

**IN THE SUPREME COURT OF THE UNITED KINGDOM**

**ON APPEAL FROM**

**THE INNER HOUSE OF THE COURT OF SESSION**

between

**FORTHWELL LIMITED**, a company incorporated under the Companies Acts (Registered Number SC450314) and having its registered office at 23 Royal Exchange Square, Glasgow, G1 3AJ

**APPELLANT**

against

**PONTEGADEA UK LTD**, a company incorporated under the Companies Acts (Registered Number 08680673) and having its registered office at 1 Hills Place, London, United Kingdom, W1F 7SA

**RESPONDENT**

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**WRITTEN CASE FOR THE APPELLANT**

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**Introduction**

1. Alf runs a profitable seafood restaurant in Glasgow. He rents the premises from Bert, on terms that provide they are to be used as a restaurant. Bert neglects to perform his obligations under the Lease to look after the roof. The restaurant is flooded in a storm. Alf sues Bert for the lost profits he suffers whilst Bert repairs the roof and reinstates the restaurant, as he is obliged to do so under the terms of the lease. Bert

is not at all shocked to be sued for such losses, these being the unsurprising result of his failure to look after the roof of the premises.

2. What if Alf rents the same premises from Bert, for the same purposes, but Alf's wife Claire is actually the one operating the restaurant, purchasing the stock, paying the wages and putting the profits into her bank account? Bert breaches his contract with Alf in exactly the same way, with exactly the same consequences for the operation of the hitherto profitable restaurant. Alf and Claire are devastated; their hitherto profitable restaurant being closed for the medium to long term. Again, Bert is not at all surprised by the losses which have arisen, these being the unsurprising result of his failure to look after the roof of the premises that he knew was going to be used as a restaurant.
3. Does Bert, in the second example, escape any liability for Claire's lost profits? That is the question raised by this appeal. It requires consideration of the circumstances in Scots law in which a party to a contract can recover damages for a breach of that contract in respect of losses that were sustained, not by the contracting party itself, but by a closely related party.

### **Motion**

4. The Appellant invites the Court to allow the appeal and to recall the Interlocutor of the Inner House dated 31 October 2025 in so far as it:
  - i) allowed the motion for review in so far as it relates to the Defenders and Respondents' seventh plea-in law
  - ii) recalled the Commercial Judge's substantive interlocutor dated 13 June 2024 in so far as it relates to the Defenders and Respondents' seventh plea-in-law
  - iii) sustained the Defenders and Respondents' seventh plea in law and
  - iv) assoilzied the Defenders and Respondents from the fourth and fifth conclusions of the summons
5. Thereafter the Appellant invites the Court to:
  - (i) Repel the Defenders and Respondents' seventh plea-in-law

- (ii) Allow parties a proof before answer
- (iii) Remit the cause to the commercial judge to proceed as accords
- (iv) Reserve meantime the question of expenses

### Overview of written case – heads of argument

6. To recap, four issues are identified in the Statement of Facts and Issues, summarised as follows:

- I. In what circumstances does Scots law allow a pursuer to recover a third party's loss on the basis of the doctrine of transferred loss? (the "**first issue**")
- II. Was the majority of the Inner House correct to determine that the only damages that the Appellant can recover are those that are recoverable in accordance with the "general rule" (that it is only its own losses that it may recover) and that the Appellant's claim must fail in accordance with the general rule? (the "**second issue**")
- III. Was the majority of the Inner House correct to consider that the Appellant's claim in any event failed because (i) standing the terms of the conclusions, it was not suing on behalf of its subsidiary; and (ii) it had not convened the subsidiary for any interest it had? (the "**third issue**")
- IV. Was the majority of the Inner House correct to conclude that if damages were recovered, there would be no obligation on the Appellant to account to its subsidiary? (the "**fourth issue**")

7. This written case is divided into the following chapters:

- I. The enforcement of rights and obligations in Scottish contracts
- II. The compensatory principle
- III. Introduction to Transferred loss
- IV. Transferred loss in Scotland
- V. The English law of transferred loss
- VI. Application of Scots law to the circumstances of this appeal and determination of the first and second issue issues
- VII. The third and fourth issues: the obligation to account

- VIII. The terms of the licence
- IX. The prohibition against subletting
- X. Summary and conclusion

## I. The enforcement of rights and obligations in Scottish contracts

8. The well-recognised and uncontroversial general rule in Scots law is that contracts create rights and obligations only as between the parties to the contract (**Gloag & Henderson, *The Law of Scotland*, (15th Ed., 2022), Volume I, paragraph 8.01**):

*“Scots law recognises the principle of privity of contract. In the ordinary case the only persons whose rights and liabilities are affected by a contract are the contracting parties. Strangers to the contract have no right to sue upon it and incur no liabilities under it. But this statement is subject to very wide exceptions. There are cases where others than the contracting parties have a right to sue, and cases also where others may incur liabilities.”*

9. This position is reflected in **Gloag, *Contract*, 2<sup>nd</sup> Edition, (1929), page 219**:

*“The general rule that only the parties to a contract have a title to sue upon it will be best illustrated in the ensuing discussion of the cases which form exceptions to it.”*

10. Whilst there is a general rule, it is not without exceptions. As a result of the general rule, it is accepted that the starting point is that when there is a breach of contract, it is generally only the innocent party to the contract that is able to raise an action in respect of the breach, including in particular to claim damages for his losses.

11. In the example given at the outset, this means that only Alf is entitled to sue Bert for his breach of his obligations under the contract. Claire would not have any right to sue Bert, unless there was a collateral warranty in her favour or if the contract between Alf and Bert had created an enforceable third party right. Neither of those are applicable to, or are at issue, in the present case.

12. The effect of this rule, when followed to a simple conclusion, is that it is typically the case that neither Alf nor Claire can recover Claire's losses arising as a result of Bert's breach of contract. This is because Claire does not have a contract with Bert, and so cannot sue, while Alf himself has not suffered any direct financial consequences because of the closure of the restaurant. This is lucky for Bert: in that state of affairs, he does not face what would otherwise be the entirely ordinary consequences of his breach of contract.
13. This effect of the general rule has been described as being "most unsatisfactory": see Lord Salmon in ***Woodar Investment Development Ltd v Wimpey Construction UK Ltd*** [1980] 1 WLR 277 at 291 (in which it is also recognised that, absent statutory alteration, it is through recourse to the Courts that the law may need to develop).
14. It is also this outcome that gave rise to discussions as to whether losses can, or should be allowed to, disappear into a "legal black hole", a phrase first coined by the Lord Ordinary (Stewart) in ***GUS Property Management Ltd v Littlewoods Mail Order Stores Ltd*** 1982 SLT 50 at 54 and then picked up by Lord Keith of Kinkel at 1982 SC (HL) 157, 177.

## II. The compensatory principle

15. Closely aligned to (but not a mirror of) the principle discussed above, is the compensatory principle of damages in Scots law. It is this principle that governs the assessment of the damages that are recoverable by a party pursuing a claim for breach of contract.
16. An introduction to the concept can be found in **McBryde, *The Law of Contract in Scotland*, 3<sup>rd</sup> edition, 2007**, at **paragraph 22-94**:

*"Damages in Scots law are compensatory, i.e. the claimant is compensated for the loss caused by the other party's breach. It is the pursuer's position which is considered. It is not the defender, or party in breach, who must be treated as if the contract had been performed. So, if the defender makes a gain from the breach, that gain is not the correct basis for assessing damages.*

*The contract is looked at as if the breach had not occurred. This is distinguishable from restitution, which might treat the contract as if it had not been made. Consider a deposit of £100 for goods which are not delivered. The defender has gained £100. Restitution would merely return the £100. Damages for breach, however, are based on what should have happened, namely delivery of goods, what did happen, non-delivery, and the consequent loss taking into account the value of the goods and the payment of the deposit...*

17. In ***A/B Karlshamns Oljefabriker v Monarch Steamship Co. 1949 SC (HL) 1*** it was also explained that:

*“the broad general rule of the law of damages that a party injured by the other party’s breach of contract is entitled to such money compensation as will put him in the position in which he would have been but for the breach” (per Lord Wright at p. 18)*

18. As the law was generally understood at that time, **Gloag**, at **page 239**, opined that:

*“A person who undertakes duties under a contract, and by failure to fulfil them properly causes loss, is not liable on the contract to a person with whom he did not contract, but on whom the loss has happened to light. If he is liable at all, it must be on the ground that he owed a duty to the party injured, and that his failure to perform that duty amounted to delict or negligence; all attempts in such cases to infer liability on the principle of jus quaesitum tertio have failed.”*

19. **Gloag’s** discussion, in this respect, continues with reference to the remarks of the Lord Chancellor (Campbell) in ***Robertson v Fleming (1861) 4 Macq 167*** at **177**:

*“If this were the law, a disappointed legatee might sue the solicitor employed by the testator to make a will in favour of a stranger, whom the solicitor never saw or before heard of, if the will were void for not being properly signed and attested. I am clearly of the opinion that this is not the law of Scotland, nor of*

*England, and it can hardly be the law of any country where jurisprudence has been cultivated as a science”*

20. Whatever the position might have been in 1861, by 3 March 1995, when the speeches of the members of the Judicial Committee of the House of Lords were handed down in ***White v Jones* [1995] 2 A.C. 207**, the law had clearly changed. There are two points to be made which help to explain how the law can be so definitely stated, and yet so thoroughly changed.

21. First, the law changes over time and it is right and necessary that it should do so:

*“Scots law is not as the law of the Medes and Persians, which altereth not: it has to reflect changes in social practices...”*

**(*Westbury Estates Ltd v The Royal Bank of Scotland plc* 2006 SLT 1143, paragraph [18], per Lord Reed)**

22. The ongoing evolution, as opposed to the immutability, of the principles of law in this area has been judicially recognised. Thus, for example, in ***Royal Insurance (UK) Ltd v Amec Construction Scotland Ltd* [2006] PNLR 12**, at 20 the Lord Ordinary (Emslie) remarked that:

*“It may be that the policy of the law is gradually moving in the direction of recognising that the day-to-day working out of ordinary family and commercial relationships should not, without good reason, be held to relieve a wrongdoer of an apparently justified liability. At present, however, as Lord Browne Wilkinson accepted in *Linden Gardens*, and as Lord Clyde later confirmed in *Panatown*, the general rule is still to the effect that a plaintiff or pursuer can only recover his own loss. The various cases cited during the debate may thus be seen as exemplifying exceptions to that general rule in particular circumstances, notably where interests in damaged property are subsequently transferred away from the primary victim having title to sue and in favour of related third parties.”*

23. The observations of Lord Emslie are consistent with those of Lord Salmon, referred to above, and to those of Lord Goff of Chieveley in ***White v Jones***, at 267D, in relation to ***Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*** [1994] 1 AC 85:

*“The decision is noteworthy in a number of respects. First, this was a case of transferred loss; and Lord Diplock’s dictum, as applied by your Lordships’ House, reflects a clear need for the law to find a remedy in cases of this kind. Second, your Lordships’ House felt able to do so in a case in which there was a contractual bar against assignment without consent; and as a result, unlike Lord Diplock, did not find it necessary to look for a common intention that the contract was entered into for the benefit of persons such as the second plaintiffs, which in this case, having regard to the prohibition against assignment, it plainly was not. Third, the consequence was that your Lordships’ House simply made the remedy available as a matter of law in order to solve the problem of transferred loss in the case before them”*

24. Secondly, such a change is explained by a proper understanding of the compensatory principle itself and the correct approach to determining the nature of damages, and the circumstances in which they can be claimed for a breach of contract. Once these are understood, it must be recognised that the Courts will do what it is considered necessary and appropriate to give effect to the compensatory principle.

25. The overarching principle which is applicable is set out in the Speech of Lord Shaw of Dunfermline in ***Watson, Laidlaw & Company, Limited v. Pott, Cassels & Williamson and others*** 1914 SC (HL) 18 at 29-30:

*“In the case of damages in general, there is one principle which does underlie the assessment. It is what may be called that of restoration. **The idea is to restore the person who has sustained injury and loss to the condition in which he would have been had he not so sustained it.** In the cases of financial loss, injury to trade, and the like, caused either by breach of contract or by tort, the loss is capable of correct appreciation in stated figures. In a second class of cases, restoration being in point of fact difficult—as in the case*

*of loss of reputation—or impossible—as in the case of loss of life, faculty, or limb—the task of restoration under the name of compensation calls into play inference, conjecture, and the like. And this is necessarily accompanied by those deficiencies which attach to the conversion into money of certain elements which are very real, which go to make up the happiness and usefulness of life, but which were never so converted or measured. **The restoration by way of compensation is therefore accomplished to a large extent by the exercise of a sound imagination and the practice of the broad axe.***” (emphases added)

A similar approach can also be seen in *A/B Karlshamns Oljefabriker v Monarch Steamship Co.* 1949 SC (HL) 1 at 28 per Lord Du Parcq.

26. The correct understanding of the compensatory principle in Scots law – as recognised by the authorities – is that while there is a clearly stated general rule, which achieves justice between the parties in the majority of cases, the law is equally not committed to that rule as a hard and fast principle from which there can be no departure. The approach of the courts to the assessment of the damages which a party is entitled to recover will always begin with regard to that fundamental general rule, but if, where doing so, a court would be prevented from doing justice between the parties in the given circumstances of a case, it departs from that general rule. That departure is, therefore, clearly the application of an exception to the general compensatory principle. However, that exception is one driven by the same purpose that animates and underpins that general rule – to compensate for loss, and ensure wrongdoing is addressed by the law – and which is therefore tolerated by the law as a principled exception to it.

27. Moreover, as was recognised by Lord Malcolm, in the present case, at **paragraph [56]**:

*“...In any event, damages are described as compensatory not generally by reference to the person entitled to receive them, but to differentiate from other possibilities such as penal awards or the disgorgement of profits accruing to the defaulter from the breach...”*

28. The approach which the Appellant respectfully submits this Court should adopt in considering the concept of transferred loss in Scots law is as follows.
29. Overall, the Court should look at the contract as if the breach had not occurred and look to make good the consequences arising as a result of that breach from the perspective of the innocent party (see **McBryde**, at **paragraph 22-94**).
30. In doing so, the primary purpose of the award of damages under the compensatory principle is to ensure that any recovery directed against a wrongdoer is directed against the actual losses caused by that wrongdoing.
31. In finding any entitlement to an award of damages, the Court is not to award damages on a punitive basis. Neither should damages be awarded on the basis of restitution (which may arise in the context of a claim for unjustified enrichment) or based on the disgorgement of profits or gains made by the party in breach.
32. The general rule – that an award of contractual damages should put the pursuer, so far as money can do, in the position that they would have been in had the breach or wrong not occurred – is subject to exceptions and so the general rule should not be applied in too literal a fashion if that would result in effect not being given to the overarching compensatory principle.
33. It is appropriate to have regard to the importance of the knowledge, actual or presumed, of the contracting parties of the consequences of a breach of contract, as it can provide an important limit upon the recovery of damages. In this respect regard must be had to what is within the reasonable contemplation of the parties at the time of their contract: see ***Balfour Beatty Construction (Scotland) Ltd v Scottish Power Plc* 1994 SC (HL) 20**. Taking our example above, one would have to consider what losses the Bert would reasonably contemplate arising if his actions caused premises let as a seafood restaurant to close.
34. In the majority of cases, the application of the foregoing principles – which are not to be applied too rigidly or too illiberally – means that the application of the general rule

and the general approach will suffice to ensure that justice is done between the parties. The innocent party will pursue the contract breaker for the losses he has directly suffered. The contract breaker will be liable to make those good. The innocent party will not have any interest in, or any tangible connection to, any losses that might have been suffered by other parties as a result of the contract breaker's breach of its obligations. The recovery of such losses will not be necessary to put the innocent party in the position it expected to be in (or, broadly, otherwise to achieve a satisfactory and just result). Returning to the earlier example, the restaurant operated from Alf's premises will close because of Bert's breach, and the local fishmonger may find his orders cancelled until the restaurant reopens, reducing the profits he expected to make. Alf does not, however, maintain any interest in those losses. Nor was the purpose or object of the contract of lease of a seafood restaurant a contribution to the running of a successful fishmongers.

35. There are, however, cases in which the application of the general rule will not truly give effect to the compensatory principle.

36. It is accordingly necessary to consider the extent to which Scots law can provide protection where losses are not directly incurred by the innocent contracting party but are closely and intricately connected to the expected performance of the contract. This is what leads to the recognition of the concept of transferred loss.

37. In the Court's consideration of whether, in this case, damages ought to be recoverable, the absence of any direct prior authority to this effect is not a bar to the Appellant's action succeeding. It is not determinative that such a claim has not arisen "to date" (*cf* Lord Pentland at **paragraph [100]**). Indeed, until the 1990s, it was thought – at least from a review of the decided cases – that transferred loss could only arise in shipping law, until it was extended to the case of building contracts in ***Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*** (as discussed above, by Lord Goff in ***White v Jones*** and see also the discussion in the Scottish Law Commission's **Report on Review of Contract Law: Formation, interpretation, Remedies for Breach, and Penalty Clauses (2018)** (the "SLC Report"), at **paragraph 18.9**).

38. Nor can it be said that Scots law should avert its gaze in order to allow black holes to swallow losses where to do so would be unjust. A need, when the facts and circumstances of a case justify the avoidance of a black hole, should generate the remedy (see *Treitel's Law of Contract*, 16<sup>th</sup> ed, at para 14-038). Rix LJ in *Offer-Hoar and Others v Larkstore Ltd* [2006] 1 WLR 2926 sets out an approach that ought to commend itself as the proper approach in Scots law: “*where a real loss has been caused by a real breach of contract, then there should if at all possible be a real remedy which directs recovery from the defendant towards the party which has suffered loss*”.

39. Against the background of the general principles discussed, above, it is now necessary to have regard more specifically to the concept of transferred loss, and how Scots law ought to approach the Appellant's claim for the losses suffered by its wholly owned subsidiary, Lynnet. That in turn requires one to ascertain when (rather than if) claims for transferred loss in Scots law are available; neither party to this appeal disputes in principle that such claims are possible in principle. The argument, rather, focuses on how and where the boundaries ought to be fixed.

### **III. Introduction to transferred loss**

40. Claims for transferred loss arise where a breach of contract occurs and loss results. That loss is, however, said to not have been sustained by the parties to the contract.

41. Often, the innocent contractual party will have no interest whatsoever in a third party's position and is indifferent and unaffected by whether or not that third party can recover compensation. In those circumstances, the unqualified application of the two general principles or rules that have already been discussed (namely, first, that only the contractual parties can enforce the rights and obligations in their contract and, secondly, that damages must restore the innocent contractual party's state of affairs to the situation they would have been in but for the breach) means that the third party's losses cannot be recovered.

42. There are, however, situations in which the application of the general rule, coupled with the compensatory principle, results in an outcome that is on any rational view unjust.
43. A clear example is the husband who contracts for work to be carried out to the roof of his wife's house, which works are then performed defectively, reducing the value of the property. The strict and narrow application of the general rule and the compensatory principle would mean that only the husband could sue, but that the husband would not have incurred any loss as a result of the property having fallen in value. That loss would only be a loss that his wife has suffered. On this approach, the law would say that the husband does not have any interest in the home he resides in being properly repaired, and that no award of damages is necessary to put his affairs in the position they ought to have been in had the contract been duly performed. For the reasons discussed below, it is submitted that this is not to be considered the correct approach in Scots law.

#### **IV. Transferred Loss in Scots law**

44. Having regard to the principles set out above, how and when can Scots law recognise a claim for transferred loss? Recognising such a claim will give rise to a breach of the general rule. But a general rule is just that – it is not an absolute rule. What is required is therefore a principled approach to transferred loss which provides reasonable certainty and does not offend against established principle.
45. Transferred loss, in Scots law, has relatively recently been considered by the Scottish Law Commission, culminating in chapter 18 of the **SLC Report**. It was suggested by the Lord President (Carloway) that "*The SLC recommended confining [transferred loss] to cases of property transfer*" (**Inner House Opinion, paragraph [44]**).
46. Whilst the **SLC Report** contains some discussion of various approaches to transferred loss in Scots law (see **paragraphs 18.20 and 18.25**) it does not in fact contain the recommendation to which the Lord President referred. Rather, the **SLC Report** concluded that:

*“We have come to think that we cannot provide a satisfactory solution to the difficulties raised by T’s present inability to recover transferred loss directly without much further investigation of the various commercial and other contexts in which the issue may arise. The limited time and resources at our disposal given other priorities within the Tenth Programme of Law Reform mean that such an investigation is not possible at present.” (paragraph 18.56)*

47. And that:

*“In reaching this view, we take some comfort from having learned from one very experienced practitioner that “[t]here are not that many black hole cases”, and the ones that do arise do so “because somebody has not thought the matter through”. Burness Paull observed that parties to the contractual matrix are usually well aware of the need to address liability for and recovery of third party losses by way of express contractual provision. Further, the problem of T’s inability to compel C to act or to account has not yet arisen in the reported case law. While the present legal position is, in our view, uncertain and capable of creating significant practical difficulties, its resolution cannot be seen as an urgent matter in relation to other current law reform issues.” (paragraph 18.57)*

48. The ultimate conclusion of the **SLC Report** is set out in **paragraph 18.59**:

*“The clear need for further investigations (for which however there is insufficient time and resource within our Tenth Programme) and the divided counsels of consultees on the matter have left us unable to identify a generally acceptable solution to the transferred loss problem. Accordingly, we make no recommendations to that end at this time.”*

49. Accordingly, and contrary to the views expressed by the Lord President (Carloway), with which Lord Pentland agreed (Lord Pentland, it is recognised, having been the Chairman of the Scottish Law Commission in 2018 at the time the **SLC Report** was published), the Scottish Law Commission expressly declined to set out what it considered would be an appropriate basis upon which Scots law would come to

recognise the concept of transferred loss. What the Scottish Law Commission did state is that: the law of transferred loss in Scots law is unclear; there is no settled view (**SLC Report at 18.6**); and it is a matter which requires careful consideration. The Scottish Law Commission, at the very least, has confirmed that Scots law ought not to simply repeat what has been set out in English law.

50. The task for this Court therefore is clearly one of principle: It is for this Court to consider when in Scots law claims of transferred loss ought to be considered. Standing the approach of the Scottish Law Commission, and the existing state of the authorities, this is an issue that is “at large”.

51. In what circumstances then could awarding damages to a party to a contract, who has not actually suffered the direct loss, amount to a claim that is consistent with the principles of Scots law?

52. The Appellant invites the Court to adopt the following approach, which it is submitted is consistent with the fundamental principles of Scots law.

*Alfred McAlpine v Panatown*

53. It is helpful to begin with the approach of Lord Clyde in the English decision of ***Alfred McAlpine Construction Ltd v Panatown Ltd (No. 1) [2001] 1 AC 518***. At page 530, Lord Clyde, opined that, in English law, a claim for transferred loss ought to be considered as “*a solution imposed by the law and not as arising from the supposed intention of the parties, who may in reality not have applied their minds to the point*”.

54. The approach of Lord Clyde, moreover, is entirely consistent with the approach to damages claims set out in ***A/B Karlshamns Oljefabriker v Monarch Steamship Co*** and in ***Watson Laidlaw v Pott, Cassels and Williamson***.

55. Lord Clyde’s analysis was driven by a desire to achieve a “*realistic and practical solution*”, which he considered would be found by permitting “*the contracting party to recover damages for the loss which he and a third part has suffered, being duly accountable to them in respect of their actual loss*” (page 535).

56. In order to respect the general rules, discussed above, Lord Clyde recognised that limits should be placed upon the availability of a claim for transferred loss:

*“...The solution is required where the law will not tolerate a loss caused by a breach of contract to go uncompensated through an absence of privity between the party suffering the loss and the party causing it...” (page 535)*

57. Further, practical and sensible, limits are placed upon the availability of transferred loss claims, in Lord Clyde’s analysis, by recognising that there is no prospect of excessive damages being paid given *“the recognition of the basic requirement for reasonableness which underlies the quantification of an award of damages”* and also the fact that such claims are likely to arise *“in the context of the domestic affairs of a family group or the commercial affairs of a group of companies”*. As to these matters, Lord Clyde forcefully remarked that these *“should not be a matter of necessary concern to a third party who has undertaken to one of their number to perform services in which they all have an interest”* and that *“it should not be a ground of escaping liability that the party who instructed the work should not be the one who sustained the loss or all of the loss which in whole or in part has fallen on another member or members of the group” (page 536).*

58. Lord Clyde’s seminal analysis in ***Panatown*** represented a principled and coherent development of the concept of transferred loss claims, a process which had been ongoing through cases such as ***The Albazero [1977] AC 774*** and ***Linden Gardens***.

*McLaren, Murdoch and Hamilton*

59. It is next helpful to have regard to the treatment of transferred loss by Lord Drummond Young in ***McLaren, Murdoch and Hamilton Ltd v Abercromby Motor Group Ltd 2003 SCLR 323***. Lord Drummond Young explained, *obiter*, that he considered the *jus quaesitum tertio* to be of *“relatively limited utility in dealing with the problem of the legal black hole” (paragraph [39])*. Instead, Lord Drummond Young preferred to adopt Lord Clyde’s analysis of the solution as set out in ***Panatown***. Ultimately, his lordship concluded that:

*“[42]...Such an approach has a number of advantages. In the first place, it provides a solution to the problem of the legal black hole that is capable of almost universal application. In the second place, it permits recovery even in the case of contracts that are incapable of assignation, since it is the original party to the contract who is responsible for raising any action. [...] In the third place, it maintains the fundamental principle that the remedy of substantial damages can only be available if there exists a loss capable of being measured in financial terms. That means that the usual rules on remoteness of damage will continue to apply.”*

60. In the Appellant’s submission the approach of this Court ought to be to consider whether anything said by Lord Drummond Young, following what had been said by Lord Clyde in ***Panatown***, results in an outcome that fails to accord with the fundamental principles of Scots law.
61. Before turning to that analysis, however, it is helpful to have regard to the subsequent treatment of ***McLaren, Murdoch and Hamilton***, prior to the decisions issued in this action.
62. Writing in 2007, Professor McBryde had little apparent difficulty accepting a conceptual place for claims for transferred loss in Scots law (see ***McBryde, paragraphs 22-26 – 22-31***).
63. ***McLaren, Murdoch and Hamilton*** also came to be considered – and applied – in the subsequent cases of ***Marquess of Aberdeen and Temair v Turcan Connell 2009 SCLR 336*** and in ***Axon Well Intervention Products Holdings AS v Craig [2015] CSOH 4***.
64. In the latter case, Lord Doherty was in general agreement with Lord Drummond Young’s observations in ***McLaren, Murdoch and Hamilton*** at **paragraph [42]** (see **paragraph 29** of the opinion). Recognising the need for the law to have at least a modicum of flexibility, and a practical approach, Lord Doherty opined that:

*“42. In my opinion it is conceivable that in some circumstances the availability to a third party of a non-contractual remedy might exclude a Panatown claim. However, where there has not been specific provision for, or clear contemplation of, the third party's means of redress, if a non-contractual remedy is to exclude a Panatown claim it should provide equivalent means of redress and equivalent prospects of success to an action for damages for breach of contract. If it does there is no risk of a legal black hole. If it does not there is such a risk.”*

65. In the Appellant's submission, it cannot be said that any aspect of the treatment of the issue by Lord Clyde, Lord Drummond Young, Lady Smith or Lord Doherty does undue violence to the general principles of contractual damages set out above.

66. It is recognised, rather, by each, that the approach of Scots law on this issue was not frozen at a particular point in time. Instead, a flexible approach was adopted which respected the general rule, and the compensatory principle, by confining contractual claims to situations in which losses would otherwise disappear into a black hole, in order to do justice to the parties, and by ensuring that the pursuer is restored to the position they would have been in had there not been a breach of contract. It does so in a realistic way that does not provide a contract breaker with an unexpected “get out of jail free card”.

67. There is accordingly nothing in these cases that demonstrates that they have failed to comply with the principles of the Scots law of damages, as set out in the authorities referred to. Contrary to the Lord President (Carloway), these concepts have not “emerged from the ether” (Lord President (Carloway) at **paragraph [46]**) and nor did Lord Clyde proceed in manner for which there was “no authority” (Lord President (Carloway) at **paragraph [38]**).

68. In each of these cases, Scottish judges have reached conclusions that accord with fundamental principles of Scots law. They have reached decisions that reflect the need to ensure that the general principle relating to the rights and obligations of the parties to a contract can only be enforced by the parties to the contract, but which also adhere to the compensatory principle, recognising principled exceptions, and

by ensuring that the innocent party obtains from the contract breaker adequate compensation to ensure that its affairs are how they expected them to be.

69. In any event, the authorities, cited above, demonstrate that the law may require to develop in order to do justice between the parties. The law is not at a standstill. See also Lord Goff in *Panatown* – “it is surely within the scope of the type of development of the common law which, especially in the law of obligations, is habitually undertaken by appellate judges as part of their ordinary judicial function” (at 553C-D). So, to the extent that the precise outcomes in any individual prior case might not be entirely suited to the particular circumstances before the Court, that does not bar the Court from finding a solution when principle, and justice, requires it.

70. Consistent with these cases, the law of Scotland in respect of transferred loss claims may be fairly stated thus:

- I. Claims for transferred loss will arise exceptionally, due to the facts and circumstances of a particular case.
- II. A claim for transferred loss is a solution that is imposed by law. It does not depend on the intentions of the parties or what was in their contemplation. It is therefore unnecessary to look to the terms of the contract that has been breached to find it, only to confirm that it has not been excluded.
- III. In any claim for transferred loss, the usual rules of remoteness will apply, and in particular the losses sought must be those that could fairly be contemplated by the parties.
- IV. Scots law only allows a claim for transferred loss where the application of the general rules discussed above would fail to do justice as between the parties.
- V. The general rules will fail to do justice between the parties in cases where they will deny a remedy despite the fact that the pursuer has a material interest in the loss suffered by the third party (typically, where there exists a close connection between the innocent contractual party and the third party’s loss). Accordingly, a claim for transferred loss is likely only to be available in cases involving family or corporate groups, when it can be demonstrated that such material interest exists. Indeed, it has been in these circumstances where the

possibility of a claim for transferred loss has arisen for discussion in the Scottish cases to date.

- VI. The requirement that there is a material interest between the innocent party and the recovery of the third party's losses ensures that, in making an award of damages, the Court, so far as it can do, restores the party to the contract to the condition it would have found itself in so far as money is able to do so. That is why the concept of transferred loss is restricted to cases in which there is a material interest between the innocent contractual party and the loss which is claimed as a result of the breach. Without that interest, it cannot be said that a claim for transferred loss is necessary to put the innocent party to the contract in the position it ought to be in, or that the application of the general rules would fail to do justice. It is this interest that drives the claim, and the policy rationale behind allowing it. It is because such an award is necessary to put the affairs of the innocent party to the contract in the position that they ought to be in.
- VII. There may well be examples not yet canvassed before the court which go beyond the legal and natural family situations in which a pursuer may seek to argue it has a material interest in a third party's affairs. But that is no affront to our law, and indeed such flexibility is consistent with ensuring that the law will be able to provide a remedy when faced with legal black hole, whatever it looks like, to which it has a longstanding aversion.
- VIII. Applying those principles, no floodgates will open, nor will the exception swallow the general rule, if a claim in transferred loss is accepted in this action. There is no indication that the floodgates have been opened to date. In identifying a principle of "material interest", the appellant proposes a delimiting factor that is both able to do justice in individual cases but also a robust protector of the boundary of the general rule. The hypothetical examples given by the Respondent which it identifies as unmeritorious examples that would now be given life on the Appellant's analysis of the transferred loss principle are no such thing, when subjected to a proper application of the principles involved.

71. The approach for which the Appellant contends is not going to allow simply any loss, no matter by whom it was suffered and in what circumstances, from being recovered

in a breach of contract claim (see Lord Braid at **paragraph [36]**). It is clear, rather, that the party to the contract who wishes to bring a claim for transferred loss is going to have to show interest in the losses that are being sought. The Lord President (Carloway) accordingly, was wrong to suggest that there are “*no meaningful limits on the extent of the exceptions*” (see **paragraph [37]**). So far as Lord Pentland was concerned in respect of the risk that a contractor would “*always be able to claim against the employer for the losses suffered by its subcontractor*” (**paragraph [102]**) this does not arise unless the contractor has an interest in suing the employer for its subcontractor – and it is unclear why or when a contractor would ever have an interest in doing so. The Appellant’s proposed approach does not have a “potentially limitless application” (**paragraph [104]**). There is a relative dearth of Scottish authority on this point. That is, however, unsurprising when one has regard to the comparative rarity of the need to rely upon transferred loss in Scots law as a matter of the policy of the law. It is a reasoned solution to a clear problem. It is grounded in principle, and (until the majority decision of the Inner House from which this appeal has been taken) has not caused any difficulties in its application in Scots law, including in its discussion in ***McLaren, Murdoch and Hamilton, Marquess of Aberdeen*** and in ***Axon***.

72. Recognition of claims for transferred loss in Scots law gives effect to the rules concerning remoteness in ***Hadley v Baxendale (1854) 9 Ex. 341, 354-355***.

73. As it was put by the Lord Justice-Clerk (Alness) in the case of ***Craig & Co v Blackater 1923 SC 472, 481***, in a passage which may aptly be applied to the circumstances of the present case:

*“...the resources of our jurisprudence have not been exhausted, and the result [for which the Appellant contends] can be attained without outraging any legal principle and without traversing any judicial decision”*

## **V. The English law of transferred loss**

74. Fundamentally, it is the Appellant’s submission that the answer to the present appeal is not to be found in the application to it of principles of English law.

75. Transferred loss in English law is not without its difficulties. Progress has been made in respect of settling the position, but that has not been conclusive.
76. In ***Lowick Rose LLP v Swynson Ltd* [2018] AC 313** it was held that the principle of transferred loss applied where it was a known objective of a contract to benefit a third party. In ***BV Nederlandse Industrie van Eiproducten v Rembrandt Enterprises Inc* [2020] QB 551**, the Court of Appeal of England and Wales arrived at a similar position.
77. In English law, it appears to have been recognised that claims for transferred loss can be permitted when either: (i) the narrow ground applies or (ii) the broad ground applies. The narrow ground will apply where the property subject to the contract has been transferred to a third party. The broad ground applies where A contracts with B for a benefit to be conferred on C and this is known by the parties at the time the contract was entered into, with it having been the common intention or known object of the contract to do so.
78. Whatever may be the position in English law, however, Scots law has not followed it (and should not do so now). If it is a requirement that a known objective of a contract be to benefit a third party, Scots law has never needed the concept of transferred loss, an adequate third party remedy having been available in terms of the common law *jus quaesitum tertio* (and, now, on a statutory footing, in terms of the **Contract (Third Party Rights) (Scotland) Act 2017**). In any event, it is no part of the principle of contractual damages in Scots law that the intention of the parties is considered – contemplation of losses that arise from breach is not the same as the intention as to what a court should order to be paid.
79. Lord Clyde's approach in ***Panatown*** was not adopted by the majority as being the law of England. Equally, however, there is no support for the English approach in the Scottish case law.
80. So far as ***McLaren, Murdoch and Hamilton*** is concerned, and contrary to the view expressed by Lord Pentland at **paragraph [98]**, what Lord Drummond Young actually said was:

*“[...] I am accordingly of opinion that Scots law should adopt the same general rule as that applied by the majority of the House of Lords in that case, as described by Lord Clyde [...] In effect the rule comes to this: if a breach of contract occurs, causing loss that can be measured in financial terms, the party who is not in breach may recover substantial damages even if that loss has been sustained by another person; if a loss has been sustained by a person other than the contracting party, however, the contracting party must sue on behalf of that other, and must accordingly account to that other for the damages recovered...”*  
(emphasis added)

81. The rule Lord Drummond Young was endeavouring to set out as part of Scots law was thus one of principle, not categorisation. His lordship expressly based his analysis on what was said by Lord Clyde rather than the other members of the majority in ***Panatown***.

82. ***Marquess of Temair*** and ***Axon Well Intervention*** also proceeded without reliance on English law and instead adopted an approach that is consistent with the principles suggested to this Court by the Appellant.

83. As set out by Lord Braid, Outer House Opinion at **paragraph [32]**:

*“...the “broad grounds” for applying the exception, trailed in the English case law, has no place in Scots law, rendering much of the discussion in *Swynson and Nederlandse* academic from a Scottish perspective”*

84. Lord Braid’s opinion at **paragraph [35]** also bears setting out:

*“[35] This issue, as both parties accepted, in effect comes down to whether *Swynson and Nederlandse* should be followed in Scotland, notwithstanding the views expressed by Lord Drummond Young and Lady Smith. However, Lord Drummond Young, in the passages referred to above, cogently and persuasively explained why Scots law and English law are not the same in this*

*area, and firmly rejected any suggestion that the “broad ground”, which was the ground relied on in Swynson and Nederlandse, formed any part of Scots law. Having explained why the jus quaesitum tertio did not offer a solution, he offered a reasoned Scots law solution to the problem, recognising, as had Lord Clyde, that the right of the contracting party to sue was conferred as a matter of general legal policy to ensure that if a loss results from a breach of contract it can be recovered from the party responsible for the breach. With all of these views, Lady Smith agreed. Nothing that was said in Swynson and Nederlandse provides, nor could it provide, any reason for now concluding that Scots law in the intervening 20 years has aligned itself, or should align itself, with English law, or that Lord Drummond Young’s summary of the principles of Scots law was, in some way, wrong”*

85. Lord Braid continued (**paragraph [38]**)

*“In the result, I conclude that English law is as different from Scots law today as it was in 2003, when Lord Drummond Young expressed his opinion, notwithstanding that the law in the two jurisdictions has a common starting point; and consequently, that the exception to the general rule exists in Scotland as a matter of policy, in circumstances where it would be perceived to be unjust to allow a loss to go uncompensated, having nothing to do with parties’ intentions, or what was in the contemplation of both of them, at the time of contracting..”*

86. Notably, in the Inner House, the Lord President (Carloway) agreed with this approach. His Lordship opined that, having considered the English authorities:

*“Whatever the current thinking south of the border may be, there is little reason for Scots law to follow it down a rabbit burrow which was formed as a result of an admittedly erroneous interpretation of Dunlop v Lambert (The Albazero, Lord Diplock at 843-845)” (**paragraph [44]**)*

87. So, whilst English law may take as the same starting point the principle that a party to a contract can only recover such losses as he has himself sustained (**The Albazero**

[1977] AC 774), the solutions created in England do not accord with the approach that Scots law ought to adopt.

88. Such an approach is not tied to the general principle, nor to the compensatory principle, as explained above. As both the Lord Ordinary (Braid) at **paragraph [32]**, and the Inner House have recognised, the English authorities ought to be considered academic in the determination of Scots law.

#### **VI. Application of Scots law to the circumstances of this appeal and determination of the first issue and second issue**

89. In this appeal, the Appellant seeks to recover the lost profits suffered by its wholly owned subsidiary, Lynnet Leisure (Rogano) Limited, as a result of the alleged breach by the Respondent of its obligations under the lease.

90. The Respondent cannot on any view be surprised that if the restaurant were to close because of its breach of contract, lost profits may arise as a result. The object of the lease was to provide a licensed bar and restaurant premises (clause 5.2.2 of the Lease). That was a term and condition stipulated in the Lease (Lord Pentland, **paragraph [102]**). This was obviously being done in order that trade might be undertaken from the premises to generate profit. It is not difficult to regard the award sought in this action as necessary in order to satisfy the object of the contract (see, to that effect, Lord Pentland at **paragraph [97]**). If reflecting the objective of the contract is the purpose of an award of damages – which is the thrust of Lord Pentland’s analysis at **paragraphs [96] – [97]** - then the Appellant’s attempted recovery ought to be permissible. Why it is necessary for the involvement of a third party’s benefit to be known before recovery is permissible is unclear – the object of a contract envisages a party providing something and being obliged to do so. There is no principled reason why the knowledge of a third party benefitting from that provision must be an **essential** component in engaging the principle (as appears to be the case in English law, applying *BV Nederlandse Industrie van Eiprodukten v Rembrandt Enterprises Inc* [2020] QB 551, Coulson LJ at **paragraph 72**). It is not obvious why this should be required (Lord Malcolm at **paragraph [58]**). It is entirely clear that the

Respondent should have foreseen lost profits arising if its breach of contract causes the premises to close (and to remain closed).

91. If the Respondent had not breached its contract, the Appellant offers to prove that, in respect of its financial position, it would have had a wholly owned subsidiary holding profits.

92. The Appellant seeks to recover those lost profits, with an obligation to put those into the hands of its wholly owned subsidiary (the obligation to account being discussed below). An award of damages made on that basis, will, in monetary terms, put the Appellant in as near as possible the same position it would have been in if the obligation had not been breached.

93. This is a realistic and practical solution to the difficulties caused by the Respondent's failure to perform its contractual obligations. The damages sought by the Appellant in this action seek to achieve no more and no less than that. That is the compensatory principle of Scots law in action. It is a limited example of a situation in which the principle of transferred loss in Scots law applies so as to allow the Appellant to recover losses that were directly suffered by its wholly owned subsidiary. Without such a recovery, justice will not be done between the parties to the contract. The Respondent cannot on any reasonable view contend that it feels hard done by or harshly treated. All that is being sought is substitutionary redress – nothing more and nothing less (see Lord Malcolm at **paragraph [56]**).

94. Accordingly in respect of the first issue for determination by the Supreme Court, the circumstances in which Scots law allows a pursuer to recover a third party's loss on the basis of the doctrine of transferred loss include those found in this case.

95. In respect of the second issue, it follows that the majority of the Inner House were incorrect to determine that the losses that could be recovered by the Appellant did not include those losses incurred by its wholly owned subsidiary.

## **VII. The third and fourth issues: the obligation to account**

96. Three subsidiary points arise for consideration if the Appellant's approach to transferred loss in Scots law is accepted by the Court.

97. The first of these is the nature of the obligation to account. This has caused difficulties in the Inner House. At **paragraph [36]** of his Opinion, the Lord President (Carloway) expressed the view that the Appellant was not suing on behalf of its subsidiary and that any sums received by it might leave the black hole in existence.

98. At **paragraph [46]** his Lordship further questioned the existence or basis for any obligation to account. Lord Pentland expressed similar views (**paragraphs [99]** and **[103]**).

99. Lord Malcolm, by contrast, did not have any difficulty with the approach adopted by the Appellant in its pleadings. Taking a pragmatic approach, Lord Malcolm opined that:

*“If it is objected that this is contrary to damages being compensatory, an obligation to account would direct the monies to the person suffering the harm and provide no more and no less than substitutionary redress”* (at **paragraph [56]**)

100. Lord Malcolm went on to remark that

*“As to accountability, this was recognised and applied in The Albazero. I see no problem in principle in the court framing an appropriate order whereby there is an enforceable obligation upon the pursuers to pass on monies recovered to Lynnet”* (at **paragraph [89]**)

101. What this then provides is a “realistic and practical solution”. To the extent that the Lord President (Carloway) and Lord Pentland had difficulty with the concept of the damages having to be issued with an obligation to account, they fell into error.

102. The obligation to account arises by virtue of the Court's decision to allow recovery and is a necessary part of the remedy. Nothing more requires to be pled by the Appellant.
103. That is entirely consistent with the approach adopted by the Courts to date: see ***The Albazero*, page 844**, per Lord Diplock; and ***Panatown*, pages 534-535** per Lord Clyde; and **page 594G** per Lord Millett; and ***McLaren, Murdoch and Hamilton*, paragraphs [42] - [43]** per Lord Drummond Young.
104. *Quantum valeat*, it may be noted, moreover, that the Appellant's pleadings are consistent with **McBryde, paragraph 22-30**, as to the pleading of a transferred loss claim, and are also consistent with the averments which were found to be sufficient in both ***Marquess of Aberdeen*** and ***Axon Well Intervention***.
105. If, to the contrary, it was necessary for there to be a pre-existing obligation to account, this would be the antithesis of a claim for transferred loss. The existence of such an obligation would result in it being unnecessary to rely upon transferred loss in order to do justice to the parties.
106. As explained by Lord Malcolm, and consistent with all prior authorities, an award of damages in respect of transferred loss is one that arises as a result of a decree. That the court might direct how those damages fall to be applied in a case of transferred loss is not an issue. A court order can create a liability to account – that is the mechanism by which the remedy is made available. It is simply not the case that “*the pursuers would be entitled to retain any damages awarded for loss profits and to apply them as they saw fit*” (Lord Pentland at **paragraph [99]**). That, of course, reflects the general law but not the rationale of a claim for transferred loss. There is no warrant for the statement that the “*mere recovery of damages cannot per se create a liability to account*” (Lord Pentland at **paragraph [103]**). In transferred loss there is no mere recovery *simpliciter*. There is recovery subject to an obligation to account.
107. Nor is it any complaint to show concern for the creditors of the third party. The insolvency of any party is a risk in any action to recover damages. It is not a reason not to recognise the obligation to account, or to apply it. If in a hypothetical scenario

the Appellant were to become insolvent such that the third party (here, Lynnet) only has a claim in the Appellant's insolvency to enforce the obligation to account, to the extent that the third party requires to rank in amongst the general body of creditors for payment, that is not the loss disappearing into a black hole. No one would characterise those that suffer losses as a result of insolvency and there being an insufficiency of funds such that their debtors cannot pay in full as being a loss that falls into a black hole. That is simply an insolvency event regulated by insolvency law. So far as the Lord President (Carloway) and Lord Pentland relied on insolvency as a reason not to recognise the obligation to account they were wrong to do so.

108. The Appellant respectfully submits, therefore, that the Lord President (Carloway) and Lord Pentland have erred in their approach to the obligation to account. In doing so they have alighted on an approach that does not find favour in Scots law (or for that matter, English law).

109. Accordingly, in respect of the third issue, the Inner House was incorrect to consider that, even if, contrary to the foregoing, the Transferred Loss Claim had been relevant in law, it was not properly invoked on the pleadings as a result of (i) a failure to seek a conclusion for payment on behalf of the subsidiary, Lynnet and (ii) a failure to convene Lynnet as a third party.

110. It also follows in respect of the fourth issue that, if damages were recovered, the majority of the Inner House was incorrect to conclude that the mere recovery of damages by the Appellant would not create an obligation to account to Lynnet. It was incorrect because the Court would not (and could not) frame an order in those terms and would frame its order by reference to the obligation to account that arises, not as a matter of fact, but as a matter of the law of transferred loss.

### **VIII. The terms of the Licence**

111. It is unclear if and to what extent the terms of the Licence featured as determining factor in the reasoning of the majority in the Inner House. The Licence provides that:

*“4.2.13 [The Licensee] acknowledges that the Licensor shall at no time become liable to the Licensee for (i) any loss, injury or damage which the Licensee may sustain from a deficiency in any part of the Licence Subjects except in the event of act, omission, default or negligence on the part of the Licensor or those for whom the Licensor is responsible in law or (ii) ... or for damage to any property or for any losses ...*

...

#### *8 Licensor not liable for repairs*

*The Licensee acknowledges and accepts that the Licensee cannot oblige the Licensor to carry out any repairs or other works to the Licence Subjects, and that the Licensor shall at no time become liable to the Licensee for any loss, injury or damage which the Licensee may sustain from any deficiency in any part of the Licence Subjects”.*

112. The Lord President (Carloway) opined that:

*“... the third party (the subsidiary) has expressly disavowed in his licence any right of recovery against the pursuers; thus potentially creating the so-called black hole. It would be baffling if the subsidiary could then sue the licensors’ landlords, who were not even aware of the subsidiary’s existence” (at **paragraph [46]**)*

113. Lord Pentland, in his opinion, opined that:

*“The licence provided in clause 4.2.14 that the pursuers would at no time become liable to Lynnet for any loss the latter might sustain from any deficiency in the premises or damage to any property (except in the case of negligence by the pursuers). Provision to the same effect appears in clause 8. How then can a liability on the part of the pursuers to account to Lynnet for damages for loss of profits be said to arise in view of the express terms of the licence?” (at **paragraph [103]**)*

114. Lord Braid's opinion was that "*the short answer to [this] is that the obligation to account arises from the recovery of damages itself, not from any pre-existing or contractual obligation to account*" (at **paragraph [39]**).
115. Lord Braid is correct. The Appellant is not liable to account to Lynnet because of any disrepair of the premises, as a result of which Lynnet could not trade. Had any such obligation been owed by the Appellant, and if the Appellant were bound to Lynnet to make good losses the latter suffered as a result, there would be no need to invoke the principle of transferred loss since the liability the Appellant incurred to Lynnet would constitute a loss in its own hands which it could recover from the Respondent.
116. Rather, on a proper understanding the Respondent has breached its contract with the Appellant. Because the Respondent has breached its contract with the Appellant, loss has arisen in the hands of Lynnet. The law accepts that this is a circumstance in which a claim for transferred loss can arise. The court will order payment by the Respondent to the Appellant of the sum of money necessary to put the affairs of the Appellant in the position they ought to be in as a result of the Respondent's breach of contract. To achieve that the Court will order payment by the Respondent to the Appellant and ordain the Appellant to account to Lynnet for those proceeds.

#### **IX. The prohibition against sub-letting**

117. Finally, it is provided in the Lease that the Appellant is not to assign or in any other way deal with the tenant's interest in, nor sublet, nor to part with or share the possession or occupation of part as distinct from the whole of the premises, nor to sub underlet the whole the premises (clause 5.3.2).
118. It is not pleaded by the Respondent that the licence granted by the appellant in favour of Lynnet in any way breaches the terms of the Lease. There are no averments of this. If such averments had been made, the Appellant would answer them.

119. In those circumstances, the Lord Ordinary (Braid) was eminently correct to opine that:

*“In any event I consider that if a claim which would otherwise exist is not available to the [Appellant] purely because of the terms of the lease, then it is for the defender to raise that issue in its defences, which it has not done”* (Lord Braid’s Opinion at **paragraph [39]**)

120. By the time the case came to be heard before the First Division, there was still an absence of any pleaded basis to maintain that the terms of the Lease had been breached by the granting of the licence.

121. Yet in the Inner House, Lord Pentland asserted that:

*“A party, such as Lynett, who elects to enter into an unauthorised licence of the premises does so at its own risk”* (at **paragraph [104]**)

122. This is not pleaded. It was accordingly an error of the majority of the Inner House to proceed (as they apparently did) upon a factual assumption that the licence was unlawful.

123. It is not clear if and to what extent the majority of the First Division considered that the prohibition in the Lease against assignation, sub-letting or dealing with the tenant’s interest to be a decisive issue.

124. The Lord President (Carloway) offered various opinions on this (see **paragraph [35]**). They do not fall to be resolved on the basis of the parties’ pleaded cases. But what the Lord President did mention was that there was a prohibition of sub-letting without consent, albeit it was also noted that there was no sub-lease.

125. The fundamental difficulty with this is that if the Respondent’s position is that the Appellant has a claim for Lynnet’s losses, but for Lynnet’s occupation being a breach of the Lease, then it is an issue for the Respondent to have raised in its

pleadings. It has not done so. Had it done so, the Appellant would have answered such averments.

126. Of particular concern is the approach of the Lord President (Carloway) at **paragraph [35]**. Respectfully, it is an approach that puts the cart before the horse. His Lordship opines that, having considered the licence “*that was the manner in which the parties had elected to arrange their affairs*” and that therefore “*if the subsidiary’s losses disappeared into a black hole, it was one of their own creation*”. There is nowhere in the opinion of the Lord President (Carloway) any recognition that the losses – which are the profits of the restaurant that the Respondent let – only arise because of the Respondent’s breach of its obligations under the Lease. It is reasonable to expect that the Respondent landlord would not cause the Premises it has let, by its failures, to be unsuitable for the very purpose for which they were let.

127. In any event, the alienation provisions in the present lease are analogous to the prohibition on assignation which featured in ***Linden Gardens***. In that case, the prohibition on assignation, far from excluding a claim for transferred loss, was instead seen as reinforcing the need for such a claim: see Lord Browne-Wilkinson, at **page 115**. To similar effect in ***Panatown***, Lord Clyde explained, at **page 531**, that:

*“In the St Martins case the employer started off as the owner of the property and subsequently conveyed it to another company. In the present case the employer never was the owner. But that has not featured as a critical consideration in the present appeal and I do not see that that factor affects the application of the exception. In the St Martins case there was a contractual bar on the assignment of rights of action without the consent of the contractor. In the present case the extra qualification was added that the consent should not be unreasonably withheld. But again I do not see that difference as of significance. It does not follow that the presence of a provision enabling assignment without the consent of the contractor excludes the exception. As was held in *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 1 WLR 68 where there is a right to have an assignment of any cause of action accruing to the employer against the C contractor, the exception may still apply so as to enable the assignee to recover substantial damages. It may be that the*

*exception could be excluded through some contractual arrangement between the employer and the third party who sustained the actual loss, but the law would probably be slow to find such an intention established where it would leave the black hole. At least an express provision for assignment of the employer's rights will not suffice”*

128. Accordingly, the Court is invited to find that nothing turns on this issue.

## **X. Summary and Conclusion**

129. The majority of the Inner House has erred. It has failed properly to articulate the concept of transferred loss in Scots law, and failed to apply it to the circumstances pled in this action.

130. Lord President (Carloway’s) analysis of the law, in the Appellant’s respectful submission, fails properly to acknowledge that a general rule is not an all-encompassing rule. As set out above: i) there are exceptions to it and ii) the Appellant places meaningful limits on the extent to which they argue an exception is applicable (contrary to what is said by Lord Pentland at **paragraph [101]**).

131. In the Appellant’s submission, Lord Pentland similarly fails to recognise that there is no closed list of exceptions to the general principle (at **paragraph [95]**). His Lordship’s checklist approach (at **paragraph [99]**) is inconsistent with longstanding authority, as is his Lordship’s analysis at **paragraph [100]** which proceeds on a similar approach of comparing the pleaded circumstances of this case with the English approach to transferred loss. The same approach is again adopted by Lord Pentland at **paragraph [102]**, with his example being flawed.

132. Ultimately, the preconditions set by the majority of the Inner House, for the availability of a transferred loss claim, are in truth the very factors which would negate the existence of such a claim (whether, for example, by demanding contractual arrangements which created a loss in the hands of the Appellant, or by requiring that

there be an intention to benefit Lynnet as a third party, thereby giving rise to enforceable third party rights).

133. For the reasons set out above, it is wrong to suggest that Lord Clyde (or the judges that have followed him) adopted an approach that has no basis in authority (Lord President (Carloway) at **paragraph [38]**), or is without principle (Lord President Carloway at **paragraph [38]**, Lord Pentland at **paragraph [99]**), or has emerged from the ether (Lord President Carloway at **paragraph [46]** and **paragraph [47]**). It is equally wrong to say (as the Lord President (Carloway) did at **paragraph [44]**) that the analysis of the Scottish Law Commission was that Scots law should be confined to, essentially, cases of property transfer. That is not what the **SLC Report** says. Nor is it what Lord Drummond Young concluded in *McLaren, Murdoch and Hamilton* (contrary to what Lord Pentland suggests at **paragraph [98]**), with Lord Drummond Young's approach reflecting a wider, separate Scots law doctrine, in cases where justice requires it. Lord Pentland recognises this approach at **paragraph [98]**.
134. Lord Pentland was correct to focus on the object of the transaction (at **paragraphs [96]** and **[97]**) but erred in his application of this at **paragraph [102]**, failing (as he ought to) to recognise the necessity of using a monetary award of damages to put the Appellant's affairs, as far as possible, in the position they ought to have been but for the Respondent's breach of contract.
135. Ultimately, it appears that the majority in the Inner House acknowledged that transferred loss exists in Scots law in some form, but they nevertheless declined to identify the boundaries of the doctrine (that being, *per* the Lord President, a matter which "may require...a deeper analysis...in an appropriate case" (**paragraph [47]**). Instead, and despite having concluded that English law was not a safe guide to the position in Scots law, they effectively held the Appellant's case to be irrelevant by the application of principles derived from the English case law.
136. In so far as the Lord President (Carloway) and Lord Pentland both considered the black hole to be of the Appellant's and Lynnet's own making (Inner House Decision at **paragraphs [35]**, **[46]**, **[103]** and **[104]**) they were in error. That analysis is flawed – it suggests that the Appellant and Lynnet should have arranged their

affairs so as to make the Appellant liable to Lynnet for the Respondent's breaches of contract. In any case of transferred loss it would be possible to say that parties could have structured their arrangements so as to avoid the existence of a black hole. The real question, however, is whether, in any given case, the circumstances are such that the law will not tolerate the loss to disappear into a black hole.

137. Further and in any event, it is not pleaded by the Respondent that Lynnet's occupation is unauthorised. The Respondent was not entitled to invite the Court to proceed on a premise which it did not offer to prove.
138. There is no requirement, when the Court considers damages ought to be awarded in a transferred loss case, to conclude for payment to the subsidiary, or to convene them as a party (Lord President (Carloway) at **paragraph [36]**, Lord Pentland at **paragraph [99]** and **paragraph [103]**). The obligation to account, like the remedy, arises by operation of law, and is reflected in the Court's order.
139. The Appellant accordingly submits that the appeal should be allowed for the following amongst other.

## REASONS

1. BECAUSE the First Division erred in law in holding that the Appellant's claim for damages in respect of the losses sustained by its subsidiary was irrelevant in law.
2. BECAUSE the First Division erred in law in holding that the said claim for damages was irrelevant in law because it fell neither within the narrow nor the broad grounds of transferred loss recognised in the law of England and Wales.
3. BECAUSE the First Division erred in law in holding that the said claim for damages was irrelevant in law on the basis that the Appellant had not concluded for damages to be paid to its subsidiary and had not convened the subsidiary as a party to the action.

4. BECAUSE the interlocutor appeal against is unfounded in law.

**IN RESPECT WHEREOF**

**David M Thomson K.C.**

**David A Ford, Solicitor Advocate  
Counsel for the Appellant**

**25 March 2026**