompasses also avoided loss". After explaining that redemptions at a lower value resulted in the Funds' losses being avoided or passed on to the investors, the Banks addressed the Funds' objections based on the reflective loss principle in the case of companies and related principles in the case of trusts and partnerships. In each case the Banks' answer was that the principles do not apply to <u>former</u> shareholders, beneficiaries or partners, and that, in any event, such investors must be entitled, pursuant to the EU principle of effectiveness, to a remedy for losses suffered by an infringement of Article 101.

8. In a reserved judgment handed down on 25 February 2021 the Judge accepted the Redemption Argument, determining that as a matter of law the defence of pass-on was available on the basis alleged and was not defeated by the trust principle, the reflective loss principle or the partnership principle (without resort to the principle of effectiveness, which he held was inapplicable). Accordingly, and to that extent, the Judge dismissed the strike out application and allowed the amendment application. Given the arguments raised on this appeal by the Banks (considered below) it is necessary to set out in some detail, by reference to the judgment, the Judge's understanding of the parties' positions on the strike-out application and the issues he determined as a result.

The judgment

9. At [11] the Judge noted that the typical example of "pass-on" mitigation in a competition case was where anti-competitive conduct resulted in overcharging a

purchaser, who then passes on some or all of the overcharge to sub-purchasers. The Judge recorded that:

> "It was apparent from the manner in which [the Banks] presented their arguments (and expressly accepted by leading counsel for [the Banks] in his oral submissions) that a successful plea of pass-on required that the person to whom the loss had been passed on had his own right to sue in respect of that loss. This is not a feature of other types of mitigation but is a feature of "pass-on" mitigation."

10. After noting at [12] that pass-on and the principle of compensatory damages apply also to claims for breach of statutory duty (referring to the decision in *Sainsbury's Supermarkets Ltd. v Visa Europe Services LLC* [2020] UKSC 24, [2020] 4 All ER 807 at [196]), at [13] the Judge summarised the dispute between the parties as follows:

> "In essence [the Funds] say that whenever an investor redeems or withdraws his investment the only legal entity with title to sue in respect of the alleged wrongdoing by [the Banks] is the investment fund, not the investor. The suggested "pass-on" would therefore entitle [the Banks] to escape liability. This is not accepted by [the Banks] who say that the investors to whom a loss has been passed on have their own cause of action."

11. The Judge then (at [15]) listed the Funds' arguments in support of the strike-out application, described as "the trust issue", "the company issue" and "the partnership issue" (a further issue as to contractual terms not being relevant on this appeal). At [17] the Judge stated that "the crucial point at issue is whether an investor who redeems or withdraws his investment has a cause of action in damages against a wrongdoing bank. If the investor does not have such a cause of action it is accepted that the pass-on plea cannot be sustained".

12. The Judge explained his concern that evidence as to precisely how the alleged wrongdoing of the Banks impacted on the Funds, how that affected their NAVs and how that affected the sum payable to the investors might be relevant to the determination of the issues of law raised by the Funds. However, the Judge noted at [47] that counsel for the Banks did not suggest that such evidence was relevant to those issues (save for evidence of the foreign law applicable to the structure of those Funds not domiciled in this jurisdiction) and did not raise the need for evidence as a reason not to determine the issues of law on the strike-out application. The Judge therefore turned to address the points of law.

13. In relation to the trust issue:

    i) The Judge recognised (at [57] and [78]) that the general rule in English law is that where trust property is damaged, the trustee, as legal owner of the trust fund, has title to sue in respect of such damage: this is not an application of the reflective loss principle, since that is now recognised as being confined to companies and shareholders: *Marex Financial Limited v Sevilleja* [2020] UKSC 31, [2021] AC 31. But where a duty is owed not only to the trustee but also to the beneficiary and the beneficiary suffers a loss, the beneficiary can also have title to sue.

ii) The Judge then held that a statutory duty was owed to all individuals, therefore encompassing beneficiaries, under Article 101 [61-63]. Further, liabilities arising and rights accrued under Article 101 (in this case dating back to 2003) survive after Brexit by virtue of section 4(1) of the European Union (Withdrawal) Act 2018 [65-66]. Whilst the general principle of EU law of effectiveness would not apply to any proceedings commenced by a beneficiary after IP Completion Day (31 December 2020), the Judge stated that that was not relevant because domestic law does permit a beneficiary to sue in his own name in respect of a duty owed to him, the breach of which caused him loss [68-73]. The Judge further held that sections 2 and 47A of the Competition Act also have the effect of creating such a duty [74-75].

iii) The Judge next held at [78] that, even if the beneficiary cannot sue for damage to trust property whilst he is a beneficiary (his investment may have fallen in value, but might rise again), once he has redeemed his investment his loss crystallises: "The reasonable man would regard him as having suffered a loss and I can see no reason why the court should not also regard him as having suffered a loss".

iv) The Judge summarised his conclusion at [79] as follows:

> "…English law allows a beneficiary to sue where a duty owed to him has been breached and he has thereby been caused to suffer a loss. Article 101 [TFEU] and section 2 of the Competition Act 1998 provide the relevant duty, it is assumed that it has been broken and, for the reasons I have endeavoured to describe, it has, on the assumptions the court must make on this application, caused the beneficiary to suffer loss."

For those reasons, the Judge held that the allegation of pass-on could not be shown to be impossible or bound in law to fail on account of the trust point [80].

14. As to the company issue:

i) The Judge recognised that, although he had found that duties under Article 101 and section 2 were owed to all individuals, including company shareholders, the rule against reflective loss, established in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 2004, as recently affirmed in *Marex*, prevents a current shareholder from enforcing that duty where the loss suffered by the shareholder is not separate and distinct from the loss suffered by the company. The rule is therefore limited to claims by shareholders that the value of their shares, or the distributions they receive as shareholders, have been diminished. Other claims, whether by shareholders or anyone else, should be dealt with in the ordinary way [83].

ii) The Judge also recognised at [88] that Lord Reed had confirmed in *Marex* that the rule against reflective loss applies also to distributions received by shareholders in their capacity as such, and that Lord Reed was not using "distribution" in any technical sense, so it was capable of covering sums received by a shareholder when redeeming their shares. At [90] the Judge further accepted that it was arguable that the loss suffered by a shareholder on

redemption was a reflection of the loss suffered by the company, but at [91] stated that it must also be arguable that on such redemption the loss became separate and distinct "because the company now has no loss".

iii) In deciding between those two arguments, the Judge considered the reserved judgment of Flaux LJ in *Nectrus Ltd v UCP plc* [2021] EWCA Civ 57, giving detailed reasons for refusing to reopen an application for permission to appeal following an oral hearing [95]. In that case Nectrus had breached an investment management agreement it had entered with UCP and its 100% subsidiary Candor by permitting assets of Candor to be invested inappropriately. UCP was negotiating the sale of its shareholding in Candor to a third party when it was discovered that the invested assets might not be recoverable and had to reduce the sale price to reflect the loss. Flaux LJ held at [43] that the rule against reflective loss should be assessed when the claim is made, at a time when the loss had crystallised. At that point, UCP was an ex-shareholder, and it was apparent from *Marex* that the rule against reflective loss did not apply to anyone other than a shareholder. At [55] Flaux LJ concluded that the contention that the Supreme Court left open the possibility that the rule against reflective loss is applicable to an ex-shareholder in the position of UCP "is unarguable". The Judge recognised (at [97]) that the factual situation in the present case was different to that in *Nectrus* and that Flaux LJ's judgment in that case was not binding on him. Nevertheless, the Judge regarded *Nectrus* as support for the Banks' argument.

iv) The Judge then returned (at [99]) to the justification for the reflective loss rule, namely, avoiding subverting the rule in *Foss v Harbottle* that the only party who can seek relief for an injury done to a company, where the company has a cause of action, is the company itself: there is no justification for concurrent claims because of the unity of economic interests which bind the shareholder and the company, such claims also giving rise to a risk of double recovery. The Judge then (at [100]) distinguished the context of the present case, holding that:

> "…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."

v) At [101-102] the Judge concluded that the rule against reflective loss does not bar claims by former shareholders and that the allegation of pass-on should not be struck out on account of the company point.

15. In respect of the partnership issue, the Judge again found that the allegation of pass-on should not be struck out, stating his reasons at [103] as follows:

> "Where a limited partnership has a claim against a third party that claim is a partnership asset which must be brought by the general partner in the name of the partnership as a whole; see *Certain Limited Partners v Henderson PFI Secondary Fund* [2013] QB 934 at paragraphs 26 and 34 per Cooke J. However, I am concerned with an investor/partner who has redeemed or withdrawn his investment. As with the beneficiary of a trust and as with a shareholder in a company the relevant duty is owed to all persons, including the limited partner. If a wrongdoer causes damage to the partnership the financial interests of the limited partners are also affected and if a limited partner redeems or his withdraws his investment he thereby crystallises his loss. I do not consider that he is disabled in English law from bringing his own claim as an ex-partner. He would not be suing as a partner…"

16. At the hand-down hearing on 18 March 2021 Mr Hoskins QC, appearing for the Banks (as he did on this appeal), sought clarification of whether the Judge had determined the issues of law in relation to the trust, company and partnership issues, or whether he had merely dismissed the application to strike out on the basis that the allegation of pass-on was not impossible or bound to fail. In a Note dated 22 March 2021 (which does not form part of the Judgment under appeal) the Judge clarified that he had determined the questions of law, but at a high level of abstraction. He recognised that when the detailed facts were found, those decisions on the question of law may be capable of being distinguished.

The Issues arising in this Appeal

17. The Funds' three grounds of appeal, filed on 8 April 2021, challenged the Judge's findings on each of the trust, company and partnership issues respectively, asserting that he erred in law in holding that an investor acquires a cause of action on redemption of the investment where the sum received is lower than it would have been but for damage suffered by the Fund.

18. The issues, at least in relation to the company point, narrowed somewhat following the judgment of the Privy Council in *Primeo Fund (in Official Liquidation v Bank of Bermuda (Cayman) Ltd* [2021] UKPC 22, [2021] BCC 1015, delivered on 8 August 2021. The Board (comprising five of the seven Justices who decided *Marex*) held that, as the reflective loss rule is substantive rather than procedural in character, the relevant time to assess whether it applies is when the loss which is said by the claimant to be recoverable in law is suffered by it. Further, the Board held that *Nectrus* was wrongly decided, Lord Kitchin and Lord Sales (giving the judgment of the Board) stating at [61]:

> "A shareholder which suffers a loss in the form of a diminution of 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."

19. The Banks (through Mr Hoskins) accepted, in the light of *Primeo*, that it was no longer arguable that the reflective loss principle did not apply to all those former shareholders who had "crystallised" their losses on exit from their investment. Instead they argued that, whilst the effect of *Marex* and *Primeo* was that a shareholder who *sells* their shares does not thereby acquire a cause of action for any diminution in the proceeds, the position is different in the case of a shareholder who *redeem*s their shares. The argument, Mr Hoskins explained, is that a sale of shares does not affect the company's assets (diminished by virtue of the alleged wrongdoing), so the company retains title to sue. In contrast, redemption entails the company paying out less to the shareholder than would have been the case but for the alleged wrongdoing, so the company has "avoided" its loss to that extent, losing its right to sue. That approach, it will be noted, was at the heart of the Judge's decision on the application of the reflective loss rule in paragraphs [91] and [100] of the judgment: he held that the fact that the company had avoided or "passed on" its loss meant that the justification for the application of the reflective loss rule was absent in those circumstances.

20. In the meantime the Banks served a Respondent's Notice dated 11 June 2021. Paragraph 1 asserted that the Judge was wrong to find that "pass-on" required that the recipient had a right to sue in respect of the loss. Furthermore, the Banks contended, "it is not the law that avoided loss may only be taken into account where a third party has a separate claim in respect of that avoided loss". In oral argument Mr Hoskins emphasised that the argument before the Judge had focused on title of the redeeming investors to sue and that (despite paragraph 4 of the Banks' skeleton argument for the hearing before the Judge), the Banks had not conceded that that issue was determinative of the Funds' application: the Banks' case was, and remained, that the effect of redemption of investments was that the Funds avoided their losses in whole or in part, regardless of whether the investors acquired a corresponding right to sue in respect of the losses that had been passed on. Mr Hoskins submitted that, whatever might be the outcome of the appeal in relation to the trust, company and partnership issues, the plea of avoided loss must stand as it is highly fact-sensitive, was not the subject of argument before the Judge and was not the subject of the appeal. He accepted, with no apparent embarrassment, that the consequence of his argument was that there would inevitably have to be a full disclosure and evidentiary exercise in relation to Fund redemptions since 2003, and that was never going to be avoided by the determination of the issues addressed by the Judge. In effect, Mr Hoskins was submitting that the Judge (and the Funds) had fundamentally misunderstood the nature and extent of the Banks' pleaded case and its consequences, most clearly reflected at [11] of the judgment, where the Judge recorded his understanding, from the way the Banks' case was presented, that "a successful plea of pass-on required that the person to whom the loss had been passed on had his own right to sue in respect of that loss". Further, at [40] of the judgment, the Judge noted the Funds' position that resolution of the issues of law in their favour would avoid the considerable costs of disclosure, a point not rebutted by the Banks. It will be noted that the Banks, despite seeking clarification of the effect of the judgment in certain respects (see [16] above), did not point out to the Judge that his understanding in these regards was mistaken.

21. Mr Hoskins accepted that it was a potential answer to the Banks' plea of avoided loss that the payment by the Funds of a lower sum on redemption of investments was a collateral benefit (res inter alios acta) which the law treats as not making good the claimant's loss. He submitted, however, that the question of collateral benefit was a

matter to be assessed in the light of all the facts and had not been the subject of argument or decision below: he invited the Court to determine the trust, company and partnership issues as matters of law, but to leave the question of avoided loss to trial, even though his answer to the reflective loss rule was that it did not apply because it was a case of avoided loss.

22. The Banks' Respondent's Notice also asserted, in paragraph 2, that the Judge was wrong to hold that the EU principle of effectiveness would not apply to a claim commenced after 31 December 2020. In other words, the Banks maintained the argument that, if the redeeming investors did not acquire a cause of action on redemption as a matter of domestic law, a claim must be permitted in order to give effect to the rights arising by virtue of Article 101 which the Judge held were owed to all individuals, including investors.

The relevance of the plea of avoided loss

23. In my judgment issues as to reflective loss and title to sue are not directly relevant to the question of whether the Funds' losses have been reduced by reason of the fact that they paid less to investors who redeemed their investments. Those issues are concerned with whether and in what circumstances a beneficiary, shareholder or partner (in this case, the investors in a Fund) can sue for losses suffered by the trust, company or partnership (one of the Funds), on the necessary assumption that the Fund itself has suffered and can itself sue for the loss. Thus the issues raised by that rule concern the right of the investor to sue in its own name, notwithstanding the corporate entity doctrine and the rules against double recovery, not the title of the Fund to sue for its own losses.

24. The true question is whether the Funds have avoided or mitigated their loss by reason of redemptions so that the amount recoverable by them is reduced. The question of reflective loss does not arise because either:

    i) the loss has not been avoided and so the Fund can claim for the full amount, regardless of whether an investor also has a claim for part of it; or

    ii) the loss has been avoided, in which case the Fund can, by definition, no longer claim it, regardless of whether the investor has acquired a claim for the amount avoided.

25. The trust, company and partnership issues appear to have arisen because, in answer to the contention that redemptions resulted in loss being avoided, the Funds pointed out that that would entitle the Banks' to avoid liability for their wrongdoing as the redeeming investors would not be entitled to sue: the Banks did not accept that argument (see paragraph [13] of the judgment) giving rise to the trust, company and partnership issues, in which the Banks are arguing (rather surprisingly, to my mind) that a multitude of investors who have redeemed their investments do have a cause of action against the Banks. Unfortunately, rather than being seen and understood as a subsidiary argument or aspect of the avoided loss question, those issues became the predominant and perhaps sole focus of the hearing before the Judge and his decision. The centrality of the avoided loss question was lost along the way, and did not resurface even when the Judge based his decision on the application of the reflective loss rule on his view that, following a redemption at a lower value, the company had avoided the

loss, a view which, in my judgment, should plainly have been regarded as a complete answer to the strike-out, rendering consideration of the reflective loss rule redundant.

26. It follows that I accept Mr Hoskins' submission that the Judge's decision did not address, and therefore left open, the key question of whether the Funds had avoided loss each time a redemption took place at a lower NAV. I have less sympathy for the Banks' attempt to lay the blame for that omission on the Judge. It seems clear to me that the Banks were content to focus on the trust, company and partnership issues, relying in particular on the support to be found in *Nectrus* for the proposition that former shareholders were not caught by the rule against reflective loss. It was perhaps only when the decision in *Primeo* rendered that position less tenable that the Banks pivoted back to the pure avoided loss argument.

27. I also do not accept that the potential answer to the avoided loss argument, namely, that paying a lower sum on redemption is a collateral benefit (res inter alios acta) as a matter of law, cannot or should not be determined on this appeal. The reasons are as follows:

    i) The application to strike-out clearly encompassed the plea of avoided loss. Whilst the Judge did not specifically address that issue, it permeated his reasons in relation to the issues he did decide and, further, the Banks seek to pursue it by way of the Respondent's Notice. In raising that argument as a further ground on which to resist the strike-out, the Banks cannot sensibly object to the Court considering the full nature and scope of the relevant law and applicable principles, including the main counterpoint to an assertion of avoided loss, namely, that the benefit in question was collateral to the loss.

    ii) Whilst the question of collateral benefit must of course be assessed on the facts of each case, the Funds' strike-out application proceeded on the factual assumption, favourable to the Banks, that redemptions will have occurred at a lower NAV due to the wrongdoings alleged. I do not see why the Court cannot determine whether redemptions of investments at lower values amount to a collateral benefit as a matter of law, just as the Judge determined (and we have been asked to determine) whether or not an investor who has redeemed at a lower NAV has a claim as a matter of law.

    iii) The leading Supreme Court authority on the question of collateral benefit, *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32, [2018] AC 313, was before the Court and was addressed by both parties (although with some reluctance by Mr Hoskins). As, in my view, the answer to the question is both important and straightforward, it is entirely appropriate to decide the point rather than sending the issue to trial.

28. As for the importance of the question, its potential scope and impact is considerable. If the Banks are right, every claim for damages (whether for breach of contract, breach of statutory duty or in tort) brought by a company, trust or partnership would require investigation and assessment of each and every change in the share capital of, or beneficial or partnership interests in, the relevant entity from the date damage was suffered by the entity to the date of judgment. The approach would have the potential to complicate vastly what would otherwise be straightforward assessments of damages. If correct, it would also mean that very many claimants have been over-compensated in the past.

Collateral benefit as an answer to avoided loss

The legal principles

29. The Banks emphasised, by reference to *British Westinghouse Electric and Manufacturing Company Limited v Underground Electric Railways Company of London Limited* [1912] AC 673 (HL), that the fundamental basis of awards of damages is compensation for pecuniary loss naturally flowing from the breach. But, as explained by Viscount Haldane LC at p. 689:

> "…this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to the neglect to take such steps.
>
> As James L.J. indicates, this second principle does not impose on the plaintiff an obligation to take any steps which a reasonable and prudent man would not ordinarily take in the course of his business. But when in the course of his business he has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act."

30. At p. 690 Viscount Haldane stated that, for a subsequent transaction to be taken into account (in reduction of the loss), it must be one arising out of the consequences of the breach and in the ordinary course of business. Sums received from a policy for insurance against accident could not be taken into account in an action for injuries suffered by a plaintiff due to a defendant's negligence: "The reason[2]…was that it was not the accident, but a contract wholly independent of the relation between the plaintiff and the defendant, which gave the plaintiff his advantage". Again, in an action for delay in discharging a ship of the plaintiff which caused the plaintiff to lose passengers they had contracted to carry[3], the damages were not reduced by reason of the same passengers taking passage in another vessel belonging to the plaintiffs, Viscount Haldane observing that: "what was relied on as mitigation did not arise out of the transactions the subject-matter of the contract".

31. In *Swynson* the claimant lending company made loans to a borrower relying on a report by the defendant accountants. When the loans went unpaid, the claimant claimed damages from the defendant for negligence but, before damages were assessed, the loans had been repaid using funds lent to the borrower by the owner and controller of the claimant by way of a corporate restructuring. The Supreme Court rejected the contention that the refinancing and consequent repayment was a collateral matter as it had resulted in the discharge of the very liability which represented the claimant's loss. Lord Sumption summarised the principles that represented a coherent approach to avoided loss (and the collateral benefit exception) in the following passage at [11]:

> "The general rule is that loss which has been avoided is not recoverable as damages, although expense reasonably incurred in avoiding it may

[2] Referring to *Bradburn v Great Western Ry. Co.* L.R 10 Ex 1.
[3] *Jebsen v East and West India Dock Co.* L.R. 10 C.P.300

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

32. The question is, therefore, whether the benefit is to be regarded as arising independently of the loss, even if occasioned by it. A benefit derived from a separate transaction for which the claimant has given consideration (such as an insurance policy, other than one for the benefit of the wrongdoer) or a gift made because of the loss are both likely to be regarded as collateral, being "tantamount to making good the loss from the claimant's own resources". In considering the application of those principles, the court should have in mind that they are derived from concepts of justice, reasonableness and public policy, but the court must nevertheless look to apply the principles.

33. In *Sainsbury's*, merchants had been overcharged (the interchange fee element of the merchant service charge ("MSC")) for card transactions by acquirer banks in breach of Article 101 and section 2. The question arose as to whether, in principle, the losses they suffered as a result were to be reduced to the extent that the merchants had "passed on" the overcharge by increasing the prices charged to customers. The Supreme Court

recognised at [196] that EU law[4] required member states to ensure that there was a defence of "pass-on" where overcharges were passed on down a supply chain, that being implemented in UK jurisdictions as an element in the quantification of damages. In that regard, the Supreme Court emphasised the centrality of the compensation principle in the assessment of damages, stating at [197]:

> "There are sound reasons for taking account of pass-on in the calculation of damages for breach of competition law. Not only is it required by the compensatory principle but also there are cases where there is a need to avoid double recovery through claims in respect of the same overcharge by a direct purchaser and by subsequent purchasers in a chain, to whom an overcharge has been passed on in whole or in part."

34. As regards the test to be applied, the Supreme Court recognised that Viscount Haldane's statement in *British Westinghouse* (set out above) gives rise to a question of legal or proximate causation (namely, whether the claimant has taken action in the course of his business which action has diminished his loss), adding at [215]:

> "But the question of legal causation is straightforward in the context of retail business in which the merchant seeks to recover its costs in its annual or other regular budgeting. The relevant question is a factual question: has the claimant in the course of its business recovered from others the costs of the MSC, including the overcharge contained therein? The merchants, having acted reasonably, are entitled to recover their factual loss. If the court were to conclude on the evidence that the merchant had by reducing the cost of its supplies or by the pass-on of all the cost to its customers…transferred all or part of its loss to others, its true loss would not be the prima facie measure of the overcharge but a lesser sum."

35. Although the Supreme Court did not specifically refer to the concept of collateral benefit (no argument being advanced by the merchants that transactions down the supply chain were independent so that benefits arising from them were collateral), the recognition that issues of legal causation were "straightforward" (and satisfied) in the context of costs being passed on in a retail business answers the point, collateral benefit arising when that test is not satisfied. The passing on of increased costs is a direct form of mitigation of losses suffered by being overcharged, effected by new transactions entered in the ordinary course of business.

Application of the principles in the present case

36. The Banks contend that the benefit of lower redemptions is not collateral to the Funds' losses (and so avoids those losses in whole or in part) because it arises directly from the alleged wrongdoing, being in effect the "passing on" to the investor of the loss suffered by the Funds in the form of a reduced share of the relevant Fund's net assets.

37. However, the matters relied on by the Banks demonstrate little more than that any benefit to the Funds in lower redemption values was <u>occasioned</u> by the alleged

[4] Articles 12(2) and 13 and recital 39 of the Damages Directive.

wrongdoings, just as is an insurance payment or a gift intended to help repair damage. As emphasised in *Swynson*, it is necessary to consider the nature of the transaction which gave rise to the benefit to determine if it is to be regarded as arising independently of the Funds' loss: the Banks have focused on the benefit, not the transactions which give rise to it. In my judgment redemptions, and any benefit the Funds derive from them, are independent of the Funds' losses for the following reasons:

i) Redemptions will usually occur pursuant to (and on the terms of) contracts between the Funds and their investors, embodied in the trust deeds, articles[5] or partnership deeds which govern the relationship between them (and between investors). Those contracts pre-existed the wrongdoings and their formation, and the exercise of the rights thereunder, are entirely independent of the wrongdoings. The benefit arises from the fact that, pursuant to such contracts, the Funds and the investors have agreed that the latter will follow the fortunes of the former: redemptions are not at a fixed price, but calculated on the basis of the NAV. If and to the extent that the Funds pay less on redemption because the Funds have incurred losses, that is because they have protected themselves against that very situation, ensuring that they only pay a proportion of assets, whatever they may be. It follows that the benefit arises from independent contracts, structured to ensure that the Funds receive that benefit in the circumstances of the loss.

ii) Redemptions are not transactions entered in the course of the Funds' investment businesses, let alone consequent on (or by way of mitigation of) the overcharges by the Banks. They are dealings with the Funds' capital structure pursuant to their constitutional documents, having no bearing on the Funds' profit or loss.

iii) Redemptions will occur over time, possibly over many years, the NAV permanently reflecting the loss suffered by a Fund (unless and until the Fund itself recovers the loss). But the Funds are structured so as to pass on all losses (as well as all gains) to their investors over time: all Funds will ultimately distribute their assets to investors, and some will have a specific limited term. It follows that the ultimate conclusion of the Banks' argument must be that a Fund cannot itself suffer any recoverable loss because that loss will inevitably, in the end, be avoided when the assets are distributed.

iv) The Banks' argument is thus, in reality, a negation of the corporate entity doctrine, treating losses as suffered by the ultimate investors rather than by the entity which has been established as the vehicle for the investments. In my judgment it is plainly misconceived because the investors sit behind a curtain created by the constitutional structure of the Funds, the relations between the investors and the Funds being entirely independent of and collateral to the rights and remedies of the Fund as a corporate entity.

38. To the extent that it is appropriate to have regard to public policy considerations, I consider that they strongly support the application of the relevant principles in the manner set out above. I have already referred above to the vast complication it would

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[5] Section 685 of the Companies Act 2006 provides that the terms, conditions and manner of redemption of shares must be determined by either the company's articles or, if authorised by the articles or by resolution of the company, by its directors.

bring to the assessment of damages in many claims brought by companies, trusts and partnerships if lower redemptions reduced the loss that could be recovered. It would give defendants a potential answer (requiring extensive investigation) to what would otherwise be readily established losses. It would also encourage defendants to delay settling claims in the hope or expectation that investors would redeem in the meantime (or that a company might undergo a restructuring). In my judgment, opening such an avenue for defendants to resist damage claims would not only be contrary to well-established principles but would also be unfortunate as a matter of policy.

39. The further substantial objection to the Banks' contention is that it would permit defendants to escape liability for losses they have caused through their wrongdoing. The Banks' answer is that the redeeming investor has a claim for the losses suffered on redemption, the existence of such a claim also giving rise to the risk of double recovery for the same loss unless the loss of the trust, company or partnership is treated as avoided. As discussed above, it is in that context, and that context only, that the trust, company and partnership issues arise. For the reasons set out below, and contrary to the findings of the Judge, I do not accept that redeeming investors have a claim for the diminution in the amount they receive on redemption by reason of the Banks' alleged wrongdoing. That view further supports my conclusion that the Funds' loss is not avoided by investors redeeming at a lower level.

40. Having explained above the context in which the trust, company and partnership issues are relevant to the central question of whether the Funds have avoided some or all of their loss, I turn to those issues, addressing first the company issue (following the approach the parties took in argument). I shall then consider the Banks' alternative contention that, even if domestic law does not provide redeeming shareholders with a remedy for the loss, such a remedy must be provided to protect rights and claims arising under Article 101.

The company issue

The legal principles

41. In *Marex*, Lord Reed PSC (with whom the majority agreed) emphasised that the fact that a claim lies at the instance of a company rather than a natural person does not usually affect the rights of other persons with concurrent claims. The rule in *Prudential* is a highly specific exception to that general rule, Lord Reed explaining:

> "9…It was decided in the case of *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204 that a shareholder cannot bring a claim in respect of a diminution in the value of his shareholding, or a reduction in the distributions which he receives by virtue of his shareholding, which is merely the result of a loss suffered by the company in consequence of a wrong done to it by the defendant, even if the defendant's conduct also involved the commission of a wrong against the shareholder, and even if no proceedings have been brought by the company. As appears from that summary, the decision in *Prudential* established a rule of company law, applying specifically to companies and their shareholders in the particular circumstances described, and having no wider ambit.

> 10. The rule in *Prudential*, as I shall refer to it, is distinct from the general principle of the law of damages that double recovery should be avoided. In particular, one consequence of the rule is that, where it applies, the shareholder's claim against the wrongdoer is excluded even if the company does not pursue its own right of action, and there is accordingly no risk of double recovery. That aspect of the rule is understandable on the basis of the reasoning in *Prudential*, since its rationale is that, where it applies, the shareholder does not suffer a loss which is recognised in law as having an existence distinct from the company's loss. On that basis, a claim by the shareholder is barred by the principle of company law known as the rule in *Foss v Harbottle* (1843) 2 Hare 461: a rule which (put shortly) states that 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."

42. At [28] Lord Reed explained that a shareholder <u>does</u> suffer loss, in the form of the diminution of the value of his shares, when the company of which he is a shareholder is damaged by a wrongdoing, but that loss is not actionable on the part of the shareholder:

> "As I understand [the reasoning in *Prudential*], what that court meant, put shortly, was that where a company suffers actionable loss, and that loss results in a fall in the value of its shares (or in its distributions), the fall in share value (or in distributions) is not a loss which the law recognises as being separate and distinct from the loss sustained by the company. It is for that reason that it does not give rise to an independent claim to damages on the part of the shareholders."

43. At [38] Lord Reed explained that, in addition to arguments based on the corporate entity doctrine, there are also pragmatic advantages of a clear rule that only the company can pursue a right of action in circumstances falling within the ambit of the rule in *Prudential*:

> "It would be necessary, for example, to take account of the fact that the wrongdoing had resulted in the company's acquiring an asset, namely its right of action against the defendant, which might have offset any detrimental effect of the wrongdoing on the value of his shares. It would also be necessary to consider the question of double recovery, and how it should be addressed both procedurally and substantively. Those issues might have to be addressed in the context of a proliferation of claims, possibly in different proceedings, at different times, and in different jurisdictions. They would also arise in a context where there might well be conflicts of interest between the shareholder and the company's directors, its liquidator, other shareholders, and creditors."

44. 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…. 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…. 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. …[T]he 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….

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."

45. As prefaced above, an argument that the rule in *Prudential* did not apply to shareholders who had sold their shares, thereby "crystallising" their losses, was rejected by the Privy Council in *Primeo*, paragraph [61] of the judgment being set out above. The Board emphasised that, consistently with *Marex*, a shareholder suffering irrecoverable loss in the form of the diminution of the value of his shares cannot convert that loss into one which is recoverable simply by selling the shares. The Board explained in some detail at [62-63] why the contrary position was untenable:

> "Testing the application of the reflective loss rule at the time when proceedings are brought rather than at the time the relevant loss is suffered would lead to other strange consequences, as Mr Smith pointed out. To say, as R1 and R2 do, that the test applies when the claim is brought by a person who happens to be a shareholder at that time and where there may happen to be some relationship between what he recovers by his claim and what the company recovers by its claim, would produce strange and unprincipled results which in fact undermine the *Marex* principle itself and the values it protects: (a) what if the shareholder commences proceedings at a time before the company appreciates it has a claim of its own or before it commences its claim? It seems that on Mr Gillis's argument the shareholder should succeed if its claim can be progressed fast enough, but this is contrary to the point in *Marex* that the rule is a substantive rule of law; (b) it leads to the conclusion, per Flaux LJ in *Nectrus*, that the shareholder can sell its shareholding and then seek to vindicate its own causes of action against the wrongdoer; but this would make the reflective loss rule easy to circumvent and would subvert its intended effect, since the wrongdoer would be wary of settling with the company for fear that, by selling its shares, a shareholder and prospective claimant could free itself to pursue its own claims; (c) it would mean that where the company's claim comes to be statute-barred, the shareholder's claim can be pursued; but such an event cannot change the proper characterisation of the loss suffered by the shareholder for the purposes of the substantive rule stated in *Marex*; (d) it would imply that if the company happened to settle its claim quickly, the shareholder could at that point bring its distinct claim; but, again, it is difficult to see how that event could change the proper characterisation of the loss suffered by the shareholder for the purposes of that substantive rule.
>
> 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)."

46. A similar analysis of when damage arising from diminution in value of an asset is actionable is to be found in *Elliott v Hattens Solicitors* [2021] EWCA Civ 720, [2021] P.N.L.R 25, albeit in the different context of when the limitation period starts to run. The claimant alleged that the negligence of the defendant solicitors had resulted in a flawed property transaction, leaving the claimant liable under the terms of her lease (as tenant) and sub-lease (as landlord) in the event of a fire when that was not intended and, as a consequence, she was not insured. The premises subsequently burned down. The claimant brought proceedings against the defendant solicitors less than six years after the fire but more than six years after the transaction. The claimant sought to resist the solicitors' limitation defence by asserting that she had not suffered damage prior to the fire because, although the leases were flawed and had less value in the market, she had had no intention of assigning her interest. That argument was rejected, Newey LJ stating at [32]:

> "Where….a flawed transaction is objectively less valuable from the start, it seems to me that the cause of action accrues at the outset. If negligence on the part of a solicitor served to reduce the market value of an asset, the claimant cannot, in my view, defer the expiry of the limitation period by pointing out that he was not intending to sell it. It is one thing to say that someone suffered damage because he did not get what he wanted regardless of whether what he got was objectively as valuable; It is another to say that someone who, looking at matters objectively, has sustained a financial loss has not yet suffered relevant damage and so could not bring a claim…Where a claimant can be seen to be "financially worse off", because an asset has a lower market value, relevant damage will, I think, have been suffered whatever the claimant was intending to do with the asset."

Application of the principles to redeeming shareholders

47. The Banks argued that shareholders who redeem their shares are in a different position to shareholders who sell, such that the reasoning in *Marex* does not apply to the former situation and *Primeo* is distinguishable. It is difficult to see any merit in that contention for the following reasons:

    i) As firmly established in *Marex* and *Primeo*, and further supported by the reasoning in *Elliott*, a shareholder suffers loss when the value of his shareholding is diminished by reason of damage to the company, albeit that it is not actionable because of the rule in *Prudential*. That must apply just as much to a shareholder who subsequently redeems his shares as it applies to a shareholder who sells his shares;

    ii) Mr Hoskins argued that the reference in *Primeo* to the time at which "the relevant loss is suffered" is the point at which an investor redeems, because that

is the point at which he has both a cause of action and damage. I do not consider that is a sustainable reading of *Primeo*, which was proceeding on the basis that a shareholder does suffer a loss (in the form of diminution in the value of the shareholder) when the company is damaged by the wrongdoing, and would have had a cause of action for that loss but for the rule in *Prudential*.[6]

iii) It is now established by *Primeo* that losses arising from diminution in value of the shareholding, for which there is no claim, cannot be converted into actionable loss by the subsequent action of selling the shares. There is no good reason to distinguish redemption from sale in that regard: the principle is that the recoverability of the loss is to be assessed when it is suffered, not at a later date when that loss is said to have "crystallised", whether by sale or redemption.

iv) It can make no difference to the above analysis that the redemption results in a payment by the company to the shareholder, whilst a sale of shares does not. Lord Reed's formulation of the rule in *Prudential* encompasses diminution in distributions as well as in market value. It is clear that Lord Reed was not using the term distributions in the technical sense of those provided for in section 829 of the Companies Act 2006, as he included within that term the distribution of a surplus on winding-up; such a distribution is expressly excluded from the remit of that section by sub-section (2)(d), as is the redemption of shares by sub-section (2)(c). There is no reason why payment out by the company on redemption should have different consequences in terms of the application of the rule in *Prudential* than any other form of distribution from the company's assets.

v) The practical considerations referred to in *Marex* at [38] and *Primeo* at [62-63] apply with equal force where a shareholder has redeemed. The difficulty in assessing the amount by which the redemption has been reduced (taking into account the asset represented by the company's claim) and the chilling effect on settlement of claims if the redeeming shareholder can acquire a new claim on so doing are strong indications that the principle applies with full force to redemptions.

48. In the end, the Banks' answer to the application of the *Prudential* rule to a redeeming shareholder was that, on redemption (unlike in the case of sale of shares), the company avoids or passes on its loss to the shareholder and so ceases to have a cause of action for that loss. That argument found favour with the Judge but, as addressed above, simply raises the prior question of whether the company's losses are avoided rather than answering the question of reflective loss, which assumes that they have not been so avoided. I have set out above my reasons for rejecting the contention that redemptions are to be taken into account in calculating a company's loss, but it is also worth noting that the avoided loss argument would also apply, if it were correct, to the payment of dividends (or other distributions made) by a company, where a reduced payment has been made to a shareholder due to the wrongdoing that caused the company's loss. Yet

[6] Further, and in any event, it is likely that the investor will "crystallise" his loss the moment he gives notice of redemption, binding himself and the company to redemption at the prevailing NAV: at that point the investor is still a shareholder.

reduced dividends and other distributions are firmly encompassed within the *Prudential* rule.

49. It follows that I reject the Banks' contention that redeeming shareholders have their own separate claim for loss that escapes the *Prudential* rule.

The trust issue

The legal principles

50. The Judge acknowledged the general rule that where trust property is damaged, the trustee, as legal owner of the trust fund, has title to sue in respect of such damage [57]. The corollary is that beneficiaries do not normally have a cause of action against the wrongdoer. The rule was explained in *Webster v Sandersons Solicitors* [2009] EWCA Civ 830, [2009] P.N.L.R 37, a case in which a 99% shareholder brought a claim in negligence against solicitors for losses suffered by his company and the company's pension fund, of which he was a beneficiary. Having set out the rule against reflective loss applicable in relation to the company's loss, Lord Clarke MR (giving the judgment of the Court) stated at [31]:

> "The pension fund is not a corporate body but a trust, whose assets are vested in the trustees for the time being. Similar principles apply. If there is a cause of action against a third party for causing loss to the trust fund, it is vested in the trustees for the time being. It can be asserted by them and, normally, only by them. The proceedings commenced in November 2007 were brought on this basis. Exceptionally, if the trustees fail to pursue such a claim, it may be open to a beneficiary to assert the claim in proceedings to which the trustees are also parties as defendants…This has some similarity to a derivative action in company law, but it does not require further consideration here, since the claimant does not say that the trustees have failed to bring proceedings…A beneficiary under a trust does not have a direct cause of action in negligence against a person who may be liable to the trustees: see *Parker-Tweedale v Dunbar Bank Plc (No1)* [1991] Ch 12."

51. The Judge referred to the earlier first instance decision in *Yudt v Leonard Ross & Craig* (1998/1999) 1 ITELR 531 as an example of an exception to the general rule where a duty of care is owed not only to the trustee but also to the beneficiaries. In that case two beneficiaries of a trust sued solicitors for negligence in preparing appointments in their favour under the trust, claiming for sums paid out of the trust fund in respect of settling litigation arising from the invalidity of those appointments and the costs of that litigation. Ferris J recognised that the trustees could sue for breach of the duty owed to them to recover any losses (and that the type of special relationship between a solicitor drafting a will and an intended beneficiary recognised in *White v Jones* [1995] 1 AC 207 did not exist), but nevertheless held that the solicitors had also assumed a duty of care towards the beneficiaries, stating at 576B:

> "Beneficiaries under a disposition by way of trust which has already been made before the negligent acts were committed have, like the trustees, a proprietary interest in the trust property. If solicitors

> instructed by the trustees carry out their work negligently, thereby causing loss to the trust property or putting that property or the interests of beneficiaries in peril, the loss resulting from such negligence will ultimately fall on the beneficiaries, even if it is the trustees who incur it in the form of a diminution of the trust property held by them or in the need to expend money in order to protect the trust. By accepting instructions to act for trustees the solicitors are of necessity assuming to act, to the extent of the matters which they are instructed to deal with, in the affairs of the beneficiaries as well. It seems to me that solicitors who act in these circumstances must be regarded as owing to the beneficiaries the same duties of care in tort as they owe to their clients, the trustees, in both contract and tort."

52. In my judgment, the reasoning in *Yudt* is directly contrary to the general principle accepted by the Judge and, although the decision was not referred to in *Webster*, it cannot stand in the light of that Court of Appeal authority. Further, it is inconsistent with the view of Neuberger J in *Chappell v Somers & Blake* [2004] Ch 19 at [15] that there must be considerable doubt as to whether it would be right as a matter of principle to impose any tortious duty to a beneficiary of a will on a solicitor instructed by the executrix of the will. That position is also reflected in *Lewin on Trusts* 20th ed (2020) para 47-23, commenting on the decision in *Yudt* as follows:

> "Whilst it is arguable that imposing liability for breach of a responsibility assumed in this way opens the door to direct actions in tort generally by existing beneficiaries of existing trusts against the professional advisers retained by the trustees, it is thought that beneficiaries are entitled to recover directly in tort only in respect of loss which they themselves suffer, beyond the non-recoverable reflective loss which they suffer by reason of a diminution in the value of the trust fund in consequences of negligence of the trustees' professional advisers, and the consequential diminution in their respective existing interests in the trust fund. In the common case where the negligence has an adverse effect on the trust fund, it is thought that the correct claimants are the trustees, and that the beneficiaries should be entitled to claim only by a derivative action…[citing *Webster*]. Otherwise the professional advisers would face a multiplicity of actions in respect of the same loss from trustees and beneficiaries which those principles seek to avoid."

53. The application of those principles where beneficiaries have redeemed their interest was considered by the Supreme Court of Victoria in *Young v Murphy* [1996] 1 VR 279. In that case new trustees brought proceedings against former trustees for breach of trust, alleging that assets of the six trusts in question had been lost or diminished. After commencement of the proceedings all those who had been unit holders in the trusts had redeemed at the NAV, being replaced by two new unit holders only. The former trustees asserted that the new trustees could not sue for those who had been unit holders at the time when the loss and damage was suffered. J.D. Phillips J rejected that contention at p 297 line 21 as follows:

> "The trustees are suing for loss or damage to the assets held on trust and an order that the former trustee recoup that loss or damage does not

> answer the claims of particular beneficiaries. As I see it, the identity of the beneficiaries from time to time is irrelevant to such a claim."

54. The former trustee further asserted that the new trustee could not recover the amount of the lower redemption due to the damage suffered by the trusts because the investors who had redeemed could still sue the former trustees and, were it otherwise, the recovery by the new trustees could only result in some "windfall" for the new investors. J. D. Phillips J rejected the premise of that contention in each respect, but held [at p. 298] that, in any event:

> "The so-called "windfall" is no more than the proper restoration of the trust funds, enuring for the benefit of those who happen for the time being to be the unit holders in these trusts. It cannot be right in principle that the former trustee is no longer bound to make compensation (if otherwise it be so bound) only because the current unit holders have joined the trust after the losses occasioned by those breaches were sustained. Not does that seem to me to be an untoward result. As I said earlier, unit holders have their interest in the trust property as defined by the trust deeds; and just as former unit holders cease to have an interest in the trust property when they relinquish their units, so those who hold the units for the time being have between them – and subject to the trust deeds – the only beneficial interest in the trust property for the time being."

Application of the principles in the present case

55. The Banks argued that, notwithstanding the principles set out above, they did owe a duty to investor beneficiaries of the Funds under Article 101 and those beneficiaries suffered distinct loss in the form of the diminution of the value of their interests, crystallised on redemption. Therefore, they contended, the trust principle does not prevent redeeming beneficiaries from claiming for such losses on redemption.

56. In my judgment that argument fails at each stage:

    i) As a matter of our domestic law, any statutory duties owed (whether under Article 101, section 2 or otherwise) in respect of or in relation to transactions entered with a Fund which is a trust (such as the FX transactions in the present case) are, in the normal course, owed to the trustees and not to the beneficiaries of the Fund from time to time. To hold that such duties were owed directly to beneficiaries simply because of their beneficial interests in the Fund (and the potential diminution in the value of those interests if the Fund suffers a loss) would be contrary to well established principle;

    ii) The beneficiaries do not suffer any distinct loss from that of the Fund at the time of the wrongdoing. The subsequent redemption of their interests does not give rise to a separate loss, but terminates their relationship with the Fund at a pre-agreed price and leaves the loss with the Fund and for the Fund to claim;

    iii) Any cause of action for damage caused to the trust vests in the trustee of the Fund and remains with the Fund upon redemption.

57. It follows that I reject the Banks' contention that redeeming beneficiaries have their own separate claim for loss that escapes the trust principle.

The partnership issue

The legal principles

58. There was no dispute between the parties that any claim against a third party in relation to damage to a limited partnership Fund is a partnership asset and that only the general partner can bring proceedings against the wrongdoer; limited partners can only bring such proceedings on a derivative basis. In *Certain Limited Partners in Henderson PFI Secondary Fund II LLP v Henderson* [2012] WEHC 3259, [2013] QB 934, Cooke J explained the position as follows at [26]:

> "It is undisputed that any claim against the Manager is a Partnership Asset, owned jointly by the Partners. Under the provisions of s 6(1) of the LPA and [the partnership agreement], which reinforces the statutory provision, no Limited Partner could, on behalf of the other partners and so as to bind them, sue the Manager, which is a third party. Only the General Partner can manage the business of the Partnership and its assets. Only the General Partner has the right to act for the Partnership in external relations in such a way as to bind the Partnership and therefore to bring proceedings against the Manager. If the General Partner will not do so, and here, under the arrangements made, because the Manager is its sister company, with a resulting conflict of interest for the General Partner, there is in reality no way a suit can be brought by the Partnership, unless a new General Partner is brought in who will pursue that cause of action, or the Court permits a derivative suit of some kind by Limited Partners in the name of the Partnership."

59. Cooke J held that if a limited partner did bring a derivative action in the name of the general partner, the limited partner would lose the protection of limited liability as he would have taken part in the management of the partnership business within the meaning of section 6(1) of the Limited Partnerships Act 1907.

60. It is therefore clear (and the parties agreed) that the position mirrors that which applies in the case of trusts: in the usual situation the cause of action for any damage caused to the partnership by wrongdoing will vest in the general partner. The main exception is that a limited partner may be able to pursue that claim in the name of the general partner.

61. In the case of a limited partner who leaves the partnership whilst it is continuing, *Lindley & Banks on Partnership* 20th ed. para 19-11 recognises that the partnership agreement will usually provide for the leaving partner's financial entitlement and expresses the view that "his share may properly be regarded as a pure debt with effect from the date on which he ceased to be a partner".

Application of the principles in the present case

62. The Banks advanced a parallel argument to the one referred to above in relation to Funds that are trusts: they contend that a limited partner in a Fund is owed a duty under Article 101 and suffers a separate loss by virtue of the debt owed to him on redemption

at a lower value than would have been the case but for the wrongdoing damaging the partnership assets. The answer to that argument is the same: as a matter of domestic law the duty is owed to the partnership, the loss is that of the partnership and the limited partner has no cause of action and does not acquire one on redemption.

Rights arising under Article 101 and the effect of Brexit

63. The Banks contend that if (as I consider to be the case) domestic law does not provide redeeming shareholders with a direct remedy, that is inconsistent with directly applicable European law as encompassed within Article 101, with the result that the domestic courts are required to make a remedy available. The Funds have two answers to that contention. First, they dispute that Article 101 has the effect for which the Banks contend. Second, they submit that, whilst rights accrued under Article 101 continue after 31 December 2020 (the end of the Implementation Period of the UK's exit from the European Union), the obligation to give effect to such rights in domestic law ended in respect of proceedings commenced after that. The Judge did not accept the first answer but agreed with the second, the latter aspect being challenged by the Banks by way of their Respondent's Notice.

The scope of Article 101

64. In *Courage Ltd v Crehan* [2002] QB 507 a tied tenant asserted that a provision in the tenancy requiring him to purchase beer exclusively from the claimant brewery was contrary to the prohibition on anti-competitive agreements and practices in Article 81 EC (a forerunner to Article 101, which in turn replaced Article 85 of the EC Treaty) and claimed damages. A preliminary question arose as to whether the tenant could maintain that claim notwithstanding that, under principles of English law, he would be debarred from suing on an illegal contract to which he was party. The CJEU first emphasised that the national court must ensure that Community law is given full effect and must protect the rights they confer on individuals, stating:

> "25. As regards the possibility of seeking compensation for loss caused by a contract or by conduct liable to restrict or distort competition, it should be remembered from the outset that, in accordance with settled case-law, the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals…
>
> 26. The full effectiveness of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.
>
> 27. Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.

> 28. There should not therefore be any absolute bar to such an action being brought by a party to a contract which would be held to violate the competition rules."

65. The CJEU then qualified that general rule with the following:

> "29. However, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)….
>
> 30. In that regard, the Court has held that Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them…
>
> 31 Similarly, provided that the principles of equivalence and effectiveness are respected… Community law does not preclude national law from denying a party who is found to bear significant responsibility for the distortion of competition the right to obtain damages from the other contracting party. Under a principle which is recognised in most of the legal systems of the Member States and which the Court has applied in the past… a litigant should not profit from his own unlawful conduct, where this is proven.
>
> 32. In that regard, the matters to be taken into account by the competent national court include the economic and legal context in which the parties find themselves and, as the United Kingdom Government rightly points out, the respective bargaining power and conduct of the two parties to the contract.
>
> 33. In particular, it is for the national court to ascertain whether the party who claims to have suffered loss through concluding a contract that is liable to restrict or distort competition found himself in a markedly weaker position than the other party, such as seriously to compromise or even eliminate his freedom to negotiate the terms of the contract and his capacity to avoid the loss or reduce its extent, in particular by availing himself in good time of all the legal remedies available to him."

66. The Banks contended, and the Judge accepted, that the effect of that decision is that duties under Article 101 are, as a matter of European law, owed to all individuals, including redeeming shareholders, and that the English court was required to give effect to the right of such shareholders to claim for the losses they suffer by reason of the breach of such duties.

67. The immediate difficulty with that contention is that it would, if correct, entail that duties were also owed to current shareholders, beneficiaries and partners who have simply suffered a diminution of their shareholding, requiring the English courts to permit them to sue: it would mean that *Marex* (where this point was not raised) reached the wrong result. Logically, there would be no end to the persons entitled to claim for the losses of an entity: shareholders of corporate shareholders would have a direct claim, as would their shareholders, ad infinitum.

68. The correct answer, in my judgment, is that it is a matter for English law to determine how, in this jurisdiction, the rights of shareholders, beneficiaries and limited partners are to be protected in respect of losses consequent on damage to the company, trust or partnership caused by a breach of Article 101. English law does so by providing that those rights are to be protected and vindicated by action through the entity (including through derivative actions) rather than by the individuals directly, for reason of both principle and policy as discussed above. There is no European authority which suggests that shareholders, beneficiaries and partners must be entitled to sue for losses they suffer by reasons of breaches of European law which cause damage to the relevant company, trust or partnership.

69. Indeed, in *Unibet (London) Ltd v Justitiekanslern* [2007] 2 C.M.L.R 30 the CJEU emphasised at [40-41] that, although the EC Treaty has made it possible for private persons to bring a direct action, it was not intended to create new remedies in national courts to ensure the observance of Community law: it would be otherwise only if it were apparent from the overall scheme of the national legal system that no legal remedy existed which made it possible to ensure, <u>even indirectly</u>, respect for an individual's rights under Community law. As further recognised in *Impact v Minister for Agriculture and Food* [2008] 2 C.M.L.R 47 at [43] and *Mono Car Styling SA v Dervis Odemis* [2009] 3 C.M.L.R 47 at [48-49], the general principle of Community law is that there must be effective judicial protection of rights derived from that law.

70. The question of direct claims by shareholders under what was then Article 85 was considered by the Supreme Court of Ireland in *O'Neill v Ryan* [1993] ILRM 557. The Court expressly rejected the contention that it was a requirement of European law that the rule in *Prudential* should be disregarded and a cause of action under (what was then) Article 85 given to shareholders.

71. There is no issue with the principle of equivalence (and none was suggested), as all domestic rights and remedies are also subject to the company, trust and partnership rule. Neither can it be said, in my judgment, that the enforcement of rights (if necessary by derivative action) is impossible or excessively difficult.

72. It follows that I do not accept the Banks' contention that redeeming investors must be given a direct right to claim their loss on redemption under Article 101 and I consider that the Judge was wrong to accept that contention.

The transitional position

73. Even if there would have been a requirement to give a direct right to claim under Article 101 before IP Completion Day on 31 December 2020, the question arises as to whether that requirement continues in relation to claims started thereafter.

74. Before the Judge the Banks argued that the principle of effectiveness continued to apply after 31 December 2020, an argument the Judge rejected. Despite challenging that finding in their Respondent's Notice and re-asserting that the principle of effectiveness still applied, the Banks did not pursue that contention in their skeleton argument or in oral argument, accepting that after IP completion day rules of common law could not be disapplied by general principles of EU law such as effectiveness.

75. Instead the Banks relied on section 5 of the European Union (Withdrawal) Act 2018, which provides that the principle of the supremacy of EU law continues to apply on or after IP completion day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law. Mr Hoskins argued that the right of investors to claim, overriding the rule in *Prudential*, the trust principle and the partnership principle (on the Banks' case, contrary to my view), was a matter of substantive law, governed by the question of supremacy, not procedural efficacy.

76. I see no merit in that point, even if it is open to the Banks to run it on this appeal. The EU authorities referred to above make clear that the issue is one of effective judicial protection, which may be by way of indirect remedy. The applicable remedy is expressed as one of effectiveness and not one of supremacy of EU law over domestic law.

77. It follows that, even if Article 101 did, as a matter of EU law, bestow rights on investors to make direct claims for losses suffered by the Funds, the requirement to give effect to that in English law did not survive Brexit.

Conclusion

78. For the reasons set out above I would allow the appeal and order that the Banks' allegation that the Funds' losses have been avoided or passed on by redemption of investments be struck out.

Lady Justice Carr:

79. I agree and would allow the appeal. In particular, Phillips LJ is right to identify that, on proper analysis, the debate over reflective loss and title to sue, which was the focus of the submissions and judgment below, is not directly relevant to the issue of whether the Funds' losses were reduced by reason of lesser payments out to redeeming investors. Rather the question is whether the Funds' losses have been avoided or mitigated by reason of lower redemption payments such as to reduce the amount of recoverable loss. For the reasons given by Phillips LJ, the Judge was wrong to decide that redeeming investors (whether as shareholders, beneficiaries or partners) had independent claims for diminution in the value of their shareholdings; but even if they did have such claims, and in any event, any benefit to the Funds by reason of lower redemption payments is to be seen in the eyes of the law as collateral. That conclusion is the product of the application of the well-established principles identified by Lord Sumption in *Swynson* at [11], and supported by sound policy reasons, as identified by Phillips LJ in [28] and [38] above.

Lord Justice Peter Jackson:

80. I agree with both judgments.