Appeal No. UKSC/2025/0034

IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM:
THE COURT OF APPEAL (CIVIL DIVISION) OF ENGLAND AND WALES

B E T W E E N:

CA-2024-000180

THE LONDON STEAM-SHIP OWNERS' MUTUAL INSURANCE ASSOCIATION LIMITED

Appellant

- and -

THE KINGDOM OF SPAIN

Respondent

AND B E T W E E N:

CA-2024-000182

THE LONDON STEAM-SHIP OWNERS' MUTUAL INSURANCE ASSOCIATION LIMITED

Appellant

- and -

THE FRENCH STATE

Respondent

M/T "PRESTIGE"

WRITTEN CASE ON BEHALF OF THE APPELLANT

A INTRODUCTION

1. This is the written case served on behalf of the Appellant, The London Steam-Ship Owners' Mutual Insurance Association Limited (the "**Club**"), in support of its Appeal against paragraphs 6-9, 11-13, and 15 of the Order of the Court of Appeal dated 22 January 2025, varying the Orders of Mr Justice Butcher against the Respondents, the Kingdom of Spain ("**Spain**") and the French State ("**France**") (together, the "**States**"), dated 15 December 2023 (sealed on 22 December 2023). 6/148 8/219 9/227

2. This Appeal arises against the background of six incontrovertible facts. **First**, the States are bound in equity to arbitrate the non-CLC claims made (in the shoes of the assured)

against the Club: in 2013, Mr Alistair Schaff K.C. granted declarations to that effect[1] and Hamblen J entered judgments of the High Court of England in their terms (the "**Hamblen** 20/742 **Judgments**").[2] **Second**, this is a commercial dispute in relation to which the States have 21/747 no entitlement to State immunity; such was the clear ruling of the Court of Appeal in The 98/2567 Prestige (No. 3) [2022] 1 WLR 3434, at [33]-[42] and [56]-[58]. **Third**, the States 98/2576 (unlike the assured who is the original counterparty or any other private third party in the States' position) are immune from injunctive relief, including anti-suit relief to enforce forum obligations, by reason of s.13(2)(a) of the State Immunity Act 1978 (the "**1978** 34/912 **Act**"). **Fourth**, the States' non-CLC claims were, and have always been, bound to fail as a matter of English law, the proper law of the insurance, in the light of the "pay to be paid" clause in the policy, such that Mr Schaff K.C. also granted declarations of non-liability, again reflected in the Hamblen Judgments. **Fifth,** an appeal to the Court of Appeal against the Hamblen Judgments was dismissed and the States declined to seek permission to appeal to the Supreme Court.[3] **Sixth**, as the Chronology shows, the States have acted in breach of their obligations to arbitrate notwithstanding the finality of the Hamblen Judgments and the clarity of the declarations they contain: Sir Peter Gross and Dame Elizabeth Gloster made declarations reflecting such breaches.[4] There was no domestic law challenge to their Awards in that respect.

3. Such breaches of equitable duty have engendered much complex litigation before arbitrators and in the Courts of England and the CJEU; and in Spain, resulting in the conflicting Spanish Judgment (a judgment that simply ignores the pay to be paid clause upon which the liability of a P&I insurer such as the Club depends). The Club has suffered and/or may suffer losses of two kinds: (i) the costs incurred so far in mitigating its loss in the Spanish quantum proceedings and the costs of any future defence of enforcement proceedings in foreign courts in further breaches of obligation; (ii) the substantial sums awarded in the Spanish Judgment and in relation to which the Club has every reason to suppose that, having definitively failed in their attempts to have that Judgment recognised in England, the States will continue in their efforts to enforce in

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[1] SOFI at paragraph 11 {ref}. 3/15
[2] SOFI at paragraphs 12-13 {ref}. 3/16
[3] SOFI at paragraph 15 {ref}.
[4] Second Partial Award of Sir Peter Gross, paragraph (A)(1) {ref} and Second Partial Award 15/512
of Dame Elizabeth Gloster at paragraph (A)(1) {ref}. See also Judgment France, [60] {ref}. 17/643
13/358

other jurisdictions where the Club may have assets. If so, the Club's future losses will be the product of: (i) the past breaches that led to the Spanish Judgment; and (ii) fresh breaches in the attempts to enforce such Spanish Judgment.

4. Although it does not affect the jurisdictional question of law before the Supreme Court (being relevant only to discretion),[5] it is noted that the flouting of the English Court's various rulings is particularly egregious in this case and take a form no reputable private party (not immune from coercive orders) would replicate. The States have consistently, systemically, and contumaciously ignored the earlier decisions of the English Courts by: (i) continuing to pursue the Spanish Proceedings to a final judgment on appeal; and (ii) then, in the case of Spain, seeking to enforce such judgment in this jurisdiction. That course was pursued notwithstanding the fact that the declarations were made in proceedings to which the States submitted; indeed the States positively **invited** the High Court to determine the question of whether they were bound to arbitrate the non-CLC claims.[6] Having lost, the continued pursuit of the litigation in Spain in the face of these binding decisions was "*vexatious and oppressive*", "*highly unjust*", and indeed an "*abuse*"[7] and must be met with a proper remedial response.

5. Against this backdrop, the core question for the Supreme Court is what, if any, relief is available to remedy these established breaches of obligation, both: (i) to compensate for past losses; and (ii) to indemnify the Club from losses that will flow from past and future breaches should the States seek to enforce the Spanish Judgment abroad. Butcher J and the Arbitrators, Sir Peter Gross and Dame Elizabeth Gloster (each sitting as sole arbitrators in separate references for each State), held that principle and logic compelled the same conclusion: there is jurisdiction to award equitable compensation in a case of conditional benefit and this was a rational, principled and incremental development in the law.

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[5] Cf the views of the Court of Appeal on the relevance of the facts to this appeal.

[6] SOFI at paragraph 12 {ref}. 3/16

[7] Masri v Consolidated Contractors International (UK) Ltd (No. 3) [2009] QB 503, [95] per Lawrence Collins LJ; and Michael Wilson v Emmott [2018] 2 All ER (Comm) 737, [53]-[58] per Sir Terence Etherton MR. See further Dame Elizabeth Gloster's findings at [198]-[199] {ref} that France's conduct had "*offend[ed] norms of international commercial law*" and was *"vexatious and abusive conduct"*, also recorded in Judgment France at [80] {ref}. 76/1996 59/1530 16/633 13/363

6. The Court of Appeal below is the lone voice in support of the view that no monetary remedy is available in a case of conditional benefit absent the power to grant injunctive relief. It held that, unless a coercive order by way of injunction is available from the outset of proceedings (which it will not be against a State given the immunity conferred by s.13(2)(a) of the 1978 Act), no monetary remedy can be granted in a conditional benefit case, with a wronged claimant being confined to a mere declaration of rights. And, of course, such declarations may, faced with a party that has already proven itself fully prepared repeatedly to ignore them, be no guarantee of a remedy at all.

7. In the Club's submission, the result of the Court of Appeal's reasoning is thus a licence for a wrongdoing State to violate the equitable rights of the claimant without any meaningful right of redress under English law. That being so, the Court of Appeal's conclusion cannot be correct: it is inequitable, both in the broad sense and in the technical sense addressed in this written case, if two sovereign States were to be permitted to breach their obligations with practical impunity, obtaining a benefit and causing a loss to the Club of c.US$1 billion or more. It misunderstands the function of the conditional benefit principle (which is to place controls on exceptions to privity of contract invoked by third parties); it misunderstands the limited substantive effects of s.2 of the Chancery Amendment Act 1858 (or "**Lord Cairns' Act**"); and it operates contrary to the policy of the 1978 Act. 33/906

8. Moreover, the Court of Appeal went beyond the narrow question of remedial power that was the sole topic on which they had jurisdiction to opine in these appeals under s.69 of the Arbitration Act 1996 (the "**1996 Act**") and held that the indemnities should not have been awarded ***on the facts of this case***. In taking this course, the Court of Appeal impermissibly considered and made new findings on several new matters, transgressing a number of the jurisdictional limits under the s.69 procedure and in any event making further errors of fact and law that did not justify its interference with the Awards. 36/932

9. In those circumstances, the Club appeals (with the permission of the Supreme Court) on the following grounds of appeal:

   9.1. The Court of Appeal erred in concluding that a court or tribunal in an *ad hoc* arbitration seated in London under the 1996 Act had no jurisdiction or power to award equitable compensation for breach of an equitable obligation to arbitrate in a case of conditional benefit against a State ("**Ground 1**").

9.2. The Court of Appeal erred in exceeding the statutory limits of the scope of the appeal under s.69 of the 1996 Act ("**Ground 2**").

B GROUND 1: EQUITABLE COMPENSATION

(1) The Club's positive case

10. Ground 1 of the Appeal raises an issue of pure jurisdiction or power as to the availability of equitable compensation in a case of "conditional benefit". The issue of law arises on the appeal in the following way: where a third party to a contract (hereafter the "**third party**") asserts a contractual right which he has derived from another against a promisor (hereafter the "**promisor**"), but acts in breach of a burden that inextricably conditions the exercise of that right as a matter of equity, can a court or tribunal award equitable compensation to the innocent promisor?

11. In the Club's submission, the answer to that question is "yes". The third party must not be permitted, in enforcing the right of another, to obtain a better right than that transferred to him and the promisor must not be placed in a worse position regarding that obligation than he originally bargained for. Equity will intervene so as to protect the promisor against the third party's unconscionable conduct in acting inconsistently with the indissociable limits placed upon the derived right the third party seeks to enjoy. Equity has a range of remedial tools to ensure that in substance the promisor is placed in the position it would have been in had its contractual counterparty performed the obligations correctly. This may include an injunction to compel the exercise of the right in accordance with the burden or, in an appropriate case the Court can and should also provide a monetary remedy requiring the third party to disgorge the benefit and/or compensate for the loss caused by pursuing the right in disregard of the burden.

12. It makes no difference to this analysis that the wrongdoing party is a State or that other remedies, notably in the form of an injunction or damages under section 50 of the Senior Courts Act 1981 (the modern successor to section 2 of Lord Cairns' Act) ("**s.50 damages**"), are unavailable, inappropriate, or incapable of remedying the position on particular facts.

13. The case law and commentary on this question is favourable to the grant of equitable compensation in these circumstances:

13.1. In addition to the reasoned decisions of the Arbitrators and the Learned Judge, Sir Michael Burton GBE (sitting as a High Court Judge) reached the same conclusion in Argos Pereira España SL v Athenian Marine Ltd (The Frio Dolphin) [2022] 1 All ER (Comm) 345, [5]-[19]. Prior judicial opinion on the point is also supportive: London Steam-Ship Owners' Mutual Insurance Association Ltd v Kingdom of Spain (The Prestige (No 3)) [2020] 1 WLR 4943, [207]-[212] per Henshaw J (good arguable case); [2022] 1 WLR 3434, *obiter* [125] per Males, Popplewell, and Phillips LJJ; and West Tankers Inc v Allianz SpA (The Front Comor) [2012] 2 All ER (Comm) 395, *obiter* [76]-[77] per Flaux J.[8] 41/1042 97/2543 107/2811

13.2. As to extra-judicial and academic opinion: see Prof Gregory Tolhurst, *The Assignment of Contractual Rights* (2nd edn, Hart Publishing), at [6.100]-[6.130] and [8.16]-[8.23]; Sir Andrew Henshaw, '*Equity's support for commercial bargains*', Commercial Court Seminar dated 8 May 2025, at paragraphs 15-21; Prof Adrian Briggs, '*The Empire Strikes Back*' [2020] LMCLQ 3, at p 6; and Thomas Raphael K.C., *The Anti-Suit Injunction* (2nd edn, Oxford University Press), at paragraphs 14.48-14.52. 124/3140 119/3082 115/2990 122/3102

14. The Club agrees with the conclusions reached in the cases and commentary. It advances three core submissions on this Appeal, which are addressed in the sections below:

14.1. The existence of jurisdiction to award equitable compensation for breach of an equitable obligation to arbitrate in a case of conditional benefit is consistent with and supported by: (i) the fundamental equitable function of the conditional benefit principle; and (ii) the authorities in which that principle has been developed and applied.

14.2. The recognition of a jurisdiction to award equitable compensation in this case is consistent with the wider case law on equitable compensation and, if not already established, constitutes a principled, incremental development which the Supreme Court should confirm.

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[8] It appears the court, which referred throughout to "*equitable damages*", had in contemplation a case based on compensation in equity and/or s.50 damages: see [63] (recording counsel's submissions). See [104] per Dame Elizabeth Gloster {ref} and [179] per Sir Geoffrey Vos MR {ref}. 16/576 7/198

14.3. The recognition of jurisdiction to award equitable compensation is justified applying well-established first principles pertaining to the equitable powers, remedies, and procedures of the High Court of England.

(a) Conditional benefit: the function of and authorities pertaining to the principle

15. The Club's first core submission is that the existence of jurisdiction to award equitable compensation for breach of an equitable obligation to arbitrate in a case of conditional benefit is consistent with and supported by the function of the principle and the authorities in which it has been developed and applied.

(i) Summary of the development of the conditional benefit principle

16. The conditional benefit principle is "*well established*". It was described most recently by the Supreme Court (sitting in a banc of seven Justices) in Aspen Underwriting Ltd v Credit Europe Bank NV [2021] AC 493 at [26] per Lord Hodge DPSC in the following terms: 43/1104

> "*It is trite law that an assignment transfers rights under a contract but, absent the consent of the party to whom contractual obligations are owed, cannot transfer those obligations: Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd [1902] 2 KB 660, 668-670, per Collins MR. An assignment of contractual rights does not make the assignee a party to the contract. It is nonetheless well established that a contractual right may be conditional or qualified. If so, its assignment does not allow the assignee to exercise the right without being subject to the conditions or qualifications in question. As Sir Robert Megarry V-C stated in Tito v Waddell (No 2) [1977] Ch 106, 290, 'you take the right as it stands, and you cannot pick out the good and reject the bad'. This concept, which has often been described as 'conditional benefit', is to the effect that an assignee cannot assert its claim under a contract in a way which is inconsistent with the terms of the contract.*"

17. It is similarly "*well established*" that "*a person who becomes entitled to enforce an obligation which is subject to an arbitration clause must do so by arbitration in accordance with the clause*": Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat ve Ticaret AS (The Yusuf Cepnioglu) [2016] 3 All ER 697 at [46] per Moore-Bick LJ. The Supreme Court has recognised that this is a specific application of the wider conditional benefit principle 86/2297

rather than a discrete rule: Aspen Underwriting at [26]-[28].[9] This is the position in relation to arbitration agreements and exclusive jurisdiction clauses and applies to transferees of the rights of an insolvent assured under the Third Parties (Rights Against Insurers) Act 1930,[10] assignees and subrogees of contractual and tortious rights[11], as well as to those exercising statutory rights of direct action against a liability insurer arising under foreign legislation that is characterised, as in this case, under English conflict of laws rules as a right to enforce the policy of insurance.[12] 43/1104

18. The law of conditional benefit has developed in different fields, predominantly in cases concerning: (i) successors-in-title to covenants in respect of estates; and (ii) as above, third-party transferees of contractual or tortious rights that are subject to exclusive forum agreements. The cases have to some extent developed independently in these areas although, as noted above, it has been recognised that the decisions engage the same principle. By way of overview, in addition to the forum cases identified above, the following are the principal strands of authority from which the modern principles on conditional benefit case are derived:

    18.1. In a number of older authorities relating to **mining rights**, the Courts articulated and relied on conditional benefit reasoning to hold that successors-in-title to

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[9] See also Shiffahrtsgesellschaft Detlev von Appen GmbH v Voest Alpine International GmbH 85/2277
(The Jay Bola) [1997] 2 Lloyd's Rep 279 (CA), 291 rhc per Sir Richard Scott V-C citing Tito 102/2638
v Waddell (No. 2) [1977] Ch 106; The Yusuf Cepnioglu, [24] per Longmore LJ; The Prestige 86/2290
(No. 3), [42]-[87] per Henshaw J and [60]-[69] per Males, Popplewell and Phillips LJJ; The 97/2506
Frio Dolphin, [5]-[19] esp [16(v)], [19]. 41/1042

[10] E.g. The Padre Island (No. 1) [1984] 2 Lloyd's Rep 408, esp 410-412 and 414 per Legatt J 89/2349
(considering earlier authorities on the 1930 Act); and The Fanti and The Padre Island (No. 2) 64/1613
[1991] 2 AC 1, 33 per Lord Goff (with whom Lord Ackner agreed).

[11] E.g. The Jay Bola, 285-286 and 289 rhc per Hobhouse LJ (with whom Morritt LJ agreed) 85/2271
and 291 per Sir Richard Scott V-C; Glencore International AG v Metro Trading International 68/1722
Inc [1999] 2 All ER (Comm) 899, 916-918 per Moore-Bick J; West Tankers Inc v Allianz SpA 106/2769
(The Front Comor) [2005] 2 All ER (Comm) 240, [15]-[34], [49]-[73] per Colman J; Airbus 40/1030
SAS v Generali Italia SpA [2019] 4 All ER 745, [64], [83], [85]-[97] per Males LJ; Aspen 43/1104
Underwriting, [26]-[28] per Lord Hodge DPSC.

[12] In addition to the present case, see the Through Transport litigation [2004] 1 Lloyd's Rep 99/2538
206 (HC), esp [9], [20], [30], [34], [36], [39] per Moore-Bick J; [2005] 1 All ER (Comm) 715 100/2593
(CA), esp [7], [16], [21], [52]-[60], [63]-[65], [70], [98(iv)] per Clarke LJ; [2005] 2 Lloyd's 101/2627
Rep 378 (HC), [11]-[28] per Moore-Bick J; The Yusuf Cepnioglu esp [22]-[35] per Longmore 86/2279
LJ and [46]-[56] per Moore-Bick LJ.

mining rights were bound to comply with the conditions attached to those rights obliging them to compensate and/or repair harm to the surface caused by working the mines: Aspden v Seddon (No. 2) (1876) 1 Ex D 496 at 503-504 and 506 per 42/1061
Bramwell B and 507-508 per Cleasby B and on appeal 509 per James LJ and 510 per Mellish LJ (with whom Baggallay JA and Quain J agreed); Chamber Colliery 49/1316
Company Limited v Twyerould [1915] 1 Ch 268 (HL)[13] at 272-273 per Lord Watson; and Westhoughton Urban District Council v Wigan Coal & Iron Co Ltd 108/2824
[1919] 1 Ch 159 (CA), 171-172 per Swinfen Eady MR and 174-176 per Duke LJ.

18.2. Halsall v Brizell [1957] Ch 169 concerned a summons seeking determination of 71/1872
the question of whether the plaintiffs "*were entitled to require the defendants [as successors-in-title to land on an estate under a deed] to pay to the plaintiffs*" certain sums in respect of maintenance of roads and other facilities due under the deed. Upjohn J referred to "*ancient law that a man cannot take benefit under a deed without subscribing to the obligations thereunder*" and held that the defendants were not entitled to enjoy the benefit of using the roads and other facilities pursuant to the deed without undertaking the obligations (viz. the obligation to pay): see at 182-183.[14] 71/1885

18.3. In Tito v Waddell (No. 2), the conditional benefit principle (as distinct from a 102/2638
wider "pure principle" of benefit and burden that was also considered) was summarised by Sir Robert Megarry V-C in the following terms, in a passage cited with approval in the later conditional benefit cases:[15]

> "*An instrument may be framed so that it confers only a conditional or qualified right, the condition or qualification being that certain restrictions shall be observed or certain burdens assumed, such as an obligation to make certain payments. Such restrictions or qualifications are an intrinsic part of the right:*

[13] Dated 20 July 1893 but reported as a note to the above report.

[14] In the event, Upjohn J held that the basis on which the payments had been calculated under a resolution made at a general meeting was outside the powers under the deed and invalid: see 71/1886
183-184.

[15] Although the House of Lords in Rhone v Stephens [1994] AC 310, 322-323 disapproved of 82/2196
Sir Robert Megarry V-C's wider "pure principle", it upheld the existence of the conditional benefit principle: see further below. This passage of Tito v Waddell (No. 2), or parts thereof, 102/2638
have been cited with approval in Budana v Leeds Teaching Hospitals NHS Trust (Law Society 47/1212
intervening) [2018] 1 WLR 1965 at [26(iii)] per Gloster LJ; Aspen Underwriting at [26] per 43/1104
Lord Hodge DPSC.

you take the right as it stands, and you cannot pick out the good and reject the bad. In such cases it is not only the original grantee who is bound by the burden: his successors in title are unable to take the right without also assuming the burden. The benefit and the burden have been annexed to each other ab initio, and so the benefit is only a conditional benefit."

18.4. The Padre Island (No. 1) and The Fanti and The Padre Island (No. 2) considered the extent to which a third party claiming under the Third Parties (Rights against Insurers) Act 1930 was bound by the conditions in the policy. In the former case, Leggatt J held that the third party was bound by the arbitration agreement. In the latter case, the House of Lords held that it was also bound by the pay to be paid clause and, in analysing the arbitration clause, Lord Goff (with whom Lord Ackner agreed) held at 33C that "*[t]he agreement to arbitrate is one which regulates the means by which the transferred right is to be enforced against the club. As such, it is inevitable that such an agreement must be treated as transferred to the statutory transferee as* ***part of, or as inseparably connected*** *with, the member's rights against the club under the rules in respect of the relevant liability*." 89/2349 64/1613 64/1620

18.5. Rhone v Stephens concerned a claim to enforce a covenant to maintain a roof against a successor-in-title to the covenant. The House of Lords approved Halsall v Brizell as an example of a conditional benefit case, holding that "***[c]onditions can be attached to the exercise of a power*** *in express terms or by implication*". It further clarified that for the conditional benefit principle to apply, the condition must be "*relevant to the exercise of the right*" and the third party must be able, at least in theory, to choose between enjoying the right and bearing the burden or alternatively giving up the right and avoiding the burden (holding on the facts that the principle did not apply): at 322-323 per Lord Templeman. 82/2184 71/1872 82/2196

18.6. In The Jay Bola the Court of Appeal considered an application for an anti-suit injunction to restrain foreign proceedings commenced by insurers directly against time charterers in which the insurers had sought to enforce subrogated rights under a voyage charter which was subject to an arbitration agreement. The Court of Appeal upheld the injunction granted at first instance, reasoning as follows: 85/2265

18.6.1. At 286 lhc, Hobhouse LJ (with whom Morritt LJ agreed) analysed a number of earlier authorities and held that these: 85/2272 "*confirm that the rights which the insurance company has acquired are rights which are subject to the arbitration clause. The insurance company has the right to refer the claim to arbitration, obtain if it can an award in its favour from the arbitrators, and enforce the obligation of the time charterers to pay that award.* ***Likewise, the insurance company is not entitled to assert its claim inconsistently with the terms of the contract. One of the terms of the contract is that, in the event of dispute, the claim must be referred to arbitration. The insurance company is not entitled to enforce its right without also recognizing the obligation to arbitrate***."

18.6.2. At 291, in a concurring judgment, Sir Richard Scott V-C held: 85/2277

"*WAV is bound by the arbitration agreement not because there is any privity of contract between WAV and DVA but because Voest's contractual rights under the sub-charter-party, to the benefit of which WAV has become entitled by subrogation, are subject to the arbitration agreement which, too, is part of the sub-charter-party.* ***WAV cannot enforce those contractual rights without accepting the contractual burden, in the form of the arbitration agreement to which those rights are subject (cf. Halsall v. Brizel, [1957] Ch. 169 and Tito v. Waddell (No. 2), [1977] Ch. 106 at p. 309).*** *WAV is, through subrogation, an assignee from Voest of Voest's contractual rights against DVA. DVA is contractually entitled, whether as against Voest or any assignee from Voest, to require the enforcement of those rights to be pursued by arbitration.* ***WAV's attempt to enforce those rights otherwise than by arbitration is a breach of DVA's contractual entitlement. I agree with Lord Justice Hobhouse that DVA's remedy is, prima facie, the grant of an injunction to restrain the attempt***."

18.7. The conditional benefit principle has since been applied in a number of decisions of the Court of Appeal in estates cases entailing monetary rather than injunctive relief: Thamesmead v Allotey (1998) 30 HLR 1052; Davies v Jones [2010] 2 All ER (Comm) 755; Wilkinson v Kerdene Ltd [2013] 2 EGLR 163; and Elwood v Goodman [2014] Ch 442. Davies related to whether retention provisions in a sale contract bound a successor-in-title and the other cases were claims to recover arrears of maintenance and service charges against successors-in-title. 94/2437 53/1417 109/2831 58/1507

18.8. The principle was also considered in Budana in the context of conditional fee agreements where the majority (Gloster and Beatson LJJ) discussed the principle but held on the facts it was inapplicable and that there had been a novation instead. Gloster LJ summarised the principle at [26(iii)] as: "*where a right under a contract was conditional upon, or qualified by, performance of some obligation in return for which the right has been granted, an assignee of the benefit of such* 47/1212 47/1225

right will only be entitled to exercise the right subject to performance of the burden" (citing Tito v Waddell (No. 2), Rhone v Stephens, and Davies v Jones). 102/2638
Her Ladyship further noted at [62(iv)] that the principle "*involves **the imposition by law** on a contractual assignee or successor in title of a positive obligation under the relevant contract or conveyance, notwithstanding the absence of any contractual or "estate" obligation to the third party beneficiary of the obligation*" (emphasis in original). 82/2184 53/1417 47/1238

(ii) The fundamental function of the conditional benefit principle supports the availability of equitable compensation

19. There are three themes which emerge from the authorities as to the fundamental function of the conditional benefit principle. Each of these themes requires the recognition of a jurisdiction to grant a remedy of equitable compensation where the third party acts in disregard of the burden to which it has become bound.

20. **A principle of consistency**. The application of the conditional benefit principle is founded on the burden being characterised as an inseparable component of or limitation upon the right which the third party has enforced. Given this inextricable link, it is a basic principle of consistency that if the third party has enjoyed the benefit of the right, he must comply with and *perform* the corollary obligation (see the quote from Budana 47/1212
above), failing which there must be real and effective remedies, including equitable compensation in appropriate cases:

20.1. The authorities have repeatedly emphasised the inseverability of the benefit from the burden. Thus, the burden is described as an "***inherent qualification***" in the right granted (Chamber Colliery v Twyerould at 273 per Lord Watson); the 49/1317
restrictions or qualifications being "*an **intrinsic part of the right***" and "*[t]he benefit and the burden have been **annexed to each other ab initio***" (Tito v 102/2657
Waddell (No. 2) at 290 per Sir Robert Megarry V-C); "*The agreement to arbitrate…must be treated as transferred to the statutory transferee as **part of, or as inseparably connected** with, the member's rights against the club*" (The Fanti 64/1620
and The Padre Island (No. 2) at 33C-D per Lord Goff); "*their duty to refer their claim to arbitration is an **inseparable component of the subject matter transferred***" to the third party (The Front Comor at [33] per Colman J); "*The* 106/2773
*arbitration agreement becomes binding on the [third party] because **it forms an***

integral part *of the contract giving rise to the obligation…*" (<u>The Yusuf Cepnioglu</u> at [47] per Moore-Bick LJ). 86/2297

20.2. It follows that, as a matter of **consistency**, if the third party takes the benefit of the right he must bear the burden which is attached thereto, including by asserting it in accordance with and/or by performing any attendant positive obligation. See:

20.2.1. <u>Tito v Waddell (No. 2)</u> at 289G per Sir Robert Megarry V-C referring to the "***simple principle of ordinary fairness <u>and consistency</u>*** *that from the earliest days most of us heard in the form 'You can't have it both ways,' or 'You can't eat your cake and have it too,' or 'You can't blow hot and cold.'…*" and, having noted that the restrictions or qualifications are an intrinsic part of the right, *"**You take the right as it stands, and you cannot pick out the good and reject the bad**.*" (at 290B, cited in <u>Aspen Underwriting</u> at [26] per Lord Hodge DPSC). 102/2656 43/1104

20.2.2. <u>The Jay Bola</u> at 286 lhc per Hobhouse LJ (cited with approval in subsequent case law including <u>The Yusuf Cepnioglu</u> at [23]-[25] per Longmore LJ (with whom McFarlane and Moore-Bick LJJ agreed)): "*Likewise,* ***the insurance company is not entitled to assert its claim <u>inconsistently</u> with the terms of the contract****. One of the terms of the contract is that, in the event of dispute, the claim must be referred to arbitration. The insurance company is not entitled to enforce its right without also recognizing the obligation to arbitrate.*"[16] 85/2272 86/2288

20.2.3. <u>Aspen Underwriting</u> at [26] per Lord Hodge DPSC approving the reasoning of Hobhouse LJ as being the "*best encapsulation*" of the principle, because "*[t]his formulation emphasises the constraint on the assertion of a right as* **being the requirement to avoid inconsistency**". 43/1104

20.3. Given that the burden is part of or an inseparable component of the right, consistency requires that there must be **real and effective** remedies to ensure that the third party only takes the benefit by also performing the indissociable burdens so that they are not, in practice, able to pick out the good and reject the bad.

[16] The principle of avoiding inconsistency was then applied in <u>The Front Comor</u> at [68], [70] and [71] per Colman J and in <u>Airbus</u> at [95] per Males LJ. 106/2786 40/1036

However, the absence of a monetary remedy **would** enable the third party, immune for whatever reason from injunctive relief (through no fault of the promisor), to assert its claim inconsistently with the terms of the contract, contrary to the approach required by the authorities. This is unprincipled: the conditional benefit principle simply does not allow for the third party to enjoy the benefit, subject only to a neutered version of the burden i.e. one that can be disregarded without financial redress; the third party must be, as Moore-Bick J put it in Through Transport (No. 2) at [22] "*bound by the arbitration agreement **as a whole***". 101/2634

20.4. The above considers the **internal** consistency of the third party's position, prohibiting him from picking and choosing parts of an inseparable bundle of rights and obligations. There is a further aspect of **external** consistency: the third party can be in no better position than the person from whom he derived his right;[17] and a transfer of contractual rights cannot act to the prejudice of, or increase the burden on, the promisor without their consent. If there were no jurisdiction to grant equitable compensation, further external inconsistency would arise: the States **would** be in a better position than the assured from whom they derived their rights because the States could (unlike the assured) escape without any financial liability despite continuing to ignore the arbitration agreement. For these reasons too, equitable compensation should be available as a remedy.

21. **A principle giving rise to equitable rights and obligations which are equivalent to contract**. This is a further explanation of the operation of the conditional benefit principle which has been adopted in the authorities. Since the equitable limits and obligations which arise are designed to replicate those arising under the original contract, the equivalent range of remedies ought to be available viz. injunctions and monetary compensation where the burden is breached:

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[17] See The Fanti and The Padre Island (No. 2) at 31H per Lord Goff (in relation to the pay to be paid clause): "*the statutory transfer of his right to a third party cannot put the third party in any better position than the member. It is as simple as that*"; Glencore v Metro at 917g per Moore-Bick J: "*The ordinary rule is that an assignee of a chose in action under English law cannot be better off than the assignor and so takes the chose assigned to him together with any restrictions attaching to it, including an exclusive jurisdiction clause.*" 64/1618 68/1723

21.1. The authorities have consistently analysed the conditional benefit principle as one giving rise to **equitable rights and obligations** modelled on the original contractual obligation or deed. See e.g.: Halsall v Brizell at 183 per Upjohn J 71/1886
("*undertaking the obligations*" under the deeds); The Yusuf Cepnioglu at [49] per 86/2297
Moore-Bick LJ (the "*right not to be vexed by proceedings otherwise than in arbitration that equity will intervene to protect"*); and Budana at [62(iii)] per 47/1238
Gloster LJ (the "*imposition by law…of a positive obligation*").

21.2. Further, the Court of Appeal has made clear that these equitable rights and obligations are fully **equivalent** to – i.e. an exact equitable simile of – those which arise as between the original contracting parties:

21.2.1. In Airbus, having held at [95] that "*an English arbitration or jurisdiction* 40/1036
*clause **gives rise to an equitable right** enforceable against subrogated insurers who seek to act inconsistently with the clause*", Males LJ held at [96] that the position is as follows:

> *"(1) Insurers exercising rights of subrogation to make a non-contractual claim are bound by an English arbitration or jurisdiction clause **to the same extent** as their insured would have been.*
>
> *(2) Whereas the commencement and pursuit of proceedings contrary to the terms of an arbitration or jurisdiction clause by the insured would constitute a breach of contract, the commencement and pursuit of such proceedings by insurers **constitutes a breach, not of the contract but of an equivalent equitable obligation which the English court will protect**.*
>
> *(3) The remedies available in such a case include the grant of a declaration in an appropriate case."* (See also at [83]). 40/1033

21.2.2. The equivalence of the rights and obligations as between contract and equity are further demonstrated by: (i) s.82(2) of the 1996 Act, providing that references in Part I of the Act to a party include any person "*claiming under or through a party to the agreement*", and applicable in cases of conditional benefit;[18] (ii) the fact that service out for conditional benefit forum cases is and was always permitted under the contractual

[18] See e.g. The Jay Bola at 285 rhc per Hobhouse LJ and The Prestige (No. 2) at [56] per Moore- 85/2271
Bick LJ. 96/2486

gateways[19]; and (iii) the Court of Appeal's confirmation that in granting anti-suit injunctions in derived rights cases, *The Angelic Grace* principles apply "*by parity of reasoning*": see The Yusuf Cepnioglu, [32] per 86/2293
Longmore LJ. Moore-Bick LJ agreed and held at [55]: 86/2299

> *"The Jay Bola proceeds on the basis that the right to have the claim against it determined by arbitration is an incident of the obligation which the claimant is seeking to enforce and does not depend on the existence of a contract between the claimant and the defendant. If that is right, there is no distinction of principle between the position of a claimant who is an original party to a contract containing an arbitration clause and one who is a remote party in the sense described earlier.* ***The grounds upon which equity will intervene, as explained in The Jay Bola, are the same in each case, namely, to protect the defendant's right to have the claim determined in arbitration.***"

21.3. This further rationale also supports a monetary remedy being available in the present case and in any other case where an injunction will not fully protect the promisor from harm. It is well established that as between original contracting parties, a claim in contract lies for breach of a jurisdiction or arbitration agreement, sounding in damages, where, for whatever reason, such harm has not been averted by the grant of injunctive relief: see D Foxton et al, *Mustill & Boyd:* 117/3006
Commercial and Investor State Arbitration (3rd edn, LexisNexis), at paragraphs 6.129-6.150.[20] It follows that a breach of the "*equivalent equitable obligation*"

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[19] See, in relation to RSC Order 11 r.1(d), The Jay Bola at 285 rhc to 288 lhc per Hobhouse LJ 85/2274
and 291 rhc per Sir Richard Scott V-C; and in relation to CPR PD6B para 3.1(6), The Yusuf 86/2296
Cepnioglu [2015] 1 All ER (Comm) 966, [45]-[47] per Teare J.

[20] See in particular Ellerman Lines Ltd v Read [1928] 2 KB 144 (CA); Union Discount Co Ltd 57/1492
v Zoller [2002] 1 WLR 1517 (CA); Starlight Shipping Co v Allianz Marine & Aviation 91/2373
Versicherungs AG (The Alexandros T) [2014] 1 All ER 590, [132] per Lord Neuberger PSC 92/2421
and [156] per Lord Mance JSC; and (on the resumed appeal) [2014] 2 Lloyd's Rep 544 (CA), [19]-[20] per Longmore LJ; CMA CGM SA v Hyundai MIPO Dockyard Co Ltd [2009] 1 All 50/1323
ER (Comm) 568, [9]-[10], [37]-[41] per Burton J; Compania Sud Americana de Vapores SA v 51/1343
Hin-Pro International Logistics Ltd [2015] 1 Lloyd's Rep 301, [37]-[40] per Cooke J (undefended). Where ascertainment of the loss may depend on future events, relief may be granted by way of an indemnity as one of the remedial options on standard principles (as to which, see Total Liban SA v Vitol Energy [2001] 1 QB 643, 651-652, 663-664 per Peter Gross Q.C. and the cases cited therein; and Trinity Logistics USA Inc v Wolff [2019] 1 WLR 3997, [30], [53]-[57] per Longmore LJ).

should, where necessary, be met with an equivalent remedy in equity viz. a claim for equitable compensation.[21]

21.4. This outcome can also readily be conceptualised in terms of primary and secondary rights and obligations.[22] Where the third party becomes subject to a primary obligation to do or not to do a certain act, if he breaches that obligation he comes under a secondary obligation to pay damages or compensation in respect of losses caused by his breach.[23] In the present context, the States have breached their primary equitable obligations to arbitrate and they should be held to come under a secondary obligation to pay equitable compensation in respect of losses flowing therefrom.[24]

22. **A principle of fairness**. The final theme is an obvious but no less important one – the conditional benefit principle exists to ensure fairness and justice between the parties:

22.1. See, for example: (i) Tito v Waddell (No. 2) at 290 per Sir Robert Megarry V-C referring to principles of "*ordinary fairness*"; (ii) Bee v Thompson [2010] Ch 412 (CA) at [32] per Mummery LJ stating that "*it is a useful principle of justice*" (though it was unnecessary to apply in that case). 102/2657

22.2. The argument as to fairness is self-evident and explained above. The States have relied on the assured's rights against the Club and by ignoring the arbitration agreement have wrongfully obtained extremely substantial judgments in their favour. It would obviously be unfair to allow them to retain that benefit and face no financial remedy. There is no logical reason why the availability of relief should depend on the adventitious availability of an injunction and there is no

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[21] See [180] per Sir Peter Gross {ref}. Indeed, a distinction between law and equity in this situation lacks any proper justification and should be rejected: A Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (4th edn, Oxford University Press) p 520. 14/455

[22] In the context of equitable rights, see C Mitchell, '*Equitable Rights and Wrongs*' (2006) 59(1) Current Legal Problems 267 conceptualising equitable remedies in terms of protecting primary or secondary rights.

[23] See C Rickett, '*Equitable Compensation: Towards a Blueprint?*' (2003) 25(1) Syd LR 31 at 33 analysing equitable compensation by reference to primary and secondary rights: "*if a primary duty in equity is not performed, that breach will give rise to a secondary right in the person to whom the primary obligation is owed to obtain a remedy*."

[24] See per Dame Elizabeth Gloster at [111] {ref} adopting this analysis. 16/585

reason why the Club should be limited to declarations in a case where they have proven ineffective.

22.3. Further, if compensation were not available, there would be scope for abuse because one party to the contract could simply transfer the rights under the contract to an assignee, e.g. an affiliated company, to which the forum agreement was not binding: see The Frio Dolphin at [16(iv)], [17], [19] per Sir Michael Burton GBE; and *Raphael* at paragraph 14.49. 41/1048 122/3101

23. For these reasons, the Club maintains that it follows from a principled analysis of the function and purpose of the conditional benefit principle that equitable compensation is and should be available as a remedy in the discretion of the tribunal in an appropriate case, particularly one where injunctive relief cannot be ordered by dint of an immunity.

(iii) The authorities on the conditional benefit principle recognise or support the availability of equitable compensation

24. In addition to being consistent with the function of the conditional benefit principle, the existence of a jurisdiction to grant equitable compensation is also recognised and/or supported by the **existing authorities** in which the principle has been developed and applied.

25. There are numerous cases which demonstrate that burdens imposed by reason of the conditional benefit principle require performance that can be enforced by positive action, resulting in monetary remedies or relief to like effect. The Club submits that these authorities are best understood as recognising and/or on any view supporting the existence of a jurisdiction to grant equitable compensation in conditional benefit cases on appropriate facts. See:

25.1. Aspden v Seddon (No. 2): the plaintiffs claimed in respect of damage to their mill 42/1054
caused by the defendants, who were successors-in-title to mining rights granted on condition of covenants to pay "*full and reasonable compensation*" for damage,
spoil, injury or loss caused by working the mines (at 498). On a case stated by an 42/1056
arbitrator asking "*Whether…the plaintiffs…are entitled to recover compensation from the defendants for damage to the mill and premises occasioned*" (at 501), 42/1059
both the High Court (Exchequer Division) and the Court of Appeal held in favour of the plaintiffs, relying on conditional benefit reasoning and holding that the

defendants were bound to pay compensation and the plaintiffs were entitled to maintain their action to recover such compensation (at 503-504 and 506 per Bramwell B and 507-508 per Cleasby B; and on appeal 509 per James LJ and 510 per Mellish LJ (with whom Baggallay JA and Quain J agreed)). 42/1061

25.2. Chamber Colliery v Twyerould: the plaintiff brought a claim against a mining company (who was again a successor-in-title to mining rights subject to covenants to pay compensation for injury to the surface) seeking an injunction and damages in respect of injury to the surface land and buildings caused by subsidence due to working the subjacent mines. Vaughan Williams J refused the injunction "*but declaring that the plaintiff was entitled to compensation*" (at 269); the House of Lords upheld the Judge's order on conditional benefit reasoning (at 273 per Lord Watson). 49/1312 49/1313 49/1317

25.3. Westhoughton Urban DC v Wigan Coal: in another mining case, the Court of Appeal held that the defendant successors-in-title obtained rights to mine only on condition of "*making…satisfaction*" for damage to the surface and a further condition that if any surface lands or building are damaged, the covenanter "*shall and will at their own expense forthwith level, repair, amend and put the same lands, grounds (as far as practicable) and buildings in good and substantial repair and condition*" i.e. a non-pecuniary obligation to repair and reinstate (at 161-162 and 169). The Court of Appeal applied Aspden v Seddon (No. 2) and ordered (i) a declaration that "*the Defendants are liable to pay to the Plaintiffs the amount of all damage to land or buildings which the Plaintiffs have sustained…through the Defendants' workings and by reason of the Defendants not having performed their obligations under the said lease*"; (ii) an inquiry as to "*the amount of damage to land and buildings respectively which the Plaintiffs have sustained…through the Defendants' workings and by reason of the Defendants not having performed their obligations under their said lease. And it is ordered that the Defendants do pay to the Plaintiffs what shall be certified in answer to the said inquiry*" (at 176-177). Thus, this was a case where the Court of Appeal enforced both a positive burden to make satisfaction (in respect of damage to the land) and a non-pecuniary obligation to repair and reinstate (in respect of damage to the land and buildings), by way of orders to pay money (both on a declaration and following an inquiry as to damage). 108/2812 108/2814 42/1054 108/2829

25.4. Halsall v Brizell: Upjohn J was considering a question on whether the plaintiffs were *"entitled to **require the defendants…to pay**"* certain maintenance costs due in respect of a prior financial year and in respect of ensuing financial years (at 178). Applying the conditional benefit principle, he held that the plaintiffs would (but for the invalidity of the resolution) have been entitled to require the successors-in-title to pay the contributions stipulated in the resolution made pursuant to the relevant deed.[25] 71/1872 71/1881

25.5. Thamesmead v Allotey: on a claim for payment of arrears of service charges against successors-in-title to the original deed, at first instance, the judge granted a money judgment for certain charges on the basis of the conditional benefit principle (at 1055-1056); the Court of Appeal considered an appeal on whether further sums should have been awarded (finding on the facts that any obligation to pay the further sums was not conditional on any rights enjoyed (at 1060)). There was no doubt that: (i) it was the conditional benefit analysis alone that applied; or (ii) conditional benefit analysis could in principle be used to enforce burdens in a positive action resulting in money judgments (either in respect of the sums which had been awarded by the judge or in respect of the further sums which were the subject of the appeal). 94/2437 94/2440 94/2445

25.6. Wilkinson v Kerdene: on a claim for payment of arrears of maintenance contributions, the first instance judge applied the conditional benefit principle and entered judgment against all defendants for the sums claimed ([6], [10]-[11] and [20]-[23]); the Court of Appeal upheld the judgment, thus confirming that positive burdens may be enforced by way of action requiring positive steps to be taken viz. the payment of money. Again, there was no doubt that there was jurisdiction to make such orders, the Court of Appeal referring to Rhone v Stephens and speaking in terms of whether the successor-in-title "*incur[red]* ***a liability to perform a positive covenant***" under the conditional benefit principle ([27]). 109/2831 82/2184

25.7. Elwood v Goodman: on a claim for payment of arrears of maintenance contributions, the first instance judge determined a series of preliminary issues which related to the defendants' liability as successors in title to the covenants, 58/1507

[25] As noted above, in Rhone v Stephens the House of Lords approved Halsall v Brizell as an example of a conditional benefit case. 82/2184 71/1872

holding that, in addition to being liable on a direct basis, they were liable on the basis of the conditional benefit principle (headnote and [1]-[2], [12]). The Court of Appeal upheld the judgment save in relation to one part of the disputed contributions (relating to the cost of maintaining a particular part of the roadway) thereby again confirming that the conditional benefit principle can be enforced by way of judgment declaring liability to pay money (there being no suggestion at any point to the contrary).

26. For these reasons, the Supreme Court is invited to conclude that the jurisdiction to award equitable compensation is not only consistent with the nature of the conditional benefit principle but that it is also recognised and/or supported by the reported authorities in which it has been developed and applied.

(b) The wider law on equitable compensation

27. The Club's second core submission is that the recognition of a jurisdiction to award equitable compensation for breach of an equitable obligation to arbitrate in a case of conditional benefit is consistent with the wider law on equitable compensation.

28. **First**, the Court has an inherent jurisdiction to make monetary orders in relation to equitable rights and wrongs: see *Halsbury's Laws of England*, vol 47 (2021) at paragraph 100 and vol 29 (2024) at paragraph 615; *Spry* at pp 647-649, 653, 657, 662; P McDermott, *Equitable Damages* (1994, Butterworths) at pp 217-218; and E Davidson, '*The Equitable Remedy of Compensation*' (1982) 13 MULR 349, esp pp 349 and 397. The language used to describe such monetary remedies has not always been consistent but the terminology of equitable compensation has gained currency and judicial recognition in recent decades. 123/3104 120/3088

29. **Second**, the remedy of equitable compensation is an evolving one that has become more prominent in the law since Nocton v Lord Ashburton [1914] AC 932: AIB Group (UK) Plc v Mark Redler & Co Solicitors [2015] AC 1503 at [56] per Lord Toulson JSC. The categories of case in which equitable compensation is available are not closed,[26] and the question is therefore whether it is principled to recognise the availability of equitable compensation in a case such as the present one. 77/1999 39/988

[26] As the Court of Appeal correctly held: [181]-[182], [210] per Sir Geoffrey Vos MR {ref}. 7/198 7/207

30. **Third**, there is no universal set of principles governing the grant of equitable compensation.[27] The unifying threads are the common requirements that: (i) equitable compensation is applied to meet the needs of justice and respond to the particular equities involved; and (ii) the object of the remedy is to undo the effects of the wrong, as a tailored restorative remedy. This is reflected in the diverse situations for which the remedy has been deployed in equity. For example:

30.1. **Trustee and fiduciary duties**: equity has long made monetary awards against trustees or other fiduciaries i.e. granted remedies in the nature of equitable compensation. In some cases, the Court will award a monetary substitute for property misapplied in breach of a trustee's custodial stewardship duty where restoration *in specie* is not possible, either in addition or in the alternative to a proprietary claim. In others, it is appropriate to make a monetary award as financial compensation for damage suffered by a breach of a management stewardship duty. Similarly, a defaulting trustee/fiduciary may be liable for breach of the fiduciary duty of undivided loyalty.[28] In addition or in the alternative to proprietary remedies or other personal remedies (e.g. an account of profits), the claimant may elect equitable compensation for losses suffered in breach of such a duty. In all such instances, equity is providing compensation for loss as part of a suite of remedies depending on the circumstances and equities of the case.

30.2. **Non-fiduciary equitable duties**: in yet other cases of an equitable duty, broadly equivalent to a common law wrong, equitable compensation is the cognate to damages. For instance, equity has a concurrent jurisdiction in respect of deceit: see Nocton at 951-952 per Viscount Haldane LC: "*in cases of actual fraud the Courts of Chancery and of Common Law exercised a common jurisdiction from the earliest times….[the Court of Chancery's] remedies were **more elastic**.* 77/2018

[27] See Rukhadze v Recovery Partners GP Ltd [2026] AC 209, [15] per Lord Briggs JSC, citing Boardman v Phipps [1967] 2 AC 46, 123 per Lord Upjohn: "*Rules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case*." Speaking of an account of profits, Lord Briggs JSC added: "*the task is not to arrive at some precise formulation as a sort of lowest common factor, but rather to elucidate the underlying concept which [the cases] seek to encapsulate. In that enquiry it is appropriate to bear constantly in mind the purpose for which the rule or principle exists, or the equitable objective which it serves.*"

[28] See AIB v Redler, [51]-[54] per Lord Toulson JSC. 39/987

Operating in personam as a Court of conscience *it could order the defendant, not, indeed, in those days, to pay damages as such, but to make restitution,* ***or to compensate the plaintiff by putting him in as good a position pecuniarily as that in which he was before the injury***". Similarly, equity imposes equitable duties of skill and care similar to those at common law for which equitable compensation is available for loss on essentially similar principles: see Bristol & West Building 46/1199
Society v Mothew (t/a Stapley & Co) [1998] Ch 1, 16C-17H per Millet LJ noting at 17G-H that *"Although the remedy which equity makes available for breach of the equitable duty of skill and care is equitable compensation rather than damages****, this is merely the product of history and in this context is in my opinion a distinction without a difference****."*

30.3. **Dishonest assistance:** equity has long awarded monetary compensation for accessory liability for breach of trust, which the modern law has recognised is properly classified as equitable compensation (cf. the earlier cases which sought to fit the relief within concepts of constructive trusteeship[29]). The flexibility of the remedy of equitable compensation was clearly illustrated by the recent case of Hotel Portfolio II UK Ltd (in liquidation) v Stevens [2025] 3 WLR 293, where 73/1891
the Supreme Court applied the remedy for the first time in a wholly new situation viz. dishonest assistance in a breach of a fiduciary's (true) constructive trust of unauthorised profits.

30.4. **Proprietary estoppel**: here too, the Court has a wide flexible jurisdiction to make an appropriate monetary order where the "*primary*" remedy (enforcing the promise) would be inappropriate to doing *"justice between the parties"*, i.e. "*remedying the unconscionability identified in the promisor's repudiation of his promise*": Guest v Guest [2024] AC 833, esp [5], [13], and [76] per Lord Briggs 70/1780
JSC. This is also equitable compensation: [282] per Lord Leggatt JSC and *Burrows* at p 511.[30]

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[29] As noted in Dubai Aluminum Co Ltd v Salaam [2003] 2 AC 366, [140]-[142] per Lord Millet and Williams v Central Bank of Nigeria [2014] AC 1189, [7]-[11] per Lord Sumption JSC and [65]-[68], [90] per Lord Neuberger PSC and the earlier case law cited.

[30] Similarly, although a developing area in certain respects, the better view is that equitable compensation is available in addition or in the alternative to any remedy under Lord Cairns' Act power for breach of an equitable obligation of confidence. See the following commentaries

31. **<u>Fourth</u>,** the assessment of equitable compensation must reflect the character of the equitable duty breached. As such, where the equitable obligation identified is derived from, modelled upon, or equivalent to one at common law and serves the same or similar functions the compensatory approach should be consistent irrespective of the historical source of the duty being at common law or in equity: see <u>AIB v Redler</u> at [136]-[138] per Lord Reed JSC and <u>Bristol v Mothew</u> at 16-17 per Millett LJ. 39/1006 46/1199

32. In the light of the above, equitable compensation should be available in a case of conditional benefit, to replicate the remedies available against the original counterparty into whose shoes the third party has stepped. The inherent jurisdiction to award monetary relief is not limited or closed to particular classes of relationship and is necessary in this class of case to satisfy the equitable duty concerned. In the case of conditional benefit, equity will require the promise to be performed and, where there have been repeated equitable wrongs that have led to identifiable loss, there should be a compensatory remedy, and insofar as there are future breaches of the same ilk, as in this case, that will crystalise future losses, the innocent party should be indemnified. Although for historical reasons the relationship between the third party and the promisor is regulated in equity and not at law, the availability and assessment of compensation in a case such as this should be no different to the contractual case.

33. For those reasons, the Supreme Court is invited to find that, insofar as the jurisdiction to award equitable compensation has not already been recognised in conditional benefit cases, this represents a modest incremental development which is in keeping with the development of equitable compensation in other contexts.

<u>(c) The equitable powers, remedies, and procedures of the High Court</u>

34. The Club's third core submission is that the recognition of a jurisdiction to award equitable compensation is justified applying well-established first principles pertaining to the equitable powers, remedies, and procedures of the High Court of England. In

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and authorities cited therein (in particular <u>Cadbury Schweppes v FBI Foods</u> (1991) 1 SCR 142 at [55]-[61] per Binnie J): S Elliott K.C. et al, *Snell's Equity* (35th edn, Sweet & Maxwell), at paragraphs 9-021 and 20-024; T Jui Chow et al, *Toulson & Phipps on Confidentiality* (5th edn, Sweet & Maxwell) at paragraphs 6-185 to 6-213; T Aplin et al, *Gurry on Breach of Confidence: The Protection of Confidential Information* (2nd edn, Oxford University Press) at paragraphs 19.23-19.24; and P Finn, *Fiduciary Obligations* (Lawbook Co, 1977) at paragraphs 385-388. 114/2964 116/2992 121/3093

Wolverhampton City Council v London Gypsies and Travellers [2024] AC 983, [16]-[22] and [145]-[153] and summarised at [238(iii)], the Supreme Court explained the core features of the Court's equitable powers. Each of the Supreme Court's guiding principles applied to the present case supports the recognition of a jurisdiction to award equitable compensation: 110/2857

34.1. **Equity provides a remedy where the others available under the law are inadequate to vindicate or protect the rights in issue.** *"The basic general principle by reference to which equity provides a discretionary remedy is that it intervenes to put right defects or inadequacies in the common law…"* (at [149]). 110/2862 The Court noted "*the deep-rooted trigger for the intervention of equity, where it perceives that available common law remedies are inadequate to protect or enforce the claimant's rights*" (at [150]), applying with approval Lady Hale in Secretary of State for the Environment, Food and Rural Affairs v Meier [2009] 1 WLR 2780 at [25]: "*The underlying principle is ubi ius, ibi remedium: where there is a right, there should be a remedy to fit the right. The fact that 'this has never been done before' is no deterrent to the principled development of the remedy to fit the right, provided there is proper procedural protection for those against whom the remedy may be granted*." Here, by virtue of the rules on privity of contract, common law remedies are inadequate to meet the equities of the case viz. to ensure that the third party cannot take the contractual benefit without the inseparable contractual burden. The only equitable remedies that the Court of Appeal says are permissible (injunction or declaration) are in reality unavailable or of limited utility as demonstrated by the States' continuing disregard of the Court's previous declaratory orders. This is therefore a paradigm case for the intervention of equity: there is an equitable right, derived from a contractual right, and there should be a remedy meaningfully to protect the right at least equivalent to common law: that remedy is equitable compensation.

34.2. **Equity looks to the substance rather than the form**. The Court approved the statement of Lord Romilly MR in Parkin v Thorold (1852) 16 Beav 59, 66-67 that *"if it find that by insisting on the form, the substance will be defeated, it holds it inequitable to allow a person to insist on such form, and thereby defeat the substance"* (at [151]). 110/2862 Here, the substance is that the third party is bound by the arbitration agreement "*to the same extent*" as the original contracting party. He should be subject to an equivalent remedy requiring compensation to repair the breach of obligation, modelled on the approach that would have applied to the original contractual counterparty into whose shoes the States have stepped.

34.3. **Equity takes an essentially flexible approach to the formulation of a remedy.** The Court emphasised the "*ability of equity to innovate*", the "*width and flexibility*" of its equitable powers (at [21]-[22]) and the "*readiness of equity to change and adapt its principles for the grant of equitable relief*" (at [147]) which enables not merely incremental development of a new type of relief over time in the light of experience (in that case a new kind of injunction) but also the detailed moulding of relief to a given case (at [152]). That is precisely the approach which the Club invites the Supreme Court to adopt here in relation to the provision of equitable compensation in response to repeated breaches of obligation that could not be restrained by the grant of an injunction. Insofar as the remedy of equitable compensation has not yet been established in relation to obligations to arbitrate in conditional benefit cases, the Court is invited to exercise its remedial flexibility by taking the small incremental step of recognising this further jurisdiction. 110/2858 110/2861 110/2863

34.4. **Equity has not been constrained by hard rules or procedure in fashioning a remedy to suit new circumstances.** *"[T]here is no supposed limiting rule or principle apart from justice and convenience which equity has regarded as sacrosanct over time*" (at [153]). For all the reasons given above, justice and convenience require the award of equitable compensation here.

35. In summary on the Club's positive case, whether the question is analysed from the perspective of the principles and authorities relating to the conditional benefit principle in particular, the wider landscape of equitable compensation, or by reference to fundamental principles pertaining to the Courts' powers to grant equitable remedies, the answer is the same: there is or should be jurisdiction or power to award equitable compensation in a case of conditional benefit and Ground 1 of the Appeal should therefore be allowed.

(2) The Court of Appeal's errors

36. The Court of Appeal concluded that there was no jurisdiction in equity to award equitable compensation in a case of conditional benefit. It relied on two main arguments which

were both erroneous: (i) alleged inconsistency with the nature of the conditional benefit principle; and (ii) alleged circumvention of Lord Cairns' Act power.

(a) Alleged inconsistency with the nature of the conditional benefit principle

37. The Court of Appeal held that the remedy of equitable compensation was inconsistent with the nature of the conditional benefit principle. In so holding, it erred as a matter of principle and on the authorities.

38. **First**, the Court of Appeal erred in its understanding of the nature and operation of the conditional benefit doctrine as a matter of principle:

38.1. The Master of the Rolls concluded that there was no jurisdiction to grant the indemnities in respect of equitable compensation because "*those indemnities disregard the nature of the conditional benefit principle as not creating a conventional cause of action*" (at [221]; see also [218]). 7/208

38.2. Andrews and Falk LJJ reasoned that (i) the Club has no independent right in respect of the States' failure to arbitrate; a form of equitable right and obligation was engaged but it operates as a restriction on the benefit that the States can take: [253]; (ii) the equitable rights and obligations which arise can only be enforced 7/215 by negative or defensive remedies which curtail actions that would otherwise flout the conditional benefit principle and could not be used to compel positive action by the States: [253] and [254]; (iii) they could not be asserted in an offensive rather than defensive way by an action equivalent to one for breach of contract, because that would disregard the fact that the third party is not a party to the contract and so cannot be sued for breach of the obligations contained in it: [257]; (iv) this is consistent with the fact that the relief granted by the courts in conditional benefit cases has been entirely negative or declaratory in nature: [252] and [253]; and (v) this reflects the fact that the third party is not a party to the contract so cannot be sued for breach of it; if this were not so then principles of privity of contract would be materially eroded: [253].

39. Taking the judgments in reverse order, as to the points raised by Andrews and Falk LJJ, it is correct that the conditional benefit principle operates to restrict the benefit the States can take; however, that says nothing about the remedies available if the restriction is

flouted. The assertion that the conditional benefit principle can only be enforced by negative or defensive remedies is wrong for two reasons:

39.1. It is inconsistent with existing authority which demonstrates that the promisor **can** enforce the burden by remedies that require positive action, the acme of which is surely distinct proceedings in which *in personam* anti-suit relief is granted to require cessation or discontinuance of proceedings already brought in the wrong forum, such injunction being amongst the most potent and invasive remedies in the Court's arsenal given its potential comity consequences. But, injunctions aside, the cases show that positive performance of indissociable obligations is expected and enforceable such that monetary judgments have been granted including in non-pecuniary burden cases; equitable relief has not been limited to a prohibitory injunction or declaration: see paragraphs 24-26 above.

39.2. It is unprincipled: for the reasons explained at paragraphs 19-23 above, on a correct analysis to ensure **consistency, equivalence and fairness** the nature of the conditional benefit principle requires **real and effective** remedies to curtail breach and, where appropriate, to address its consequences. There is therefore no basis for neutering the burden and holding that it can be enforced by negative prospective remedies alone, particularly when providing final (as opposed to interlocutory) relief. And when injunctive relief (whether negative or mandatory) is not available or the third party has contumaciously continued to ignore the English Court's rulings such that further positive relief is needed, such monetary relief should be available.

40. The objection as to erosion of privity is similarly misplaced:

40.1. The whole point of the conditional benefit principle is that equity intervenes to impose an obligation on the third party where the common law would not,[31] in order to address the erosion of privity that is otherwise operating by virtue of a third party gaining rights to a contract by subrogation or assignment or, as here, the effect of foreign law; the grant of equitable compensation does not therefore

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[31] See Budana at [62(iv)] per Gloster LJ.

constitute any material erosion of privity, it is in fact supporting a principle that qualifies or limits erosion that would otherwise occur.

40.2. There is no warrant for caution in recognising that the conditional benefit principle can be enforced by monetary action: the principle is carefully circumscribed by the requirement for the inseparability of the benefit from the burden (producing the sort of careful analysis present in Thamesmead) and the fact that the third party must have had the possibility to choose whether to exercise the right; the burden in this case only arises after the third party has voluntarily **chosen** to take the benefit (and not before)[32] and so there is no sense in which any obligation or its attendant consequences are being foisted upon an unwilling third party. 94/2437

40.3. On any view, granting equitable compensation would not interfere with privity any more than the grant of an injunction; indeed the latter is a more intrusive remedy because it is backed by penal sanctions for contempt of court. The fact that it is too late or impossible, because of a personal immunity, to grant an injunction may mean that a different order is required, such as disgorging the benefit or compensating for loss. However, these are no more invasions of privity than an injunction. All orders that achieve consistency with the right transferred and ensure the promisor is in no worse a position by reason of the transfer, without their consent, are legitimate and operate in aid of the law, not against it.

41. These responses deal also with the Master of the Rolls' objection. The conditional benefit principle does not bind the third party in contract but it does impose a requirement of consistency and equivalence upon a party choosing to take the benefit in question. It follows that the real and effective, equivalent remedy of equitable compensation is and should be available to remedy breach.

42. **Second**, the Court of Appeal erred in its analysis of the authorities on the conditional benefit principle:

42.1. Both judgments[33] placed reliance on the statements of Hobhouse LJ in The Jay Bola that: (i) "*the right to apply for an injunction is not a 'cause of action' of the same character as the right to sue for damages for breach of contract or tort or* 85/2265

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[32] See Aspen Underwriting [28]-[30] per Lord Hodge DPSC. 43/1105

[33] [216]-[218] and [221] per Sir Geoffrey Vos MR {ref}; [252] per Andrews and Falk LJJ {ref}. 7/208 7/215

to collect a legal debt"; and (ii) *"where the action is brought by the assignee in another jurisdiction which does not recognise the equitable right of the debtor, the debtor's only remedy is (just as it was in the first half of the last century) to apply for an injunction to restrain the assignee from refusing to recognise the equity of the debtor*" (at p 286). However: 85/2272

42.1.1. There was no question of equitable compensation before the Court in The Jay Bola. Further, when Hobhouse LJ described "*the right to apply for an injunction*", he was explaining the nature of a claim for an injunction, which he simply pointed out was not a "*cause of action*" of the same character as a claim in contract, tort or debt (i.e. an action at law where monetary relief is available as of right) and is instead a discretionary equitable remedy to protect the plaintiff against the consequences of unconscionable conduct. On any view, he was not making any comprehensive statement as to the nature of the rights or remedies which arise in a conditional benefit case, particularly if injunctive relief were either not available or not complied with; rather he was simply noting that the equitable foundations of relief may trigger analytical differences. 85/2265

42.1.2. Similarly, when Hobhouse LJ stated that the "*only*" remedy was an injunction, he was commenting on his analogy with the position of assignees pre-Judicature Acts and observing that, where the wrongful proceedings are pursued in a foreign court, the aggrieved party does not have the option of raising the equitable wrong in the wrongful proceedings themselves and so is left with the other remedy which was the subject of the claim viz. an injunction. He did not consider or purport to exclude yet further remedies. The key point is that, as Males LJ held in Airbus at [92], the question of other relief "*did not arise*".[34] 40/1035

42.1.3. In any event, neither the decision nor the reasoning in The Jay Bola is binding on the Supreme Court; it is obviously unsafe if read as widely as the Court of Appeal took it, and wrong. This Appeal must be answered as a matter of equitable and first principle and the Arbitrators and the 85/2265

[34] The point also made at [96] and [100] per Dame Elizabeth Gloster {ref}; and in The Frio Dolphin at [17], [19]. 16/571 41/1049

Learned Judge were correct for the reasons they gave and the additional reasons set out above.

42.2. Both judgments[35] also sought to gain assistance from the approval of Hobhouse LJ's formulation in Aspen Underwriting at [27]. Andrews and Falk LJJ emphasised the formulation that a claim may not be asserted inconsistently with the terms of the contract, and that conditional benefit "*operates as a constraint on the assertion of the right to claim the benefit under the contract*". However, as explained above: (i) the principle of consistency **supports** the availability of equitable compensation, since that is the relief that would address the consequences of past breaches of the equivalent contractual duty, and such analysis has led to the award of compensation; and (ii) the fact that the conditional benefit principle operates as a "*constraint*" says nothing about the remedies available if the constraint is flouted. 43/1105

42.3. Andrews and Falk LJJ further sought to distinguish Halsall v Brizell and Thamesmead v Allotey on the basis that the facts of those cases were allegedly "*very different*" because "*[t]hey concerned actions not for the consequences of a breach of duty but for the enforcement of a condition or incident of the contract that the landowner was taken to accept on a continuing basis by using the relevant services*".[36] However, those cases **were** actions for the consequences of a breach of duty (a duty to pay money); and the present case **is also** one "*for the enforcement of a condition or incident of the contract*" which the third parties have accepted by using/enjoying the relevant right. It should make no difference to the jurisdiction to grant relief whether enforcement is sought in respect of a breach of a non-pecuniary duty (say, a duty on the third party to undertake maintenance or repairs) or an express obligation to pay money (say a duty to pay up to £X towards the promisor's costs of repairs), or whether the condition has arisen but been ignored in the past or continues to arise on an on-going basis: such distinction is pure formalism. In all these cases the Court is meeting the same equities in the same way: where a right has been enjoyed and the third party has failed to comply with the burden, the Court is enforcing the burden by way of 71/1872 94/2437

[35] [215] per Sir Geoffrey Vos MR {ref}; [255] per Andrews and Falk LJJ {ref}. 7/207

[36] [256] {ref}. The Master of the Rolls did not address these authorities at all. 7/215

positive action requiring the payment of money. The lack of any principled basis for distinguishing these cases is borne out by the authorities, considered at paragraphs 24-26 above, which show that monetary judgments in non-forum conditional benefit cases have been awarded in relation to breaches of pecuniary and non-pecuniary obligations and in respect of retrospective arrears without discrimination.

(b) Alleged circumvention of Lord Cairns' Act power

43. The Court of Appeal further held that the "*primary*" remedy for breach of an equitable obligation to arbitrate is an injunction (plus s.50 damages) and that the grant of equitable compensation would "*short circuit*" or "*circumvent and potentially render otiose*" the power to grant s.50 damages.[37] In substance, the Court of Appeal held that, leaving aside declaratory relief, an injunction (plus s.50 damages) was the **exclusive** remedy in cases such as the present. Here, the Court of Appeal erred in the following three respects.

44. **First**, the Court of Appeal was wrong to say that an injunction/s.50 damages is in all conditional benefit forum cases the "*primary*" remedy:

44.1. An injunction may be a remedy of choice in some cases, but there will be others where it is not e.g. where a claimant claims ***only*** in respect of a past breach of a dispute resolution provision (akin to the classic type of claim brought in Union Discount Co Ltd v Zoller and the other cases cited at fn 20 above). In such a case (i) there is no continuing or future breach such as to engage injunctive relief and there can be no question of an injunction/s.50 damages being the "*primary*" remedy; (ii) there can be no question of circumvention and no basis for suggesting that an entirely (on those facts) irrelevant remedy should preclude the availability of a highly relevant one (common law damages or equitable compensation). The logic of the Court of Appeal's judgment must be that a claimant, such as the Club here, who has suffered losses from past breaches is somehow worse off because it is ***also*** the victim of continuing or future breaches (justifying injunctive relief). That is perverse and obviously wrong.

[37] [212]-[213], [218]-[221] per Sir Geoffrey Vos MR {ref} and [259]-[261] per Andrews and Falk LJJ {ref}. 7/207 7/216

44.2. In any event, insofar as the injunction is the remedy that an aggrieved claimant would often look to first, typically at the outset of proceedings (and in such cases is, in that sense, "*primary*"), that simply reflects the fact that in most cases injunctions are available and in most cases they are sufficient to prevent further wrongdoing and thus to prevent loss from occurring. This cannot mean that other remedies must be excluded where this is not the case and the Court was wrong to think otherwise.

45. **Second**, Lord Cairns' Act (or its successors) do not exclude or limit the Court's inherent jurisdiction to grant equitable compensation. The Act added further remedial powers to the Court's armoury, but there is no basis in the history or objectives of the Act or otherwise to suggest that it supplanted other remedies or suppressed the development of equity's inherent jurisdiction to fashion appropriate remedies to meet the equities of the case:

45.1. The principal purpose of Lord Cairns' Act was to enable the Court of Chancery to do "*complete justice*" between the parties to the proceedings.[38] It addressed a need arising from the historical divide between the common law courts and the Court of Chancery, with the former having no power to grant equitable remedies (such as an injunction or specific performance) and the latter having no power to grant common law damages for breach of contract or a tort. If a plaintiff wished to claim an injunction and common law damages, he would have to bring his claims in two different courts for relief. Lord Cairns' Act enabled the Court of Chancery to award damages *"in addition to or in substitution for"* an injunction or specific performance. The need to achieve "*complete justice*" manifested itself in the award of **common law damages** by the Court of Chancery for a past breach

[38] Hindley v Emery (1865) LR 1 Eq 52, 54 per Sir W Page Wood VC, referring to the grant of "*complete relief*"; The Third Report of Her Majesty's Commissioners Appointed to Inquire into the Process, Practice, and System of Pleading in the Court of Chancery (1856), p 2 referring to conferring on the Courts "*such jurisdiction as would enable them to administer entire justice*". For further explanation of the history and purpose of Lord Cairns' Act, see Ferguson v Wilson (1866) LR 2 Ch App 77, 88-89 per Turner LJ; Leeds Industrial Co-operative Society Ltd v Slack [1924] AC 851, 856-857 and 861-863 per Viscount Finlay; Jaggard v Sawyer [1995] 1 WLR 269 at 284 per Millett LJ; and Morris-Garner v One-Step (Support) Ltd [2019] AC 649 at [43] per Lord Reed JSC. 72/1888 32/891 62/1591 75/1958 74/1944 79/2087

of obligation **at law** (thus avoiding plaintiffs being *"bandied about"* from one Court to the other).[39]

45.2. A further effect of the Act was to enable the grant of damages in place of an injunction where they were **not** available at common law, viz. in respect of a continuing or anticipated wrong at common law (e.g. a nuisance), where a common law cause of action was not yet completed/accrued (e.g. damages in respect of future nuisance which could be the subject of a *quia timet* injunction): Leeds Industrial Co-operative Society Ltd v Slack at 856-859 per Viscount Finley; 75/1958 Jaggard v Sawyer, cited at fn 38 above, at 276-277 per Sir Thomas Bingham MR; 74/1936 United Utilities Water Ltd v Manchester Ship Canal Co Ltd (No 2) [2025] AC 104/2711 761, [7] and [13] per Lord Reed PSC and Lord Hodge DPSC. The extended jurisdiction has also been applied to award equitable damages in lieu of an injunction to restrain the breach of purely equitable rights: see e.g. Jaggard v 74/1929 Sawyer.

45.3. On any view, therefore, the principal purpose of the Act was procedural viz. to give the Court of Chancery additional powers to grant **common law** damages to avoid claimants being "*bandied about*" and sent back to the common law courts. To the extent the Act or its successors confers any power to award damages in respect of a **past** breach of **equitable** obligations, it is at best incidental. As Andrews and Falk LJJ observed, s.50 was **not** regarded as simply reflecting part of a broader power of the Court to award financial compensation (at [260]). The 7/216 logical consequence of this is that it was **not** intended to codify the grant of monetary orders or oust or ossify any general powers to award compensation arising in the Court's inherent jurisdiction. The position is analogous to the deprivation of common law rights under statute where, as explained in the Manchester Ship Canal cases, there is a *"strong presumption that…private rights* 104/2701 *are only to be taken away by statute by means of clear and specific words"*, there

[39] Ferguson v Wilson at 88 per Turner LJ. 62/1591

obviously being no clear words expressing any intention to oust inherent equitable remedies here.[40]

45.4. S.50 damages (which hinge on prospective breaches justifying an injunction) and equitable compensation (which does not) are simply two different remedies which coexist in the way that numerous other statutory, common law or equitable remedies do. Such remedies may be cumulative or alternative, particularly where they might respond to different wrongs or losses or where they are suitable for different situations. The unavailability of one (even a primary) remedy does not of necessity exclude another, unless the remedies are inconsistent (in which case, the claimant must elect): Tang Man Sit v Capacious Investment Ltd [1996] AC 514 (PC), 520H-525A per Lord Nicholls. Thus, a claimant may have cumulative remedies from different causes of action such as damages for negligence in contract/tort and equitable compensation for want of equitable duties of care (see e.g. the facts of Bristol v Mothew) or he may have cumulative remedies for the same wrong, as where a defrauded claimant elects to set aside a voidable transaction and to sue for damages (noted in Tang Man Sit at 521C). He may have alternative remedies in respect of the same cause of action such as an account of profits or equitable compensation (as in the case of dishonest assistance e.g. Stevens v Hotel Portfolio). Similarly, in relation to proprietary estoppel, where the "*primary*" remedy of specific enforcement of the promise/assurance is inappropriate, a monetary award of equitable compensation may be made instead (as in e.g. Guest v Guest). The situation is analogous here, where the award of equitable compensation is designed to respond to ***past*** breaches and an injunction is designed to respond to ***future*** breaches such that it is unlikely that the collateral power to award damages in addition or in lieu of the latter was intended to supplant or exclude the former. Even if there is some overlap, the remedies are principally directed at different things. It follows that they are simply alternative remedies which arise in different situations and the unavailability of one remedy does not exclude the other.

46/1184

73/1891

70/1780

[40] Manchester Ship Canal (No. 2), cited above, at [123] per Lord Reed PSC and Lord Hodge DPSC, citing Lord Neuberger PSC in Manchester Ship Canal Co Ltd v United Utilities Water plc [2014] 1 WLR 2576, at [58]. 104/2747

45.5. The availability of cumulative or alternative remedies is precisely the sort of flexibility that is equity's great gap-filling strength: see Wolverhampton, above. 110/2838 Indeed, if s.50 damages are not available, and there is a remedial gap for a conscious breach of equitable obligation formally declared by the Court that is precisely why there ***must*** be equitable compensation: as explained above, where there is an undeniable equitable wrong there must be a remedy and the Court of Appeal's reasoning in the opposite direction was for this reason too directly contrary to the Supreme Court's guiding principles in Wolverhampton.

46. **Third**, the Court of Appeal's analysis is either inconsistent with existing and well-entrenched authority and practice in respect of compensatory remedies or, if limited to cases of conditional benefit, lacks any justification or principle:

46.1. The logic of the Court of Appeal's view is that Lord Cairns' Act was intended to codify the availability of compensatory remedies in **any** case where an injunction might also be available, but that is plainly wrong:

46.1.1. It obviously does not apply to exclude **common law** rights to compensation. If a claimant is unable to obtain an injunction in pursuit of a common law right such that damages cannot be granted under s.50, it could not possibly be said that "*the limits of section 50 must be observed*" such that the common law right to claim compensation for past breach is excluded.

46.1.2. Similarly, it cannot sensibly apply in all scenarios where there may be overlapping power to grant compensation in **equity's inherent jurisdiction**. As noted already, the existence of an inherent jurisdiction to award equitable compensation outside s.50 is established beyond argument in respect of myriad equitable rights, where it is routinely awarded: see paragraph 30 above. Moreover, many, if not most, of the developments in relation to equitable compensation in such fields have taken place after the passing of Lord Cairns' Act. Yet, no one has regarded the jurisdiction to grant equitable compensation as having been ousted or limited by the availability of s.50 damages. The argument is analogous to the well-known fallacy, conclusively spiked by the majority opinion in Convoy Collateral Ltd v Broad Idea [2023] AC 389 at [45]- 52/1368

[47] per Lord Legatt JSC (Lord Briggs, Lord Sales and Lord Hamblen JJSC concurring), following Lawrence Collins LJ in Masri v Consolidated Contractors International (UK) Ltd (No. 2) [2009] QB 450, [141]-[184], that s.25(8) of the Supreme Court of Judicature Act 1873 confined the court to granting injunctions or appointing receivers to those circumstances established prior to 1873. That argument *"has over time been proved conclusively to be, wrong"*: see Wolverhampton at [148]. 110/2862 To the extent the question has been considered in terms, judicial and academic opinion correctly notes that equitable compensation may be awarded under equity's inherent jurisdiction outside of, or in addition to, equitable damages under s.50.[41]

46.2. Alternatively, if the Court of Appeal's view was that Lord Cairns' Act or its s.50 successor provides an exclusive monetary remedy only in the specific context of breaches of arbitration agreements in conditional benefit cases or in the context of conditional benefit cases more generally, this is also plainly unsustainable. The Act was a procedural Act of general application and there is no basis in the language or policy of the provisions (or s.50 succeeding it) for singling out any statutory intention in relation to a narrow type of factual application.

47. **Finally**, taking a step back, the Court of Appeal's conclusion gives rise to arbitrary and unprincipled consequences:

47.1. It is both surprising and illogical to say that the availability of a compensatory remedy in respect of past breaches should depend on the fortuity of whether there is an ongoing/future breach such as to justify an injunction. Compensation is needed to repair a breach – the damages flowing from which may be fully or substantially incurred by the time of trial – quite apart from whether an injunction may also be needed.

47.2. It is also recalled that the reason why an injunction is not available in this case is because the States are immune from injunctive/coercive remedies under s.13(2)(a)

[41] For example, see *Spry* at 649, 653 and 657; *McDermott* at 217-218; indeed, in respect of breach of confidence, the need for monetary compensation to be independent of the grant an injunction is the reason why such awards should be available as equitable compensation and not limited to relief under Lord Cairns' Act (or its successor): see the materials at fn 30 above. 123/3104 120/3088

of the 1978 Act. However, the Court of Appeal's judgment converts that narrow immunity, designed for a very particular purpose (to prevent the subjection of one sovereign State to the coercive powers of another) into a collateral and complete immunity from all monetary remedies for their breach. This is not only beyond the intention of s.13(2)(a), and contrary to the policy of that Act more broadly (which is by s.3(1)(a) to ensure that States acting commercially have no State immunity) but is contrary to: (i) the principle of legality (and the strong presumption that private rights are only to be taken away by statute by means of clear and specific words: Manchester Ship Canal); and (ii) the requirements of Art 104/2701
6 ECHR that immunities be justified by a legitimate aim and proportionate in scope: Benkharbouche v Embassy of Sudan [2019] AC 777 and UK P&I Club 45/1130 103/2679
NV v Repúpublica Bolivariana de Venezuela (The Resolute) [2024] KB 399. Unlike the latter case (where it was held that the core s.13(2)(a) immunity from injunctive/coercive relief was in line with a tenable view of international law and proportionate *inter alia* because of the availability of declaratory relief and equitable compensation (see [9], [21], and [54]), on the Court of Appeal's 103/2689 103/2691 103/2698
approach here, the s.13(2)(a) immunity has a significantly wider and deeper effect, precluding all monetary relief in respect of commercial acts for which the States have no immunity from adjudicatory jurisdiction. This result is incoherent and bears no or no proportionate relationship to the limited aims pursued by s.13(2)(a).

(3) Conclusion on equitable compensation

48. The Arbitrators were each entitled in a case of conditional benefit to make an award of equitable compensation in their discretion. On the question of remedial jurisdiction or power, the Awards contained no error of law. The Learned Judge was therefore correct to dismiss the s.69 appeals and the Court of Appeal was wrong to disagree.

C GROUND 2: INTERFERENCE WITH THE AWARDS ON THE FACTS

49. Butcher J granted permission to appeal to the High Court under s.69(2) of the 1996 Act only on questions of law as to whether there was jurisdiction or power to award equitable compensation in a case of conditional benefit in respect of a direct-action statute: SOFI paragraph 29, Ground 4 (Spain) {ref} and paragraph 32, Ground 2 (France) {ref}. The 3/22 3/23
Club agreed that permission should be granted because the generic question of

jurisdiction/power was of general public importance and met the merits threshold for a s.69 appeal. Butcher J determined the substantive appeals on the same, focussed basis.[42]

50. However, the Court of Appeal went beyond the pure question of jurisdiction/power and held that equitable compensation was not available ***on the facts of this case***. The Master of the Rolls held that *"even if the jurisdiction exists, it should not have been exercised here"* (at [224]) and that this accorded with "*the justice of the case*": [235]; also [237]. 7/210 7/212 7/216
The Lady Justices agreed and held that although the Spanish Judgment could not be enforced in England *"it does not follow that any further relief would be appropriate, even if it was possible to grant it as a matter of law"*: [238], [262]-[263]. In particular, the Court of Appeal impermissibly considered new matters and made new findings on (i) causation; (ii) the parties' respective culpabilities; and (iii) considerations of international comity.

51. In the Club's respectful submission, the Court of Appeal lost sight of the fact that it was hearing an appeal on a ***question of law*** arising out of arbitration awards under s.69 of the 1996 Act. It wrongly disregarded the tight jurisdictional limits imposed by the section, as well as erring in fact or law on the substance.

52. In Sharp Corp Ltd v Viterra BV [2024] 4 All ER 273, at [51] Lord Hamblen JSC (with whom the other Justices agreed) noted the following limitations directly derived from the text of s.69 of the 1996 Act (fully recited at [50]), which were "*important and indeed necessary*" to respect and apply: 84/2249

> *"(1) A party may appeal on "a question of law arising out of an award" (section 69(1)).*
>
> *(2) The question must be one "which the tribunal was asked to determine" (section 69(3)(b)).*
>
> *(3) The application for permission to appeal must "identify the question of law to be determined" (section 69(4)).*
>
> *(4) At the permission to appeal stage, the court must be satisfied (inter alia) that "on the basis of the findings of fact in the award", the decision of the tribunal is "obviously wrong" or "the question is one of general public importance and the decision of the tribunal is at least open to serious doubt" (section 69(3)(c)).*

[42] Spain Judgment, [315]-[337] {ref} and France Judgment, [57]-[71] {ref}. 12/325 13/358

(5) When determining whether the tribunal made an error of law in relation to the question of law, the court must proceed on the basis of the findings of fact in the award."

53. As to points (1), (3), (4) and (5), the basic division of competence under s.69 (one of the basic safeguards against overly broad appeals (see Sharp at [52]-[53])) is that whilst questions of law are amenable to review by the Court, factual matters are **exclusively** within the arbitrator's domain: 84/2251

53.1. The distinction between questions of law and fact was analysed in The Chrysalis [1983] 1 WLR 1469, 1475 per Mustill J, who divided the arbitrator's process of reasoning into three stages: (i) the arbitrator ascertains the facts (including making findings of any facts which are in dispute); (ii) the arbitrator ascertains the law (comprising the identification of all material rules of statute and common law, identification and interpretation of the relevant parts of the contract and the identification of those facts which must be taken into account when the decision is reached); (iii) in the light of the facts and the law so ascertained, the arbitrator reaches his decision. Mustill J confirmed that "*The second stage of the process is the proper subject matter of an appeal under the 1979 Act*" (albeit in some cases errors of law can be inferred where a correct application of the law would lead inevitably to one conclusion but the arbitrator has reached another: see below). 63/1602

53.2. As to questions of fact, the Tribunal has **exclusive** competence; the Court cannot interfere with or make its own findings of fact. See:

53.2.1. Geogas SA v Trammo Gas Ltd (The Baleares) [1993] 1 Lloyd's Rep 215, 228 lhc per Steyn LJ: 67/1697

> *"**The arbitrators are the masters of the facts.** On an appeal **the Court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators.** It is irrelevant whether the Court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be. That is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the Courts. Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators' award on the facts. **The principle of party autonomy decrees that a Court ought never to question the arbitrators' findings of fact**."*

(see also Steyn LJ's description of "***the cardinal rule** that the arbitrators are the masters of the facts*" (ibid.) and proscribing "*intrud[ing] into the **forbidden territory** of the fact-finding process*" (at 235 lhc).) 67/1704

53.2.2. Sharp v Viterra at [71] confirming the Court "*has **no jurisdiction in relation to errors of fact and no power to make its own findings of fact***". 84/2253

53.3. As to questions of mixed fact and law, review under s.69 is only permissible if the tribunal has misdirected itself in law or reached a conclusion which no reasonable arbitrator applying the right legal test on the facts he has found could reach (demonstrating that the arbitrator did not properly understand the principles and must have made an error of law): see *Mustill & Boyd* at paragraphs 14.133-14.134 117/3002 and of the recent authority CTI Group Inc v Transclear SA (The Mary Nour) (No. 2) [2008] 1 All ER (Comm) 203, [11]-[16] per Field J (causation and remoteness); Sylvia Shipping v Progress Bulk Carriers (The Sylvia) [2010] 2 Lloyd's Rep 81, 93/2432 [53]-[55], [61], and [83] per Hamblen J, noting that there are only limited circumstances when the Court will interfere, adopting Pioneer Shipping Ltd v 81/2153 BTP Tioxide Ltd (The Nema) [1982] AC 724 and a test of whether it can be shown that the conclusion is "*necessarily inconsistent*" with the application of the correct legal test, a "*heavy burden to discharge*" (remoteness); and Simmonds v Gammell 87/2307 [2016] 2 Lloyd's Rep 631 at [33]-[39] per Cooke J (causation).

53.4. As to discretionary decisions, the circumstances in which the court will find that an arbitrator's exercise of discretion is unlawful are "*likely to be rare*" such as where there is bad faith or the taking account of *"a matter which on no conceivable view could be regarded as relevant"* or *"wholly extraneous matters"* or a *"complete failure of the tribunal to exercise its discretion on any identifiable grounds at all, in other words, a case where the tribunal had abdicated its responsibility of making a rational decision and, in effect, had simply tossed a coin":* see SOS Corporación Alimentaria SA v Inerco Trade SA [2010] 2 Lloyd's 90/2363 Rep 345, at [29]-[33], [42]-[43], [77], and [98] per Hamblen J and the authorities referred to therein.

54. As to point (2), in identifying whether the tribunal was asked to determine the question, *"the point has to be fairly and squarely before the arbitration tribunal* ***for***

determination" (bold emphasis in original), whether or not it was actually articulated as a question of law: Sharp v Viterra at [61]-[62] per Lord Hamblen JSC. 84/2252

55. As to relief, if an appeal is allowed on a question of law, the default position under s.69(7) is to remit to the arbitrator as the primary decision-maker: *"[t]he court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration."*[43]

56. In the light of these well-established principles of arbitration law, the Court of Appeal erred in the three respects foreshadowed above.

57. **First**, the Court of Appeal relied on new findings as to **causation** in concluding that equitable compensation was not available in this case.[44] It held that: (i) what caused the Club's losses was "*the failure of the Club to appear in the Spanish court, or to persuade that court, that it (the Club) had no liability to anyone unless the pay to be paid clause was satisfied, which it was not*";[45] (ii) the Club's losses were **not** caused by the breach of the equitable obligation to arbitrate; they flowed from a 'breach' of the pay to be paid clause, which was not the claim asserted;[46] and (iii) the Club's losses were caused by the fact that the Spanish Courts did not apply the pay to be paid clause.[47]

58. Causation issues were dealt with differently in the Spanish and French Arbitrations. Whilst in both disputes the Arbitrators expressly or impliedly concluded that the breach of the obligation to arbitrate was the cause of the Club's loss: (i) Spain at least argued in the Arbitration that the Club's decision not to appear in Spain and invoke the pay to be paid clause was the sole effective cause of the loss and/or constituted a failure to mitigate.

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[43] Generally, remitting will be refused only if it would be futile: see *Mustill & Boyd* at paragraphs 14.163-14.167; D Sutton et al, *Russell on Arbitration* (24th edn, Sweet & Maxwell) at paragraphs 8-171 to 8-172; R Merkin, *Arbitration Law* (Looseleaf, Lloyd's List Intelligence), at paragraph 21.58. 117/3002

[44] It held that the alleged absence of causation was one of the reasons why the indemnities could not "*as a matter of law, have been awarded in this case*" and/or was a reason why even if jurisdiction existed, it should not have been exercised and/or why relief would not be appropriate even if it was possible to grant it as a matter of law: [221] and [224] per Sir Geoffrey Vos MR {ref}; [263], [266]-[267] per Andrews and Falk LJJ {ref}. 7/209 7/216

[45] [208] per Sir Geoffrey Vos MR {ref}; see also [266] per Andrews and Falk LJJ {ref}.

[46] [220]-[221] per Sir Geoffrey Vos MR {ref}.

[47] [266]-[267] per Andrews and Falk LJJ {ref}.

Sir Peter Gross rejected these arguments, holding that, as a matter of fact, the Club's absence was **not** the reason for the Spanish Court's decision, the Club had conducted itself reasonably in the circumstances, and its conduct did not break the chain of causation/was not a failure to mitigate.[48] (ii) France raised certain other arguments on causation and mitigation[49] but it **did not even argue** that the cause of the loss was the Club's conduct in not invoking the pay to be paid clause or a 'breach' or the Spanish Courts' non-application of that provision.

59. In the circumstances, the Court of Appeal's reversal of the Arbitrators' conclusions on causation grounds was an impermissible and erroneous basis on which to set aside the indemnities:

59.1. **Not a question which the tribunal was asked to determine and/or outside scope of s.69 questions of law.** As to France, the Arbitrator was not asked to determine the question of whether the effective cause of the loss was the Club's conduct in failing to appear and invoke the pay to be paid clause or any failure (by France or the Spanish Courts) to adhere to that provision cf. s.69(3)(b). Further, **neither State** even sought and certainly no s.69 permission to appeal was granted on any causation issues, and so the Judge made no relevant determination in his Judgments on such issues. In short, causation was wholly outside the scope of the s.69 appeals and it was simply not open to the Court of Appeal to raise these new points for the first time on appeal.

59.2. **Impermissible new findings of fact**. The Court of Appeal's conclusions on causation rested on new findings of fact which were not contained in the Awards and, indeed, contradicted the factual findings in the Spanish Award: (i) the Tribunals expressly or impliedly found that the breach of the obligation to arbitrate was a cause in fact of the loss; insofar as the Court of Appeal disagreed,[50]

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[48] [186]-[192] and [203]-[226] esp [204], [218]-[219] and [225] {ref}. 14/457

[49] It argued that the Club's alleged failure to invoke the **arbitration agreement** (cf the pay to be paid clause as relied on by the Court of Appeal) by issuing a stay application in the Spanish Proceedings was a failure to mitigate (having abandoned its argument that this constituted a break in the chain of causation) and/or the loss would have been suffered in any event as a result of the claim filed by the Public Prosecutor on its behalf. 14/464 14/471 14/474

[50] Given the paucity of reasoning, it is not clear whether the Court of Appeal's views on causation were based on a purported absence of factual causation or legal/effective causation.

that was an impermissible reversal of a factual finding; (ii) there was no finding in the Awards that the **Club's** conduct was a cause in fact of the loss; on the contrary, when faced with this argument, Sir Peter Gross conducted a detailed review of the Spanish law expert evidence and the Spanish Supreme Court judgment, holding that even if the Club had invoked the clause, there was a real or appreciable risk the Spanish Courts would not have applied it and concluding in express terms that "*the Club's absence was **not** the reason for the Court's decision*".[51] The Court of Appeal's conclusion that, as a matter of fact, the Club's conduct by failing to appear and invoke the pay to be paid clause was a cause of the loss was therefore directly **contrary** to Sir Peter Gross' factual findings or on any view constituted fresh factual findings made for the first time on appeal.

59.3. **Impermissible review of mixed question of fact and law.** Insofar as the ruling as to causation was a mixed question of fact and law, the Court of Appeal transgressed the limits of permissible review (see paragraph 53.3 above). It identified no error of law by either Tribunal and it cannot be said that the Arbitrators' conclusions were so unreasonable that no arbitrator properly directed as to the law could have reached them. On the contrary, Sir Peter Gross directed himself properly as to the relevant legal test[52] and, far from being unreasonable, his conclusion was plainly right. The Spanish Supreme Court upheld the non-CLC claims and the wrongful pursuit of those claims in the wrong forum was clearly a cause in fact of the Club's losses resulting from such judgment having been obtained.[53] There was no basis for saying that any other cause had intervened to obliterate or exonerate the causative effect of the States' wrongdoing, given: (i) the Club had clearly acted reasonably given the risks of entering an appearance (as found by Sir Peter Gross on the detailed evidence), and (ii) the well-established position in English law that an innocent party should not have to submit itself to the wrongful forum and take its chances in the foreign court: see Enka Insaat ve

[51] [203]-[218] (esp at [204] and [218]) {ref}. 14/464

[52] The correct legal principles were common ground before him: [191]-[192] {ref}. The Arbitrator referred to the uncontroversial statements of principle in Borealis AB v Geogas Trading SA [2011] 1 Lloyd's Rep 428, [42]-[47]. 14/471 14/460

[53] The Court of Appeal's reasoning, that the States "*breached*" the pay to be paid clause, is puzzling given that a pay to be paid clause is not a warranty but a condition precedent to the obligation to indemnify arising in the first place: The Fanti and the Padre Island (No. 2). 64/1613

Sanayi AS v OOO Insurance Company Chubb [2020] 3 All ER 577, [42]-[65] per Popplewell LJ (with whom Males and Flaux LJJ agreed); [2020] 1 WLR 4117, [173]-[185] per Lord Hamblen and Lord Leggatt JJSC, [261] per Lord Burrows JSC, and [293] per Lord Sales JSC. 60/1551 61/1574

59.4. **Matter to be remitted**. Even if the Court of Appeal had identified some error of law, the correct course would have been to remit the matter to the Arbitrators to make any necessary new factual findings or apply the law to the facts unless it identified some reason why it would be inappropriate to do so: s.69(7). No such reason having been identified, the Court of Appeal erred in simply substituting its own views instead of remitting.

60. **Second**, the Court of Appeal relied on new findings as to **the parties' respective culpabilities**. It held that (i) "*despite the strong words adopted by the Arbitrators and in some of the previous judgments, it is hard to see how the Spanish proceedings could have been completely avoided*" since the CLC claims had to be brought in Spain and "*the non-state claimants could only sensibly claim in Spain for their losses*";[54] (ii) the States' pursuit of their non-CLC claims in Spain could not be *"the subject of any legitimate criticism*"; the losses were caused by the Spanish Supreme Court not applying the pay to be paid clause and *"[t]he States' contribution to the Club's difficulty in that respect was **limited** to continuing to participate in the Spanish proceedings without themselves volunteering that the pay to be paid clause was engaged, if indeed it was as a matter of Spanish law…"*;[55] (iii) the Club was guilty of a *"significant delay"* in commencing arbitration proceedings in 2012.[56] The reliance placed on these considerations was also impermissible and/or erroneous:

60.1. **Outside scope of s.69 questions of law**. The questions of law on the s.69 appeal related to jurisdiction/power to award equitable compensation. On appeal the States did not raise any challenge based on culpability or matters of discretion such as delay. These points were therefore again wholly outside the scope of the s.69 appeals.

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[54] [209] per Sir Geoffrey Vos MR {ref}. 7/206
[55] [264] and [267] per Andrews and Falk LJJ {ref}; [237] Sir Geoffrey Vos MR agreeing {ref}. 7/217 7/212
[56] [265] per Andrews and Falk LJJ {ref}.

60.2. **Impermissible new factual findings and/or impermissible review of mixed question of fact and law**. (i) The suggestion that the non-State claimants could only sensibly claim in Spain for their losses was a new finding of fact by the Court of Appeal and was in any event wrong: like the States, it was entirely possible for the non-State parties to bring their CLC claims in Spain and pursue any non-CLC claims by arbitration;[57] on any view, the existence of CLC claims and/or claims by non-State claimants is completely irrelevant to whether compensation should be available against these States which, it has already been established, were obliged to bring their non-CLC claims in arbitration; (ii) the States' conduct is certainly the subject of "*legitimate criticism*": the States were bound to arbitrate their non-CLC claims as a matter of English law, their conduct was wrongful, and the English Courts had ruled on the matter, establishing the position in a forum to which the States submitted. The continued pursuit of the claims thereafter in the face of those decisions was "*vexatious and oppressive*", "*highly unjust*", and an "*abuse*": see paragraph 4 above; (iii) the finding of delay was not based on factual findings in the Awards and was in ignorance of the full facts. Neither Arbitrator held that the Club was guilty of delay; on the contrary, Dame Elizabeth Gloster made an express finding that the Club was **not** guilty of delay, in the context of injunctive relief.[58] There was no error of law and the Tribunal's view was plainly reasonable not least because the Court of Appeal's allegation as to delay was simply wrong on the facts. The non-CLC claims were not served on the Club until ***24 June 2011*** and the Club commenced the first arbitration proceedings just a few months later: see SOFI at paragraph 11 and the chronology at page 4 {refs}. 3/15 3/34
This obvious error clearly shows the danger in the Court making fresh findings on appeal without an understanding of the full factual or evidential picture.

60.3. **Impermissible review of question of discretion**. Insofar as the Court of Appeal relied on these matters as going to the exercise of discretion in deciding whether to grant equitable compensation, it did not direct itself by reference to the correct

[57] Further, the assumption the Court of Appeal made in respect of Spanish law was not based on findings in the Awards. In fact, it involved a disputed question of **primary fact** which the Arbitrators did not resolve viz. whether the Spanish Courts had international jurisdiction to entertain the non-CLC claims under Spanish law. The Club's position was and remains that the Spanish Courts had no such jurisdiction under their own conflict of laws rules either.

[58] [179]-[202] {ref} and SOFI at paragraph 27.5 {ref}. 16/620 3/22

legal test for intervention. The Tribunals committed no error of law and their evaluation of whether equitable compensation should be granted was not perverse. In fact, their conclusions were obviously correct for the reasons given above.

61. **Third,** the Court of Appeal relied on **considerations of international comity**. It held there was an analogy between the nature of the indemnities awarded and the Court of Appeal's approach to anti-enforcement injunctions in Ecobank Transnational Inc v Tanoh [2016] 1 WLR 2231 in that *"the object of [the] indemnities would be to neutralise attempts to enforce [the Spanish Judgment] in third countries"*[59] and the indemnities would create "*extra-territorial consequences*" that *"are not justified in law or on the facts*".[60] The reliance on these points was also impermissible and/or erroneous: 54/1432

61.1. **Not a question which the tribunal was asked to determine and/or outside scope of s.69 questions of law.** (i) As to Spain, no argument was pursued in the Arbitration that the indemnities should not be granted because they would neutralise or interfere with enforcement in third States. The Arbitrator was not asked to determine this question cf. s.69(3)(b). Spain did not seek, and Butcher J did not grant, s.69 permission to appeal and he did not decide any questions as to comity on the substantive s.69 appeal. The issue is therefore out of jurisdictional bounds on the s.69 appeal. (ii) As to France, questions of comity and neutralisation of the foreign judgment were the specific subject of Ground 4 of France's application for permission to appeal under s.69: SOFI at paragraph 32 {ref}. The Judge **refused** France an extension of time to pursue these arguments and/or permission to appeal *inter alia* on the basis that Dame Elizabeth Gloster was correct in rejecting these concerns, and the application did not meet the s.69 thresholds.[61] France could not and did not seek permission to appeal to the Court of Appeal in respect of Ground 4. Again, it was not open to the Court of Appeal to reopen such considerations of comity on appeal as they had been finally disposed of. 3/23

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[59] [222] per Sir Geoffrey Vos MR {ref}. 7/209

[60] [235] {ref}. See also [237] {ref}. The Lady Justices agreed and held "*the Arbitrators were in effect seeking to interfere with those enforcement processes by neutralising their effect*": [268]-[269] {ref}. 7/212 7/217

[61] France Judgment, [39], [42], [66] and [72]-[83] {ref}. 13/354 13/359 13/361

61.2. **Impermissible review of question of discretion**. The Court of Appeal's analogy was with anti-enforcement injunction cases where comity or interference with foreign process arises in relation to the decision-maker's discretion: see *Mustill & Boyd,* at paragraphs 6.125-6.127 and the recent summary of the case law in Google LLC v NAO Tsargrad Media [2025] EWHC 94 (Comm), [2026] 1 All ER (Comm) 75 (Note), [56]-[82] per Henshaw J. In relying on considerations of comity, the Court of Appeal failed to apply the correct legal approach to the review of questions of discretion their analysis and analogy provoked. There was no error of law in any discretionary decision (see below) and a decision to grant equitable compensation notwithstanding comity concerns, if any, was not a decision no reasonable arbitrator could reach. 117/3002 69/1748

61.3. **Erroneous in any event**. The Court of Appeal's analogy between the indemnity and anti-enforcement relief was fallacious. The two remedies are materially different: whereas an anti-enforcement injunction prevents the judgment creditor from bringing the matter before the enforcement court of the third State, and therefore indirectly prevents consideration by a foreign court of whether to enforce the judgment under its local law, an award of compensation in the event of enforcement proceedings which is dependent on what such proceedings produces (a foreign liability, a need to incur costs etc) does not interfere, even indirectly, with such a process. It imposes a personal liability which seeks to repair the harm caused by the defendant having wrongly obtained the judgment in the wrong forum in the first place and which it may seek wrongly to enforce. In this respect, the position in a case of conditional benefit (where relief lies in equity) is no different to the contractual case where damages are available in law as of right for the losses arising from a judgment that has been wrongly obtained.[62]

62. Finally, in relation to all the above points, the States have previously argued that the Court of Appeal was entitled to go beyond questions of power/jurisdiction because the Grounds of Appeal for the appeal ***from the High Court to the Court of Appeal*** referred to whether the Tribunal could award compensation "*in the circumstances of this case*": see SOFI at paragraph 40 {ref}. That argument is flawed: 3/27

[62] See France Judgment, [73]-[77] {ref} and [113]-[115] per Dame Elizabeth Gloster {ref}. As to the position in contract, see the authorities at paragraph 21.3 and fn 20 above. 13/361 16/586

62.1. A s.69 appeal is confined to the questions of law for which permission has been granted to the High Court.[63] Whilst the wording of the question of law may be refined by minor modifications, this is only permitted to the extent that "*the substance of the question of law remains the same*": Sharp v Viterra at [55]. It follows that the States are confined to the **substance** of the questions of law certified by Butcher J for the substantive s.69 appeal and cannot expand their scope by any grounds of appeal for the **subsequent** appeal from the High Court to the Court of Appeal. 84/2251

62.2. The s.69 questions of law for which permission was granted are set out at SOFI paragraph 29, Ground 4 (Spain) {ref} and paragraph 32, Ground 2 (France) {ref}. Their substance is to ask whether there is jurisdiction or power to grant equitable compensation in a case of conditional benefit.[64] Thus, any purported expansion in the subsequent grounds to considering "*all the circumstances of the case*", now said to encompass wider questions e.g. causation or discretion, would clearly be a change in the substance of the questions of law and entirely illegitimate. 3/22 3/23

62.3. In any event, the reference to "*the circumstances of this case*" in the Grounds of Appeal to the Court of Appeal was more limited in nature, reflecting France's argument that equitable compensation was not available due to the nature of the derived right obligation. This is clear from reading France's relevant Ground as a whole, with the final sentence explaining: "*As a matter of law…equitable compensation is not available as a remedy for breach of an equitable obligation*

[63] This is the position at first instance or on a further appeal: as to the latter, see s.69(8) which provides that any further appeal requires the leave of the High Court which shall not be given unless that Court considers "*the question*" (i.e. the question of law which was considered by the High Court) is one of general importance or should for some other special reason be considered on appeal.

[64] For the avoidance of doubt, the words in the French question of law referring to "*whether equitable compensation is otherwise available in those circumstances*" were noted by France as being an additional point to Spain's corresponding Ground of Appeal on equitable compensation viz. whether the equitable relationship between an insurer and a direct action claimant is capable of sustaining a grant of equitable compensation (i.e. it was a point about the nature of the obligation being enforced, France seeking to distinguish direct action rights from other derived rights); it was not suggested to be a wide catch-all permitting consideration of all the circumstances of the case: see France's Skeleton in support of the s.69 application at paragraph 45(b) and heading above paragraph 69 including fn 40-41 {ref}. 25/805 25/807

to arbitrate, either generally ***or in the specific case of a third party asserting rights against an insurer pursuant to a direct action statute***".

63. It follows from the above that the various new issues decided by the Court of Appeal were not within the scope of the s.69 questions of law or, for that matter, the Grounds of Appeal from the High Court. The Court of Appeal's consideration of these issues was wholly impermissible and in error. The Supreme Court is therefore invited to allow Ground 2 of the Appeal.

D CONCLUSION

64. In the light of the above, the Club invites the Supreme Court to allow the Appeal for the following reasons:

    64.1. The Court of Appeal erred on the question of law under s.69 of the 1996 Act in concluding there is no jurisdiction or power to award equitable compensation in a case of conditional benefit against a State; and

    64.2. The Court of Appeal erred in its reliance on other considerations of fact and/or law, exceeding the statutory limits of the scope of the appeal under s.69 of the 1996 Act.

CHRISTOPHER HANCOCK K.C.

THOMAS DE LA MARE K.C.

CHARLOTTE TAN

ALEXANDER THOMPSON

27 April 2026