Appeal No. UKSC/2025/0034

<u>IN THE SUPREME COURT OF THE UNITED KINGDOM</u>

ON APPEAL FROM:
<u>THE COURT OF APPEAL OF ENGLAND AND WALES (CIVIL DIVISION)</u>

BETWEEN:

Appeal No. CA-2024-000180

THE LONDON STEAM-SHIP OWNERS' MUTUAL INSURANCE ASSOCIATION LIMITED

<u>Appellant</u>

- and -

THE KINGDOM OF SPAIN

<u>Respondent</u>

AND BETWEEN:

Appeal No. CA-2024-000182

THE LONDON STEAM-SHIP OWNERS' MUTUAL INSURANCE ASSOCIATION LIMITED

<u>Appellant</u>

- and -

THE FRENCH STATE

<u>Respondent</u>

<u>M/T "PRESTIGE"</u>

WRITTEN CASE ON BEHALF OF THE RESPONDENTS

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1. This is the Respondents' (together "**the States**") Written Case in response to that of the Appellant ("**the Club**").

2. In summary, the position of the States on this appeal is as follows.

3. **Ground 1:** the decision of the Court of Appeal is correct and should be upheld for the reasons it gave.

(a) The nub of the Club's argument is that where there is a right there must be a remedy, and the result of the Court of Appeal's judgment ("**the Judgment**") is that the Club is unjustly deprived of an effective remedy. This is not correct:

(i) True it is that the Club has not been granted injunctive relief or damages in lieu under s.50 of the Senior Courts Act 1981 ("**SCA**") given the bar arising [35/930] from s.13(2)(a) of the State Immunity Act 1978 ("**SIA**") in the absence of [34/918] consent of the State in question. This would be true in respect of any State party which had not consented to be subject to injunctive relief, including by reason of an arbitration clause in a contract to which it was a party.

(ii) The Club has been granted declaratory relief by the Tribunals, which is undisturbed on appeal and which makes it clear to courts in other jurisdictions that, as a matter of English law, the execution order of the Provincial Court in Spain dated 1 March 2019 ("**the Spanish Judgment**") [22/752] was obtained in breach of an equitable obligation to arbitrate.[1]

(iii) The English Court has also, by reason of the Judgment, declined to recognise the Spanish Judgment meaning it is unenforceable in this jurisdiction.

(iv) The only question is whether the Club can obtain further relief in the form of equitable compensation, being compensation for legal costs it incurred in defending one part of the Spanish proceedings, and an indemnity to meet the contingency that one of the States seeks recognition and enforcement of the Spanish Judgment outside of the UK or Spain, and a foreign court decides to recognise and permit enforcement of that Judgment against the assets of the Club. In this regard, Spain has not, since the Spanish Judgment was made in 2019, sought to enforce the Spanish Judgment anywhere other than Spain

[1] Although in fact the CJEU decided in this case that for the purposes of Regulation 44/2001, [38/943] the States were not bound to arbitrate in view of the relative effect of the arbitration clause. However, the Court of Appeal decided the States remained bound by the Awards of Alastair Schaff KC ("**the Schaff Awards**") which declared the existence of the equitable obligation to [18/646] arbitrate and which had *res judicata* effect. [19/692]

and England. For its part, the French State has never sought to obtain recognition or enforcement of the Spanish Judgment in any jurisdiction other than Spain. It did not seek recognition or enforcement in England.

(b) To the extent that the Club has not been granted this additional relief, this is due to the limits of the conditional benefit principle, as articulated by Hobhouse LJ in the *Jay Bola* [1997] 2 Lloyd's Rep 279 and by this Court in the *Atlantik Confidence* [2021] AC 493. As explained by Andrews and Falk LJJ at Judgment [252]–[253], the conditional benefit principle operates defensively, rather than creating a freestanding right or cause of action which can sound in a monetary award. [85/2265] [43/1069] [7/215]

(c) Whereas statute has created a discretionary remedy to compensate for past and future loss arising out of the Court's refusal to grant an injunction to restrain an equitable wrong, which remedy could in principle be used in a conditional benefit case (being s.50 SCA), that statute is of no application in this case because the Club cannot fulfil the conditions for the grant of relief. [35/930]

(d) The principal form of relief sought by the Club is equitable compensation in respect of contingent future loss, the recovery of future loss being one of the key innovations of Lord Cairns' Act (now s.50 SCA). However, as the Court of Appeal found, to grant equitable compensation for future loss where such compensation is not available under s.50 because the claimant cannot fulfil the threshold criteria for the grant of such relief would cut across the scheme created by s.50 SCA. [35/930]

(e) Were it otherwise, no claimant would elect to pursue a claim under s.50 SCA and thereby assume the burden of satisfying the jurisdictional requirements as well as persuading the Court to exercise its discretion in favour of a grant of monetary relief. Instead, claimants would simply seek equitable compensation 'as of right' as an equivalent or parallel remedy to damages for breach of contract. [35/930]

(f) That an equitable obligation to arbitrate arising out of the operation of the conditional benefit principle does not result in a cause of action and remedy indistinguishable from breach of contract and contractual damages is not objectionable. It follows from the status of a defendant as a non-contracting party — in this case, parties who relied on a direct action statute in another jurisdiction.

(i) On the Club's view of the law, any third party who tries to rely on a right in a contract to which they are not a party, but which right is qualified by a jurisdiction or arbitration clause, will become bound by that clause and all of the contractual consequences as if they were an original contracting party. As a matter of substance, the third party's position becomes indistinguishable to that of a contracting party save that different labels are applied to the obligation arising and the remedies granted. This would be a considerable extension of the role of equity and equitable compensation.

(ii) The consequence of that will be that third parties (whether States or non-State parties) resident abroad suing often in their home courts under their home law (including the rights granted to them under Regulation 44/2001 and the [38/943] Recast Judgment Regulation, to sue in those courts) in respect of damage suffered by them in that jurisdiction, will become liable to pay equitable compensation if they do not agree that the dispute be resolved in compliance with a jurisdiction or arbitration clause. This goes too far.

4. **Ground 2**: the findings or statements made by the Court of Appeal which are the subject of complaint by the Club do not affect the core reasoning or the decision of the Court of Appeal, which was that: (i) s.50 SCA equitable damages were not available because the [35/930] Court had no jurisdiction to grant an injunction against the States; (ii) equitable compensation was not available as a matter of law because to grant it would cut across the statutory scheme for compensation found in s.50 SCA; and (iii) the conditional benefit principle operates only defensively and does not create a right on the part of the contracting party to damages against the non-contracting party. The comments made by the Court of Appeal relating to causation, comity and relative culpability[2] did not affect its conclusions that the tribunals hearing the Club's claims against the States ("**the**

[2] As the Master of the Rolls made clear, "[i]*t does not matter who is to be blamed for what occurred*" (Judgment, [220]). [7/209]

Tribunals") had erred in law, did not go beyond the scope of review it was entitled to carry out under s.69 of the Arbitration Act 1996 ("**the 1996 Act**") and did not constitute impermissible factual findings. [36/935]

I. GROUND 1: AVAILABILITY OF EQUITABLE COMPENSATION

5. The Court of Appeal was right to find that equitable compensation cannot be awarded in the circumstances of this case — namely, against States which had pursued a claim in violation of an arbitration agreement within the contract in question, but which were not parties to that contract, and became bound (in equity) to arbitrate only by reason of the conditional benefit principle.

6. The Club's position is that equitable compensation should be granted in these circumstances as a nearly identical substitute for contractual damages, despite the defaulting party not being a party to the contract in question (see, e.g., Club's Written Case, [32]: "*the availability and assessment of compensation in a case such as this should be no different to the contractual case*"). That ignores the statement in *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503 that, before equitable compensation is awarded, the nature and content of the equitable obligation in question must be analysed, with no automatic conclusion that it would be awarded on an equivalent basis to common law damages: [76] (Lord Toulson), [136]–[137] (Lord Reed). Accordingly, in determining whether equitable compensation is available in the circumstances of this case, regard must be had to the specific character of the conditional benefit principle. [4/71] [39/993] [39/1007]

7. As will be shown below, the particular nature of the obligations arising under that principle are very significantly different to those arising in the cases on which the Club relies — such as cases concerning fiduciary or similar duties. Even the conditional benefit cases the Club relies upon for the proposition that monetary relief can be granted — cases involving deeds of covenant under which a third party has chosen to enjoy property rights or services and therefore must pay for them — are far removed from direct action cases where the contractual nexus is more remote. Direct action claimants will be suing pursuant to laws available to them in their home jurisdictions (often where the damage will also have been suffered), sometimes (as in this case) within the context of criminal proceedings. Such claimants may have no idea that English law requires them

to arbitrate. The Club's case is that any and all such claimants should be liable to an adverse monetary award, equivalent to contractual damages, if they do not use (and pay for) a private dispute resolution mechanism in a different country. Aside from being incompatible with the nature of the conditional benefit principle, it would cut across the statutory scheme in s.50 SCA (with all its jurisdictional thresholds and the discretionary nature of relief under it), leaving that provision with no discernible purpose. [35/930]

8. The central question for the Court on this appeal is whether it is prepared to extend English law to require such claimants to be liable for equitable compensation when they do not to arbitrate. The decision will apply to them, just as it will apply to the States.

(a) Analysis of the conditional benefit principle

9. It is an inherent feature of cases involving the conditional benefit principle that one party sits outside the contractual relationship in which the contracting parties have voluntarily and consensually assumed obligations *inter se*. The third party will become bound by any relevant obligation in the contract via a legal device or concept other than privity of contact — here, equity, which considers the third party bound by the relevant obligation where that party seeks to rely on a right deriving from the contract. The third party has not voluntarily or deliberately undertaken any obligations and bears no positive duties. As in the present case, it may have relied upon a right considered by English law to be contractual because a law in another jurisdiction permitted it to do so. This distinguishes the third party from not only the original parties to the contract, but also from assignees or subrogees, and other parties bearing more traditional forms of equitable obligation, such as trustees or other fiduciaries or those who owe an equitable duty of confidence.

10. This critical feature — that the party to be bound sits outside of the contract — has informed the nature and scope of the conditional benefit principle as developed in the leading authorities.

a. <u>Key authorities</u>

11. The basic rationale of the conditional benefit principle is that a party seeking to assert a benefit contained within a contract cannot do so other than in accordance with the relevant terms of the contract — that is, subject to the corresponding contractual burdens:

Club's Written Case, [16]–[18]; and see, e.g., *Aspen Underwriting Ltd v Credit Europe Bank NV ("The Atlantik Confidence")* [2021] AC 493, [26]. The manifestation of this principle insofar as relevant to the present case is 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, [46]. [4/54] [43/1104] [86/2297]

12. That basic rationale serves to justify the imposition of an obligation on a third party which has asserted a right under the contract which is qualified by a particular or corresponding obligation. However, as the authorities make clear, it does not follow that the third party is assimilated as a party to the contract for all purposes. Were it otherwise, there would be a novation of the contract.

13. The starting point is *DVA v Voest Alpine ("The Jay Bola")* [1997] 2 Lloyd's Rep 279. In that case, a vessel had been sub-chartered by DVA (time charterers) to Voest (voyage charterers) under a charter which included a London arbitration clause. Voest's insurers commenced a subrogated action against DVA in the courts of Brazil. DVA sought an injunction to restrain the insurers from pursuing the Brazilian claim. Hobhouse LJ described the relationship and potential legal action between the contractual parties at 285, explaining that, if either of them had commenced an action in Brazil (which was not a party to the New York Convention), the "*primary remedy*" of the other would be "*to apply for an injunction to restrain the contract breaker from continuing with that action in breach of contract*", while that party would also have "*the option to sue for damages for breach of contract though this is rarely a satisfactory remedy*". [85/2265] [85/2271]

14. Hobhouse LJ turned then to the position of the insurers who were a third party to the contract but were seeking to rely on a benefit under it. He rejected the notion that the insurers could assert a right under the contract "*without any obligation to refer the dispute to arbitration*", confirming that "*the rights which the insurance company has acquired are rights which are subject to the arbitration clause*" and that it was "*not entitled to assert its claim inconsistently with the terms of the contract*" (at 285–286). However, he proceeded to make clear that, in such a case, the nature of any claim against the insurer [85/2271]

was not in all respects the same as would arise against a contractual counterparty. Specifically, at 286, he likened the insurers' position to a case in which the assignee of a legal right of action sought to enforce that right against the debtor without taking into account an equitable set-off which the debtor was entitled to raise, as to which he stated: [85/2272]

(a) In such a case, the debtor's remedy was "*to apply … for an injunction to restrain the assignee from asserting the common law right … unless and until he recognised the equitable right of the debtor*".

(b) In such a scenario, "[t]*he injunction was granted to provide the debtor with the appropriate protection from the unconscionable conduct of the assignee*", but it did not involve the assignee becoming liable for the sums to be set off.

(c) Accordingly, the debtor's "*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 to collect a legal debt*". Instead, it is "*an application for an equitable remedy to protect the plaintiff against the consequences of unconscionable conduct*".

(d) Where, in this scenario, the assignee has brought its claim in another jurisdiction "*which does not recognise the equitable right of the debtor, the debtor's only remedy is … to apply for an injunction to restrain the assignee from refusing to recognise the equity of the debtor*".

15. Hobhouse LJ's logic was that, if a court granted a monetary award against the assignee, it would be going further than restraining the assignee from acting inconsistently with the burden of the contract (i.e. the obligation not to act inconsistently with the debtor's right to set-off). Such a monetary award would, in effect, impose on the assignee liability for the sums to be set off.

16. Having explained that scenario in detail, Hobhouse LJ stated that the claim before him was subject to the same analysis ("[t]*he present case is such a case*") (at 286). As in the case of the assignee and a debtor, he stated that in the case before him: [85/2272]

"[T]*he insurance company is failing to recognise the equitable rights of the timecharterers. The equitable remedy for such an infringement is the grant of an injunction.*" [85/2272]

17. Sir Richard Scott V-C agreed with Hobhouse LJ that "*DVA's remedy is, prima facie, the grant of an injunction*" (at 291). [85/2277]

18. At [42.1] of its Written Case, the Club contends that Hobhouse LJ's reasoning was nothing more than an explanation of "*the nature of a claim for an injunction*" and did not consider or exclude the availability of any other remedies. That is not the case. [4/77]

    (a) The insurers had argued that DVA's claim "*would amount to treating the burden of the contract as having been transferred* [to the insurers]*, something which would only occur if there had been a novation*", and further that if granted the claim would impose an "*actionable liability*" on the insurers (at 286). Hobhouse LJ rejected this submission on the basis that it "*fail*[ed] *to understand the nature of the equitable remedy which is being sought in this action*". Thus, the foundation for his reasoning that DVA's action could succeed <u>was</u> the specific nature of the remedy it had sought. He did not grant the injunction merely because, by happenstance, it was the remedy which the insurers had sought, with some other remedy being interchangeable if the insurers had asked for it. The specific nature of an injunction as the remedy available was central to his analysis. [85/2272]

    (b) Moreover, as set out above, Hobhouse LJ explained that the court could not grant a remedy which would impose a positive liability on a party bound only by the conditional benefit principle (with reference to the analogy of an assignee seeking to enforce a legal cause of action). An award of monetary compensation would transgress this principle.

    (c) Thus, it is unsurprising that Hobhouse LJ described an injunction as the "*only remedy*" available in these circumstances. The Club cannot explain why he used this form of words if he had intended to leave open the possibility of a monetary award being available as against a non-party.

19. This reasoning has been adopted in other cases. *The Yusuf Cepnioglu* was a conditional benefit case in which a third party to the insurance contract sued under a Turkish direct action statute. After citing from the judgments of Hobhouse LJ and Sir Richard Scott V-C in *The Jay Bola* at length, Longmore LJ stated that those judgments "*make clear that the only way in which the claimant can be protected is by way of an injunction*" ([24]). See also [33] ("*It is only by way of an injunction to restrain Turkish proceedings that the charterers in the present case can be required to recognise the Club's right to have the dispute referred to arbitration*"). Again, the (repeated) use of the word "*only*" signifies the exclusivity of this remedy. [86/2279] [86/2290] [86/2293]

20. In *The Atlantik Confidence*, following the casualty of a vessel, insurers had entered into a settlement agreement with the vessel's owners and managers. The insurers had paid part of the settlement proceeds to a broker as authorised by a bank which had provided finance to the owners and managers. Subsequently, it was determined that the casualty had been caused by the deliberate conduct of the owners and managers, and the insurers commenced an action against the bank (among others) to recover the settlement proceeds. One of the grounds on which the insurers sought to establish jurisdiction in England was that the bank was bound by the exclusive jurisdiction clause in the policy of insurance between the insurers and the owners/managers (to which it was not a party). While it was not disputed that the bank would have been bound by the clause had it sued the insurers ([22]), the Supreme Court held that the insurers could not exercise the right to bring a claim against the bank pursuant to that clause (absent the bank first invoking a relevant contractual right resulting in a dispute falling within the dispute resolution clause). [43/1069] [43/1103]

21. The Supreme Court's judgment did not call into question the basic rationale of the conditional benefit principle as stated above: at [26] Lord Hodge (with whom all other members of the Court agreed) described the principle as being "*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*". However, his judgment emphasised the essentially <u>defensive</u> nature of the principle. Specifically: [43/1104]

    (a) He stated that the formulation of the principle by Hobhouse LJ in *The Jay Bola* (as approved in *The Yusuf Cepnioglu*) was its "*best encapsulation*", and endorsed it on [43/1105] the basis that it "*emphasises the constraint on the assertion of a right as being the requirement to avoid inconsistency*" ([27]). [43/1105]

(b) In the case before the Court, the bank had not acted in a way which was inconsistent with the exclusive jurisdiction clause, such as by commencing proceedings to enforce its claim, and therefore could not, as a non-party, be bound by the jurisdiction agreement ([29]–[30]). [43/1105]

22. All of these cases demonstrate that the position of a third party asserting rights characterised (by English law) as contractual rights who becomes bound by an obligation in the contract by reason of the conditional benefit principle, is not for all purposes equiparated with the position of a party to the contract. The third party, far from being subject to all the obligations arising under a contract, is subject to a lesser or narrower constraint: namely, not to exercise a right under the contract in a way which is inconsistent with the contract's terms. The remedy described repeatedly as the "*only*" one available — an injunction — is specially directed at restraining a party from doing so.

23. It is in that context that the Court of Appeal's judgment in *Airbus SAS v Generali Italia SpA* [2019] 4 All ER 745 is to be read.[3] In that case, an aircraft suffered damage following the incomplete deployment of its landing gear. The insurers of the airline that had leased the aircraft brought an action in negligence against the manufacturers before the Italian courts. The manufacturers sought a declaration that the Italian proceedings had been brought in breach of an exclusive jurisdiction clause in favour of the English courts in the agreement between the airline and the manufacturer. [40/1010]

24. The Court of Appeal upheld the lower court's grant of the declaration sought. At [64], Males LJ (with whom Lewison and Davis LJJ agreed) restated the underlying logic of the conditional benefit principle ("*in general, an assignee will be bound by an arbitration or jurisdiction clause in the contract from which its assigned rights derive, at any rate in* [40/1030]

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[3] *Airbus* was cited to the Supreme Court in *The Atlantik Confidence* but was not referred to in the judgment. [43/1072]

the sense that if it seeks to enforce those rights, it must do so by the contractually agreed mechanism”). Even within this passage, the second clause makes clear that an assignee is not in the same position as a contractual party, in that it can only be bound by an exclusive forum clause to the extent that it seeks to assert any rights under the contract; thus, the clause can be deployed against it only defensively, not offensively (as insurers had tried to do in <u>*The Atlantik Confidence*</u>).

25. At [96]–[97], Males LJ stated as follows: [40/1037]

“*96. … Accordingly 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.*

97. … If it is held that commencement of the Italian proceedings by Alitalia would have been a breach of the jurisdiction clause in the Warranties Agreement, it follows that their commencement by the appellant insurers is a breach of an equivalent obligation in equity which Airbus is entitled to enforce and that the English court has jurisdiction to grant a declaration to say so.”

26. As to this reasoning:

(a) Males LJ stated that the equitable obligation not to bring a claim inconsistently with an arbitration clause was “*an equivalent equitable obligation*” to the obligation of the contracting parties. However, he did not make any broader suggestion that a party suing under a direct action statute (or becoming bound by the conditional benefit principle in any other way) was for all purposes in a position 'equivalent' to the contracting parties. The Supreme Court's subsequent judgment in *The Atlantik Confidence* specifically did not say that and did not so characterise the effect of the conditional benefit principle.

(b) The main innovation in *Airbus* was that the Court of Appeal accepted that, whereas injunctive relief had been granted in previous conditional benefit cases, there was no barrier to a grant of declaratory relief. This is unsurprising because a declaration is nothing more than a statement by a court as to a legal (or factual) position — in the current context, that there exists an equitable obligation to act consistently with an arbitration clause and/or that a party has breached such equitable obligation. A finding by a court as to the existence and/or (actual or anticipated/threatened) breach of the obligation is necessary before there can be any grant of injunctive anti-suit relief (at least on the *Angelic Grace* basis rather than the 'vexation and oppression' ground). Therefore, given that courts had granted injunctions, it followed logically that they must have had the power to make declarations provided the declarations served a useful purpose (see Males LJ's judgment at [83]). [40/1033]

(c) It is for that reason that Males LJ did not see his decision as incompatible with the judgment of Hobhouse LJ in *The Jay Bola*. He stated at [92]: "*I would not accept that Hobhouse LJ was saying that the court could not even grant a declaration. That question did not arise.*" Further, Males LJ noted that in a different case (*West Tankers* [2005] 2 Lloyd's Rep 257), the court had in fact awarded declaratory as well as injunctive relief against insurers pursuing a tort claim in Italy inconsistently with an arbitration clause in a charterparty. [40/1035] [106/2764]

(d) As Sir Geoffrey Vos MR correctly recognised in the Judgment ([180], [217]), Males LJ's explanation of the equitable rights and obligations arising in a case of this sort does not lead to the conclusion that a financial remedy in the form of equitable compensation should be available, not least because that issue was not before Males LJ. [7/198] [7/208]

27. There are only three first-instance decisions which lend any support to the proposition that equitable compensation is available in a conditional benefit case. None of them is of any real persuasive value (aside from the obvious fact that none is binding on this Court).

(a) In *West Tankers v Allianz SPA ("The Front Comor")* [2012] 2 Lloyd's Rep 103, [78], Flaux J suggested that European law had not deprived the arbitral tribunal of "*the jurisdiction to award equitable damages for breach of the obligation to arbitrate*". This was not the *ratio* of his decision, and there was no relevant analysis. Further, it was not even clear if he was referring to equitable compensation or damages under s.50 SCA (in circumstances where the question which had been referred to the CJEU in that case was whether it was possible to grant an anti-suit injunction against EU defendants, and thus whether there was power to award s.50 damages was clearly in issue): see the Master of the Rolls' analysis of this at Judgment, [179], [214]. [107/2811] [35/930] [7/198] [7/207]

(b) In *The Prestige (No. 3)* [2020] 1 WLR 4943, Henshaw J held (for the limited purposes of an application under s.18 of the 1996 Act to appoint an arbitrator) that the Club had a good arguable case in respect of (*inter alia*) a right to equitable compensation: [207]–[212]. He expressly stated that this was "*a good example of a complex and novel point of law*" which it would not be appropriate to determine finally "*on limited argument*" on a s.18 application ([212]). Other points on which he considered the Club had a good arguable case (such as a tribunal's ability to order injunctive relief and/or s.50 SCA damages against a State: see [178]–[206]) have since been decided finally against the Club. [97/2543] [97/2544] [97/2536]

(c) In *Argos Pereira España S.L. v Athenian Marine Ltd ("The Frio Dolphin")* [2021] 2 Lloyd's Rep 387, Sir Michael Burton held that equitable compensation should be available against a subrogated insurer. After summarising the parties' submissions, his reasoning spanned only three paragraphs ([17]–[19]) and largely relied on the judgments of Flaux and Henshaw JJ addressed above, neither of which are of material persuasive value for the reasons set out. As the Court of Appeal in the present case pointed out, it had had the benefit of "*much more detailed argument*" and did not consider Sir Michael Burton's decision to be correct (Judgment, [214]). [41/1049] [7/207]

b. <u>The Court of Appeal's reasoning as to the nature of the conditional benefit principle</u>

28. Read in the light of these authorities, the Court of Appeal's reasoning as to why an award of equitable compensation would be incompatible with the nature of the conditional benefit principle is not only unsurprising but plainly correct.

29. There were three key themes concerning the conditional benefit principle which ran through the Judgment. The <u>first</u> concerned the inherently limited nature of the obligations arising under the conditional benefit principle, which were said to be incompatible with a grant of equitable compensation. The <u>second</u> was that a grant of equitable compensation would undermine privity of contract (the fundamental precepts of which are not displaced by the conditional benefit principle). The <u>third</u> is that the unavailability of equitable compensation does not leave an unacceptable lacuna in terms of remedies.

30. As to the **first** issue (whether a grant of equitable compensation is compatible with the limited nature of the conditional benefit principle), the Master of the Rolls considered <u>*The Atlantik Confidence*</u> to be "[t]*he most compelling authority*" as to the nature of the conditional benefit principle ([215]). Like Lord Hodge, he considered the core of the [7/207] conditional benefit principle to be a requirement to avoid "*inconsistency*" ([215]). He also endorsed Hobhouse LJ's finding in <u>*The Jay Bola*</u> that the right to apply for an injunction was not a 'cause of action' of the same character as the right to sue for damages for breach of contract, and that the equitable remedy for a breach of an equitable [7/208] obligation to arbitrate is an injunction ([216]). He thus concluded, at [217], that "*this case* [7/208] *is in the same category, and the authorities I have mentioned bind us to hold that an injunction and a declaration are the remedies that have, thus far, been established for a breach of the equitable obligation to arbitrate*". He further held that the indemnities awarded by the arbitrators as equitable compensation "*disregard the nature of the* [7/209] *conditional benefit principle as not creating a conventional cause of action*" ([221]).

31. Andrews and Falk LJJ, in agreement with the Master of the Rolls, considered that upholding the Tribunals' awards of equitable compensation would "*ride roughshod*" over the conditional benefit principle as it has developed in the jurisprudence and thus would impermissibly extend "*the boundaries within which equitable compensation may be awarded*" ([251]). The remedies which have been acknowledged as available in [7/215]

conditional benefit cases (injunctions and declarations) are both negative in nature: "*they aim to protect the debtor in a defensive manner, rather than to enable a claim to be brought that requires positive action, such as the payment of money*" ([252]). This finding was consistent with the characterisations of the conditional benefit principle in *The Jay Bola*, *The Yusuf Cepnioglu* and *The Atlantik Confidence* as set out above. [7/215]

32. As Andrews and Falk LJJ explained, under the conditional benefit principle, any inconsistency arising from the States' conduct does not give rise to an "*independent right in law or equity*"; rather, the principle "*operates as a restriction on the benefit which the States can take*" from their case before the Spanish courts ([253], and see also [255]). It is injunctive relief which (if it were available) would have the effect of restricting the States from pursuing a claim which is inconsistent with the Club's right to have any claims determined in arbitration (and the Court's refusal to recognise the Spanish Judgment has achieved a similar end without the need for injunctive relief). [7/215]

33. The reasoning of all the members of the Court of Appeal is consistent with the principles articulated by the Supreme Court in *AIB*: that the availability of equitable compensation needs to be determined in light of the nature of the specific equitable obligation in question. Implicit within that statement of legal principle is a recognition that equitable compensation is not available as a remedy for breach of any and all equitable obligations. The conditional benefit principle confers an equitable obligation of limited scope. It does not produce a result indistinguishable from a contractual novation. Therefore, the Court of Appeal was right to find that the obligation to avoid inconsistency cannot provide the foundation for a monetary remedy. [39/966]

34. As to the **second** issue, the Judgment also makes clear that using the conditional benefit principle as a vehicle to confer a monetary remedy (other than as compensation for an injunction not being granted) would unjustifiably erode the principle of privity of contract ([251], [253]). As Andrews and Falk LJJ explained at [257], a grant of equitable compensation in a case such as the present would amount to an "*offensive*" use of the conditional benefit principle against a third party to the contract in a way that is "*equivalent*" to a claim for breach of contract, but that this would "*disregard the fact that the third party is not a party to the contract and so cannot be sued for breach of the* [7/215] [7/216]

obligations contained in it". (In Through Transport v New India Assurance [2005] 1 All ER (Comm) 715 at [65], the Court of Appeal declined to uphold a declaration that a person bound to arbitrate via the conditional benefit principle was in breach of contract in commencing court proceedings, and expressed the view that such a person could not be sued for damages for commencing such proceedings.) [100/2616]

35. This conclusion as to privity of contract is correct. In conditional benefit cases generally, with the position being *a fortiori* in a direct action case, the underlying principles are neither equivalent, nor similar, to the position in a contractual claim for damages. The law of contract accepts that the third party is not bound by the contract such that damages for breach cannot be awarded. If equitable compensation were available, this would amount to equity being relied upon to produce precisely that result without adhering to the foundational principle which justifies an award of damages in the first place — namely, a voluntary assumption of rights and obligations when a party enters into a contract.

36. In cases involving claimants (often foreign claimants) suing in another jurisdiction under a local direct action statute, an obligation to arbitrate (arbitration being contractual in nature) arises from an exercise of characterisation of the relevant issue from a specifically English law conflict of laws perspective.

    (a) English law and the conditional benefit principle apply only to non-contracting parties as a result of the English law shorthand characterisation of such claims as 'quasi-contractual': see, e.g., the judgment of Butcher J in respect of Spain in these proceedings at [2024] 1 WLR 2331, [81]. It is this characterisation which leads to the application of English law, being the governing law of the contract, and thus the application of the conditional benefit principle. This initial characterisation exercise would therefore also constitute the foundation for any imposition of a financial liability on a non-contracting party. [12/271]

    (b) When carrying out a characterisation exercise, the Court considers the provisions of the foreign direct action statute in order to decide whether, properly characterised, their application results in the claimant pursuing an independent statutory right (which is governed by the system of law which produced the statute) or pursuing a right based on the terms of the insurance contract (which is governed by the law applicable to the contract). In this case, the Court has found that the effect of the Spanish direct action statute "*is in substance to enable the claimant to enforce the obligations arising under the contract of insurance*": *Prestige (No. 2)* [2015] 2 Lloyd's Rep 33, [26]. The claim was therefore characterised as contractual and governed by English law. [96/2482]

(c) A party suing under a direct action statute which is characterised in this way is, by virtue of the conditional benefit principle, constrained from acting inconsistently with the terms of the contract in question.

(d) However, that does not justify the complete assimilation of contractual and equitable obligations and remedies such that there is no longer any material difference between being a party to a contract and being a third party. It cannot be the position of English law and nor can it be considered equitable for a direct action claimant to be treated for all intents and purposes as being in an equivalent position to a party which has contracted to be bound by an arbitration agreement. There has been no consideration and no contractual (or any) consent to arbitrate. In commencing proceedings abroad in their home court or where they suffered harm, the direct action claimant may have no idea that they thereby become bound to arbitrate in London or are breaching an obligation, let alone one sounding in damages. Notably, this arises in a context where the CJEU has held that an EU-based direct action claimant has a right to claim in the court of their domicile and is not prevented from doing so by an exclusive jurisdiction clause in the insurance policy (C-386/16, *Assens Havn v Navigators Management (UK) Ltd* [2018] QB 463; affirmed and expanded to include an arbitration agreement in the present case: C-700/20, *The Prestige* [2023] 1 WLR 1, [60]–[61]). Where the English Court says, in conflict with that and relying on a *res judicata* created by an arbitral award which pre-dated the CJEU's decision, that the States must arbitrate, there is no sound basis for concluding that English law takes precedence for all purposes (particularly as the Court of Appeal found that the CJEU's decision in this regard was binding on the English courts). As addressed below, the position should rest with mutual non-recognition in the two jurisdictions directly concerned, and it should be left to third [111/2875] [113/2908]

States to decide for themselves what are the consequences of the failure to arbitrate in light of the Schaff Awards, the Spanish Judgment, EU law (where relevant) and the third States' own conflicts of laws principles.

(e) That is why, as Andrews and Falk LJJ held, an equitable obligation to arbitrate arising under the conditional benefit principle cannot be used to found "*a positive claim to anything other than remedies which are aimed at ensuring that the burdens of the contract are accepted by anyone seeking to claim the benefit, by curtailing actions that would otherwise flout that principle*" ([254]). Any other conclusion would eviscerate entirely the distinction between a contractual party and a third party. Contracts bind the parties to them and the remedy of damages for breach is confined to such parties. [7/215]

37. The Club responds to the analysis of Andrews and Falk LJJ by stating that "[t]*he 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, 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*" (Club's Written Case, [40.1] (internal citation omitted)). It is true that the conditional benefit principle intervenes to prevent a third party from asserting the benefit of a contract inconsistently with a corresponding contractual burden, and thereby maintains the essential balance of rights and obligations enshrined in the contract. But the principle is not directed at creating or imposing privity as such between a contracting party and a third party, which simply cannot exist as the third party has not consented to contract. [4/75]

38. As to the **third** issue, the Judgment made clear that recognising the proper limits of the conditional benefit principle does not leave the Club, or other parties in a similar position, without adequate protection. This is an answer to the Club's argument in the present appeal that equitable compensation must be available in order for there to be "***real and effective*** *remedies*" in support of the equitable obligation to arbitrate (Club's Written Case, [20.3] (emphasis in original), and see also [34.1]). [4/60] [4/72]

39. The Club has obtained declaratory relief. It can deploy the relevant declarations in foreign jurisdictions as it chooses in support of an argument that the Spanish Judgment

should not be recognised or enforced. It has already used the Schaff Awards to procure non-recognition in England.

40. In a standard case against non-State parties, the Club would also be able to pursue injunctive relief and/or damages under s.50 SCA, the latter of which could include [35/930] damages for both past and future losses (Judgment, [207]). Indeed, had the Club chosen [7/206] to initiate proceedings against any of the hundreds of non-State claimants to the Spanish proceedings, it could have pursued these remedies. Whether such remedies would have been awarded would have been within the Tribunals' discretion in accordance with normal equitable principles. However, in such cases, "*there would be no reason to resort* [7/208] *to equitable compensation as a remedy for the breach*" (Judgment, [219]).

41. In the circumstances of the present claim, the Club was not able to obtain injunctive relief (and, consequently, nor was it able to obtain s.50 damages) by virtue of the defendants being sovereign States (conclusions which it was not granted permission to challenge in this appeal). The unavailability of injunctive relief against States arises as a matter of the United Kingdom's obligations under international law (see *UK P&I Club NV v República* [103/2679] *Bolivariana de Venezuela ("The Resolute")* [2024] KB 399), not from any deficiency in the English Court's approach to the remedies available following a breach of an equitable obligation to arbitrate arising from the conditional benefit principle. As the Court of [7/205] Appeal recognised (Judgment, [206], [219]), the unavailability of injunctive relief [7/208] because of the idiosyncratic circumstances of the present case does not provide a principled basis for significantly expanding the types of cases in which equitable compensation is available. To the contrary, doing so would not only ignore the nature of the conditional benefit principle, but would also cut across the statutory scheme created to allow monetary remedies to be available in appropriate circumstances in such cases, as addressed below.

42. The Club contends that a grant of equitable compensation in this case would be consistent with three tenets of the conditional benefit principle (Written Case, [19]–[22]). The [4/59] analysis above disposes of those submissions:

(a) The Club refers to the conditional benefit principle seeking to achieve "*consistency*", such that if the third party enjoys the benefit of a contractual right it

must be subject to any corresponding obligation (Club's Written Case, [20.1]– [4/59]
[20.2]). This statement is correct, so far as it goes: as set out above, *The Jay Bola*, [85/2265]
The Atlantik Confidence and the Court of Appeal in this case all emphasised that [43/1069]
the premise of the conditional benefit principle is that a third party cannot assert a right inconsistently with the terms of the contract. However, also as set out above, this underscores the defensive nature of the principle, meaning that it is only appropriate, at least in a case concerning adherence to an exclusive forum clause, for a court to grant negative remedies (such as injunctive and declaratory relief).

(b) The Club states that the conditional benefit principle "*giv*[es] *rise to equitable* [4/61]
rights and obligations which are equivalent to contract", relying primarily on
Airbus (Written Case, [21]). As set out above, when in *Airbus* Males LJ referred to [40/1010]
'equivalence', he was referring to uniformity as between law and equity in terms of the substantive benefits and burdens arising under the contract, not with the nature of the remedies available as against contracting and third parties. That case was not concerned with, and does not justify, a grant of equitable compensation.

(c) Finally, the Club appeals to a vague notion of "*fairness*" (Written Case, [22]). What [4/64]
is fair is to be judged in light of the nature of the equitable obligation in question:
as made clear in *AIB*, equitable compensation is not available indiscriminately. As [39/966]
addressed further below, a party considered to be bound by an equitable obligation pursuant to the conditional benefit principle (and, in particular, a direct action claimant) is in a very different position to, for example, a trustee or other fiduciary. It is the nature of the obligation which must form the basis for a principled analysis of whether the categories of case in which equitable compensation is available should be expanded. Contrary to the Club's case, such expansion should not occur simply because, in the peculiar circumstances of this case in which the UK's international obligations concerning State immunity are in play, injunctive relief and s.50 SCA damages are not available. This argument about 'fairness' would not realistically be open to the Club if it had chosen to commence arbitral proceedings against any of the claimants in the Spanish proceedings other than the two sovereign States.

c. <u>Conditional benefit authorities said to justify the imposition of a monetary remedy</u>

43. At [24]–[26] of its Written Case, the Club refers to certain authorities which it contends justify the imposition of a monetary remedy in conditional benefit cases. Those cases have a common fact pattern: each of them concerns a person who used a service or right granted in a deed, which deed imposed an obligation to pay for the service or right. The person was required to pay for the service or right which they had used. The conditional benefit principle would have no utility at all in those cases if it did not require a defendant to make payment. [4/65]

44. An award of monetary compensation in these 'covenant' cases is fundamentally different to what is proposed in this case: a monetary remedy being awarded against a third party to a contract because it has brought a claim that is not in the correct contractual forum. Andrews and Falk LJJ rightly distinguished the two types of cases at Judgment, [256], as follows: [7/215]

> "*The facts of* [the deed of covenant] *cases are very different. They concern 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.*"

45. In the Judgment, the deed of covenant cases referred to were <u>*Halsall v Brizell*</u> [1957] Ch 169 and <u>*Thamesmead Town v Allotey*</u> (1998) 30 HLR 1052. As to those cases: [71/1872] [94/2437]

(a) In <u>*Halsall*</u>, a non-party to a deed of covenant sought to take advantage of the right to use roads and sewers in a development without paying the monies required to be paid under the deed for the use of those rights. Upjohn J stated (at 183) that "*the defendants here cannot, if they desire to use this house, as they do, take advantage of the trusts concerning the user of the roads contained in the deed and the other benefits created by it without undertaking the obligations thereunder*". In other words, the <u>substantive burden</u> created by the deed (which correlated with the right used) was an obligation to pay. The only way to avoid 'inconsistency' (to use the more recent authorities' nomenclature) was to require the defendant, if they wished to continue using the roads and sewers, to perform the payment obligation. [71/1886]

Payment was not sought as a remedy for breach of a substantive obligation or burden in the deed. Importantly, the essentially defensive character of the conditional benefit principle was recognised in this case: Upjohn J stated (at 182) that "[i]*f the defendants did not desire to take the benefit of this deed … they could not be under any liability to pay the obligations thereunder*". [71/1885]

(b) *Thamesmead Town* concerned a deed of covenant for the use of, among others, road, footpaths, sewers and communal areas. The defendant (not a party to the deed) refused to pay the relevant charges. The significant development in that case was that the Court of Appeal emphasised that the burden sought to be imposed must correlate to a benefit which the defendant had chosen to exercise: see 1060–1061. The case is otherwise materially the same, for present purposes, as *Halsall*. [94/2445]

46. The Club now refers to further authorities which were not before the Court of Appeal (see Club's Written Case, [25]). They take the analysis no further. Each of them is materially similar to *Halsall* and *Thamesmead Town* in that the contract in question contained a substantive obligation to pay money, which the defendant was required to perform if they wished to take the relevant associated benefit under the contract.[4] [4/65]

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[4] See *Aspden v Seddon (No. 2)* (1876) 1 Ex D 496 (contractual duty to pay compensation for damage caused by working mine); *Chamber Colliery v Twyerould* [1951] 1 Ch 268 (contractual duty to provide "*satisfaction*" for damage caused by working mine); *Wilkinson v Kerdene Ltd* [2013] 2 EGLR 163 (contractual duty to make maintenance payments for facilities which the defendants exercised the right to use); *Elwood v Goodman* [2014] Ch 442 (contractual duty to pay maintenance contributions which corresponded to contractual rights to use a road). *Westhoughton Urban DC v Wigan Coal* [1919] 1 Ch 159 also concerned a contractual duty to provide compensation for damage caused by mining work. The Club suggests that the Court of Appeal in that case granted monetary compensation in respect of not only that positive burden but also "*a non-pecuniary obligation to repair and reinstate*": Club's Written Case, [25.3]. However, it is clear from the Court's analysis that their reasoning turned on the defendants' contractual duty to provide compensation for any damage caused by their exercise of mining rights: see 170–172 (Swinfen Eady MR), 174 (Duke LJ). [42/1054] [49/1312] [109/2831] [58/1507] [108/2812] [4/66] [108/2823] [108/2827]

(b) Cutting across the statutory scheme

47. Having decided that: (i) an equitable obligation to arbitrate arising by reason of the conditional benefit principle was not an adequate basis for a grant of monetary relief; and (ii) the primary remedy for contravention of such an obligation was an injunction, the Court of Appeal went on to consider the statutory scheme for an award of equitable damages under s.50 SCA, and whether, in a conditional benefit case, monetary relief [35/930] could be awarded outside of that scheme. The subject is addressed at Judgment, [218], [7/208] [219] and [221] (Vos MR) and [259]–[261] (Andrews and Falk LJJ). [7/209]

[7/216]

48. The Court of Appeal's focus was not on whether the Court (or a tribunal) had power in the strict sense to award equitable compensation[5] (the question to which the authorities cited by the Club at Written Case, [28] would be relevant), but on whether it could do so [4/68] as a matter of authority or principle in view of the inter-relationship between the limited nature of the obligations arising by virtue of the conditional benefit principle, the remedies granted to date reflecting that nature, and the statutory scheme for the grant of monetary relief in respect of equitable obligations represented by s.50 SCA. [35/930]

49. It is a critical part of the Court of Appeal's analysis on this point that neither Lord Cairns' Act nor s.50 SCA created a freestanding right to monetary relief for breach of an equitable obligation. The authorities made clear that the function of monetary awards under these statutes is to compensate a party for an injunction not being granted where it could have been (and what is lost thereby), not for the underlying wrongdoing. For example, in <u>*Leeds Industrial Co-operative Society Ltd v Slack*</u> [1924] AC 851, Viscount Findlay stated at 859 that "*the power to give damages in lieu of an injunction must in all* [75/1961] *reason import the power to give an equivalent for <u>what is lost by the refusal of the injunction</u>*" (emphasis added). In <u>*One Step (Support) Ltd v Morris Garner*</u> [2019] AC [79/2088] 649, having cited this passage, Lord Reed proceeded to state (at [44]):

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[5] See e.g. Judgment [219] where the Master of the Rolls referred to whether it was appropriate [7/208] to widen the categories of case in which the power to award such compensation had been recognised.

"*Where it is likely that the refusal of an injunction will result in the claimant's sustaining loss and damage as a consequence of the tort, breach of contract or other wrongful act which the court has declined to prevent, the damages should provide compensation for that loss and damage*" (emphasis added).

To similar effect see [62] and [95(3)]. [79/2092] [79/2101]

50. The position of the States, both before the Court of Appeal and this Court, is that s.50 SCA was enacted to compensate for the unfairness that arises where there is a *prima facie* or possible entitlement to an injunction, but the Court in its discretion decides not to award one.[6] [35/930]

51. A further purpose of Lord Cairns' Act, as explained by Millett LJ in *Jaggard v Sawyer* [1995] 1 WLR 269, 284 was to allow damages to be granted in substitution for an injunction, which damages related to future wrongs or harm. This was subsequently explained and endorsed in *United Utilities Water Ltd v Manchester Ship Canal Co Ltd (No. 2)* [2025] AC 761, (at [130] per Lords Reed and Hodge): [74/1944] [104/2749]

"*There is therefore no basis for excluding a common law claim or an award of damages at common law. Further,* [under s.50 SCA] *the court has the power at common law to award damages for past invasions of property rights, and the power in equity to award damages for future or repeated invasions of those rights: see Jaggard v Sawyer [1995] 1 WLR 269, 276–277 ("Jaggard"). The power to award damages is not curtailed when a court exercising its discretion does not grant an injunction. So long as the court has jurisdiction to grant an injunction, it may award such damages under section 50: see the fourth and fifth propositions of Millett LJ in Jaggard, pp 284–285, and One Step (Support) Ltd v Morris-Garner [2019] AC 649, para 45. In our view the 1991 Act does not remove that jurisdiction. It constrains by implication the court's exercise of its discretion as to the grant of injunctions* [74/1936] [79/2088]

[6] See e.g. Hanbury and Martin, *Modern Equity* (23rd ed, 2024), §28-050, and *Snell's Equity* (35th ed, 2024), ~~§20-060.~~ §20-051 [118/3054] [116/2999]

which would be inconsistent with the operation of the statutory mechanisms for the allocation of capital expenditure and the enforcement of the section 94 duty, but it does not remove the court's jurisdiction. In so far as the court is implicitly constrained by the scheme of the 1991 Act from granting such an injunction, it has the power to award damages both at common law and, in equity, in substitution for the injunction" (emphasis added).

52. In the present case, the indemnities granted by the Tribunals related to future wrongs and future and contingent harm. They are therefore precisely the type of relief which would typically be available under s.50, but which could not be granted under that provision in this case because the Club could not fulfil the jurisdictional requirements (by virtue of the defendants being foreign States). [35/930]

53. It therefore could not be clearer that where a claimant seeks but cannot be granted an injunction because the Court has no power to grant one such that the claimant cannot be awarded equitable damages under s.50 SCA for an equitable wrong, it cannot as a matter of principle be correct that the Court can resort to its general equitable jurisdiction to grant what is in effect equitable damages under the guise of equitable compensation. [35/930]

54. There is a statutory scheme created by s.50 for the award of discretionary equitable damages for equitable wrongs, and to grant equitable compensation where s.50 cannot be invoked because the Court cannot grant an injunction, would cut across that scheme. [35/930]

55. While the Club complains that it has not been granted an injunction and that it is unfair that it has as a result been denied monetary relief, that is precisely the reason why it has been denied monetary relief. The Club was never entitled to protection by way of injunction due to s.13(2)(a) SIA (which exists to implement the UK's international law obligations) and is therefore not entitled to be compensated for that which it could not have had. As Millett LJ made clear in *Jaggard v Sawyer* at 284, "*There have been numerous cases where damages under Lord Cairns's Act were refused because at the date of the writ it was impossible to grant an injunction or specific performance.*" [34/918] [74/1944]

56. At [47] of its Written Case, the Club complains that the Court of Appeal's conclusion "*converts that narrow immunity* [in s.13(2)(a) SIA]*, designed for a very particular* [4/84]

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". In the same paragraph, it suggests that, "*on the Court of Appeal's approach here, the s.13(2)(a) immunity … preclud*[es] *all monetary relief in respect of commercial acts for which the States have no immunity from adjudicatory jurisdiction*", which was not the purpose of s.13(2)(a). That argument is misconceived: [34/918]

(a) Section 13(2)(a), taken in isolation, does indeed have the narrow effect of preventing a grant of injunctive relief against a foreign sovereign State (absent its consent). That provision reflects the UK's obligations under customary international law. Those obligations (concerning courts' enforcement jurisdiction) arise irrespective of whether the foreign State would be immune from the courts' adjudicative jurisdiction. [34/918]

(b) It is perfectly conceivable that the grant of immunity from injunctive relief (in compliance with international law) has other consequences under domestic law, especially in respect of statutory powers the exercise of which are premised on a pre-existing power to grant injunctive relief.

(c) Section 50 SCA refers to the Court's jurisdiction to grant injunctive relief and specific performance. It prescribes a consequence or remedy for the court having jurisdiction to grant those equitable remedies — i.e. that monetary compensation may be granted in addition or in lieu. But s.50 does not itself set out what that jurisdiction is. The scope of the court's jurisdiction needs to be determined by looking at rules outside of s.50 itself, including s.13(2)(a) SIA which deprives the court of the jurisdiction to grant injunctive relief against a foreign State. [35/930] [34/918]

(d) That is why the Court of Appeal held, at [204], that, "[s]*ince there was no power or jurisdiction for the Arbitrators to injunct Spain and France from continuing the Spanish proceedings, there was no power for them to award equitable damages* [under s.50] *in place of such an injunction*". The Club sought but was denied permission to appeal that finding. [7/205]

(e) Thus, it is not that s.13(2)(a) deprived the Club of the right to obtain s.50 damages. Section 50 itself prescribes the jurisdictional requirements for a grant of equitable damages. [34/918] [35/930]

(f) On precisely the same logic, it is not the case that the Judgment treats s.13(2)(a) as a provision which deprives the Club of the right to recover equitable compensation. On the States' case and the Court of Appeal's findings, no defendant in a conditional benefit case could have an award of equitable compensation made against them, given the nature of the conditional benefit principle and the fact that such an award would cut across the s.50 SCA statutory scheme (which would, for claimants other than sovereign States, provide the obvious route to monetary compensation). Thus, s.13(2)(a) does not oust any pre-existing right to equitable compensation; no such pre-existing right exists. [34/918] [35/930]

(g) Lastly, s.13(2)(a) SIA (whether taken alone or in conjunction with s.50 SCA) does not preclude the grant of any monetary award at all when an injunction is not available. For example, a litigant may still obtain common law damages in respect of loss caused by past breaches of a relevant duty.[7] However, in such a case, the claimant either needs to establish a common law right to damages, or an equitable right to monetary relief which exists independently of s.50 SCA. That does not exist in this case, the law would have to be extended to create it, and it should not be so extended to get around the confines of: (i) the limited nature of an equitable obligation to arbitrate; and (ii) the jurisdictional constraints of s.50 SCA. [34/918] [35/930]

57. Further, contrary to the Club's Written Case at [45.3], this is not a case of a cause of action or a right to a remedy which is otherwise available to the Club, being ousted by s.50 (without express words or absent necessary implication). Absent an application of s.50, the right to monetary relief does not arise. The outer limits set by s.50 are not extraneous to or imposed on the right: they simply constitute and delimit the right (in circumstances where, as the Club contends at Written Case, [45.1], Lord Cairns' Act was [4/81] [4/80]

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[7] A point made by the Club at Written Case, [46.1] in a different context, namely that s.50 was not designed to oust compensatory remedies where an injunction was not available. [4/83]

enacted to do "*complete justice*" between the parties). Further, and for the reasons given above, no cause of action arises by virtue of the conditional benefit principle. This contrasts with the *United Utilities* case where common law causes of action existed which were not excluded or ousted by the relevant statutory provisions (see [129]–[130]). [104/2748]

58. Moreover, were the Court to cut across the statutory scheme by awarding equitable compensation when it could not award equitable damages, there would, as the Court of Appeal found, be no discernible purpose for s.50, and no reason why claimants would take on the burden of complying with its jurisdictional requirements. There would also be no basis for claimants to pursue damages under s.50 given that they are a discretionary remedy, if the Club were right that equitable compensation should be awarded as a complete substitute for common law damages and would, on that logic, be available essentially as of right and on the same scale as damages: cf Judgment, [207], [219], [221]. [7/206] [7/208] [7/209]

(c) *Comity*

59. The Court of Appeal held that a further factor supporting (although not central to) its findings as to the availability of equitable compensation in the circumstances of this case was comity.[8]

60. In this case, the Spanish courts have accepted that the claimants before them (including the States) were permitted to rely on the direct action statute to pursue their claim against the Club. The CJEU has confirmed the same (see [36(d)] above) in a judgment that binds [5/115] the UK courts. The only reason that the Spanish judgment is not able to be enforced in this jurisdiction is that, before the CJEU issued its judgment, Alastair Schaff KC had issued awards which had *res judicata* effect between the Club and the States: see Judgment, [154]–[161], [244]–[249]. (Therefore, if any of the non-State claimants who are beneficiaries of the Spanish Judgment sought recognition of it in the UK, recognition would have to be granted under Regulation 44/2001.) If any relevant parties sought to have either the Schaff Awards or the Spanish Judgment recognised or enforced in any [7/190] [7/213] [22/752] [38/943] [18/646] [19/692] [22/752]

[8] As to whether the Court of Appeal exceeded its powers under s.69 of the 1996 Act by considering questions of comity, see the States' response to Ground 2 of the present appeal. [36/935]

third jurisdiction, it would fall to the courts in that jurisdiction to determine whether to allow recognition / enforcement, including in light of their own conflicts of laws principles and obligations (if any) under EU law and the New York Convention.

61. The purpose and effect of the indemnities awarded in this case (as a form of equitable compensation) would be to neutralise, in practical or indirect terms, the decision of a court in such a third jurisdiction to recognise and/or enforce the Spanish Judgment in the States' favour. As the Master of the Rolls recognised, upholding the grant of such indemnities would "*create extra-territorial consequences (if the Spanish judgment were sought to be enforced in other countries in circumstances which cannot be predicated) that are not justified in law or on the facts*" (Judgment, [235]). Andrews and Falk LJJ made the same point at [250] and [268].[9] [22/752] [7/212] [7/214] [7/217]

62. All members of the Court of Appeal drew an analogy with cases arising in the context of anti-enforcement injunctions: see Judgment, [222], [268]. English courts have shown significant restraint in such cases out of an appreciation that recognition and enforcement in a third country "*is a matter which it is, intrinsically for the relevant court to decide according to its applicable law*": see Ecobank Transnational Inc v Tanoh [2016] 1 WLR 2231, [136]. This accorded with the previous finding of the Court of Appeal in ED&F Man (Sugar) Ltd v Haryanto (No. 2) [1991] 1 Lloyd's Rep 429, in which Indonesian courts had issued a judgment which was irreconcilable with a previous judgment of the English Court of Appeal; the Indonesian judgment was not recognised in England because of the public policy in favour of the *res judicata* effect of English judgments. The Court of Appeal refused to grant the claimant an injunction to restrain the defendant from relying on the Indonesian judgment in any jurisdiction. The lower court's assessment that it should be left "*to Courts in foreign jurisdictions to choose (if the* [7/209] [7/217] [54/1458] [55/1466]

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[9] Certainly, a judgment for equitable compensation in a case such as the present would likely result in its non-recognition and enforcement in the EU. The CJEU has ruled in C-590/21, Charles Taylor Adjusting Ltd v Starlight Shipping Co [2023] 4 WLR 68 that an English judgment awarding damages for breach of an (English) exclusive jurisdiction clause by proceedings having been brought in an EU Member State (Greece) could deter defendants from bringing or continuing claims before the Greek courts and would therefore constitute a 'quasi anti-suit injunction' which would undermine access to justice for defendants. [112/2883]

matters arises) whether to recognise the judgment of the English or Indonesian courts" [55/1474] was upheld (at 437–438, 440). As Mann LJ explained, English courts should respect the [55/1477] principle of "*not constraining albeit indirectly, the ability of foreign Courts to apply their local law in regard to the recognition and enforcement of judgments*" (at 440).[10] [55/1477]

63. Thus, considerations of comity provide a further and obvious basis to support the conclusion that equitable compensation should not be available in a conditional benefit, and in particular a direct action, case such as this.

(d) Circumstances where equitable compensation has been found to be available to date

64. The Club dedicates a substantial portion of its Written Case to previous types of cases in which equitable compensation has been awarded ([30.1]–[30.4]). However, it is clear [4/69] that the equitable obligations considered in those cases are qualitatively different from that in the present case, and a grant of equitable compensation in the present case would not constitute a "*modest incremental development*" in the case law (contrary to the Club's Written Case, [33]). [4/71]

65. The categories of cases where equitable compensation has been found to be available previously concern a situation in which a party has voluntarily assumed obligations and/or there is an unconscionable breach of such an obligation or the defendant has dishonestly assisted in the breach of a (fiduciary) obligation.

66. The paradigmatic case is where there has been a breach of a duty owed by a trustee or other fiduciary (Club's Written Case, [30.1]). In such cases, the trustee or fiduciary has [4/69] voluntarily assumed obligations and is under a duty to subordinate their interests to those of the beneficiary. It is firmly established that equitable compensation is available in such [39/966] cases: see, e.g., *AIB*; *Nocton v Lord Ashburton* [1914] AC 932. There is also the passage [77/1999] of the Judgment of Richards LJ in *Auden McKenzie v Patel* [2019] EWCA Civ 2291,

[10] See also *SAS Institute Inc v World Programming Ltd* [2020] 1 CLC 816 in which the Court [83/2198] of Appeal followed *Société Eram Shipping Co Ltd v Cie Internationale de Navigation* [2004] [88/2309] 1 AC 260, and applied the internationally recognised principle that enforcement was a matter for the courts of the State where the asset against which enforcement was sought was located.

[31] cited at Judgment, [181]. The States accept that passage was not designed to be a comprehensive statement of the circumstances in which equitable compensation could be awarded, but it contradicts the proposition that equitable compensation is available to remedy any breach of any equitable obligation arising out of any form of equitable relationship. [44/1121] [7/198]

67. The Club highlights that equitable compensation has been granted in cases concerning accessory liability for breach of trust, pointing to the example of dishonest assistance and the case of <u>*Stevens v Hotel Portfolio II UK Ltd*</u> [2025] 3 WLR 293 (Club's Written Case, [30.3]). It is unsurprising that equitable compensation was awarded in a dishonest assistance case, given the recognised close adjacency between the breach by the trustee (the paradigm case of where equitable compensation is available) and the conduct of the dishonest assister: see [5] ("*Those who dishonestly assist a trustee in a breach of trust are jointly liable with the trustee to the beneficiary for any loss caused by the breach*"), [42] ("*The constructive trust of profits imposes the usual obligation on the constructive trustee not to dissipate the trust property, and the usual obligation on both him, and upon any dishonest assistant in the dissipation, to compensate the beneficiary for any loss caused thereby*"). As it was put by the Supreme Court in <u>*Byers v Saudi National Bank*</u> [2022] 4 WLR 22, [41], dishonest assistance gives rise to "*a truly ancillary liability, ancillary that is to the breach of trust by the trustee, which renders the assister liable as an accessory to the same extent as the trustee*". Given that a dishonest assister is so closely assimilated to a defaulting trustee, it is natural that their unlawful act gives rise to the same remedy as the breach by the trustee themselves. [73/1891] [4/70] [73/1896] [73/1905] [48/1269]

68. The Club refers to examples of equitable compensation being awarded for breaches of non-fiduciary equitable duties (Club's Written Case, [30.2]). However, the cases where this has arisen bear material similarities to the cases concerning breach of fiduciary duty. [4/69]

(a) The Club contends that equitable compensation is available in cases of deceit. The authority it cites in this regard is <u>*Nocton*</u>. As referred to above, that case in fact concerned a breach of fiduciary duty. The breach had been a fraudulent one. It is natural that, in that context, the House of Lords found that actual dishonesty could give rise to an award of equitable compensation (at 951–952). [77/1999] [77/2018]

(b) The Club says that equitable compensation is available following a breach of an equitable duty of care and skill, citing *Bristol & West Building Society v Mothew* [1998] Ch 1. However, that case concerned a solicitor, and thus there was an underlying fiduciary relationship. Although the duty to exercise care and skill was not itself a fiduciary duty (in that it was not characterised by the duty of loyalty which is specific to fiduciaries: see 17–18), it was nonetheless a duty that arose in a fiduciary context and had been assumed voluntarily. This is the basic fact pattern in which equitable duties of skill and care arise. [46/1184] [46/1200]

(c) As stated in the Judgment at [178], equitable compensation was awarded in *Force India Formula One Team Ltd v Malaysia Racing Team* [2012] EWHC 616 (Ch) for breach of an equitable (non-contractual) obligation of confidence (see [388]–[424]). Even in the absence of a fiduciary relationship, an equitable obligation of confidence is one "*ultimately based on conscience*": see *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2013] 1 WLR 1556, [22], citing *Coco v A.N. Clark (Engineers) Ltd* [1968] FSR 415 at 419 ("*The equitable jurisdiction in cases of confidence is ancient; confidence is the cousin of trust*"). The Supreme Court has affirmed that the circumstances giving rise to a breach of confidence (i.e. that the recipient of information must have agreed or must know that the information is confidential) mean that "*the conscience of the recipient* [is] *affected*" (*Vestergaard Frandsen*, [23]). This factor creates an alignment between the equitable obligation of confidence and fiduciary obligations, which are the traditional context for a grant of equitable compensation. Indeed, one leading commentary states that "*there is a close parallel between a person owing an equitable obligation of confidence and a person owing a fiduciary obligation*", while noting that there are "*obvious differences between such a duty and the equitable obligation to arbitrate with which the Court of Appeal was concerned*" in the present case: *Toulson & Phipps on Confidentiality* (5th ed, 2026), §§6-202, 6-211. [7/198] [65/1649] [105/2758] [105/2758] [121/3098] [121/3100]

69. Finally, the Club refers to the monetary relief granted in *Guest v Guest* [2024] AC 833, a case concerning proprietary estoppel, where farm-owning parents were estopped from acting unconscionably in repudiating a promise previously made to their son who had worked on the family farm for low wages (see, e.g., [4], [10]). The Supreme Court held [70/1780] [70/1786] [70/1788]

that it will not always be equitable (in view of the detriment suffered by the promisee) to enforce the promise in full, and that the remedy might need to be limited to have regard to the detriment in question. Equitable compensation was found to be one option available to fulfil the equity arising in that case (the other being an award of a reversionary interest under a trust of the farm, with a life interest in the meantime). Thus, equitable compensation could be granted in substitution for an interest in real property. The rights and obligations arising there bear no relation to the rights and obligations arising under the conditional benefit principle.

70. In short, all of the categories of cases to which the Club refers concerned either duties which were fiduciary in nature, or were closely adjacent or at least materially similar to them (or concerned an equitable interest in property).

71. Conditional benefit cases are different. The equitable obligation bears no resemblance to a fiduciary duty or equitable proprietary interest. The duty is simply one to avoid inconsistency. Moreover, there is no voluntary assumption of obligations and no promise made from which it would be unconscionable to resile.

72. The position is *a fortiori* in a direct action case. A person claiming under a foreign direct action statute is doing no more than pursuing a claim that is made available by statute, typically under the domestic law of the place of their domicile or where they suffered harm. The bar to them doing so arises as a result of English law characterising their claim as contractual in nature, and thus (as Andrews and Falk LJJ explained) in this case "*any arguable unconscionability is from an English, not Spanish, law perspective*" (Judgment, [265]). (Indeed, as a matter of EU law, the claimants before the Spanish courts, including [7/217] the States, were entitled to pursue the Spanish proceedings unencumbered by the arbitration clause in the policy of insurance (as found by the CJEU: see [36(d)] above).) [5/115]

73. These factors distinguish direct action claimants even from other parties pursuing claims under the conditional benefit principle, such as subrogated insurers or assignees. In a case of subrogation or assignment, the parties have a close relationship to the contract in question. Their position is not intermediated by another law or statute, which in a direct action case dictates the nature and extent of the right of action available, the defences available to the insurer and how and in what forum the right of action is to be exercised.

Although Andrews and Falk LJJ were not persuaded by this distinction (Judgment, [258]), this was mainly due to *The Yusuf Cepnioglu*. However, that case dealt with the question whether the equitable obligation to arbitrate applied equally in assignment and direct action cases in the particular context of whether the *Angelic Grace* or vexation/oppression test applied to an application for an anti-suit injunction. *The Yusuf Cepnioglu* did not consider whether the two categories of case were identical for all purposes. In any event, the States agree with the Court of Appeal that equitable compensation should not be available in conditional benefit cases generally, for the reasons given in the Judgment and set out in this Written Case. But the situation of direct action claimants puts the reasons for this in particularly sharp relief. [7/216] [86/2279]

(e) Whether an incremental expansion is justified by Broad Idea or Wolverhampton

74. The Club relies on the Supreme Court's judgment in *Wolverhampton City Council v London Gypsies and Travellers* [2024] AC 983 as the basis for a closing appeal to the inherent flexibility of equitable doctrines, including in respect of remedies (Club's Written Case, [34]). It emphasises the Supreme Court's statements that the purpose of equitable remedies is to "*put right defects or inadequacies in the common law*" and that equity is capable of flexibility and innovation (*Wolverhampton*, [21]–[22], [149]). [110/2838] [4/71] [110/2858] [110/2862]

75. These were matters of which the Court of Appeal was keenly aware. For example, the Master of the Rolls quoted from *Wolverhampton* at significant length at Judgment, [167], where he also referred to *Convoy Collateral Ltd v Broad Idea International Ltd* [2023] AC 389, in which the Judicial Committee of the Privy Council referred to the Courts having an "*unlimited*" power to grant injunctions, subject to any statutory restrictions. He properly recognised, with reference to both cases, that the categories of case in which equitable relief will be granted are not closed ([210]). [7/192] [52/1345] [7/207]

76. However, the Court of Appeal ultimately (and correctly) recognised that it does not follow from these judgments that equity will intervene to provide a remedy (monetary or otherwise) in every circumstance. As the Master of the Rolls stated at [168], "*The principles of equity are not exactly the same as those of the common law, and the distinction between equitable compensation and common law damages has not yet been swept away*" (and see the similar statement at [223]). For their part, Andrews and Falk [7/195] [7/209]

LJJ acknowledged that the conditional benefit principle and s.50 damages are examples of where equity has intervened to correct inadequacies in the common law, but rightly noted that their "*limits must be observed*" ([261]). [7/216]

77. In *Wolverhampton*, this Court did not conceive of equitable remedies as being capable of providing relief in any case, untrammelled by principle or authority. Instead, it endorsed "*the principled development of the remedy to fit the right*" ([150]). In this case, the Court [110/2862] of Appeal rightly posed the question of whether allowing equitable compensation to be granted in conditional benefit cases would amount to a principled development in this field. It rightly answered that question in the negative.

II. GROUND 2: ALLEGED ERRORS BY THE COURT OF APPEAL AS TO QUESTIONS OF FACT AND DISCRETION

(a) Summary of the States' position

78. In its Judgment, the Court of Appeal decided questions of law which had been before the Tribunals (and the Judge) for decision, and decided those questions on the basis of facts as found by the Tribunals, and/or which were common ground. The Court of Appeal's findings on the law were not predicated on or affected by any errors of approach on a s.69 appeal.

79. Specifically, the Court of Appeal did not, as alleged by the Club: (i) make new findings of fact (relating to causation and culpability); (ii) substitute its view of causation; (iii) exceed the boundaries of a review under s.69 of a question of mixed fact and law (on the question of causation); or (iv) improperly rely on considerations of international comity.

80. While the Club has suggested (at Written Case, [60.3], [61.2]) that the Court of Appeal [4/93] relied on the matters in issue for the purposes of exercising a discretion as to whether to [4/95] grant equitable compensation, this is incorrect. The Court of Appeal did not refuse to grant equitable compensation as a matter of discretion. It refused as a matter of law.

81. In any event and to the extent the Court of Appeal commented on:

(a) **First**: facts relating to the relative culpability of the parties, the purpose was to record their view of the justice of the situation before it, which is not as black and white as the Club makes out. It is legitimate to take a wider view of the ethical considerations of this case: why the States have acted as they have, how criminal and civil proceedings came about in Spain, the hundreds of non-State parties to those same proceedings,[11] and the implications of a decision to grant equitable compensation in a case such as this for ordinary, non-State litigants before the courts of other jurisdictions. However, none of these matters affected the decision of the Court of Appeal on the questions of law before it.

(b) **Second**: causation, it was entitled to do so because the question of causation was before both Tribunals for decision (by necessary implication given they had to decide what loss had been suffered by the Club before granting equitable compensation in respect of it), and causation constitutes a mixed question of fact and law (not a pure question of fact[12]), which was something the Court of Appeal was entitled to review having found the Tribunals had erred in law in deciding they had the power (either at all or in accordance with settled principle and authority) to grant equitable compensation in respect of the Club's claimed losses. Even so, properly analysed, the Court of Appeal's view of causation did not drive its legal analysis or its decision on the questions of law before it. The result would have been the same whether the Court of Appeal had considered the Club's losses to have been caused by breach of an obligation to arbitrate or by the non-implementation of the pay to be paid clause.

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[11] See Statement of Facts and Issues ("**SOFI**") at [6] and [16], the latter recording the fact that the Spanish Judgment was made in favour of over 260 claimants. [3/14] [3/17]

[12] Contrary to the Club's characterisation of the Tribunal's findings on causation as wholly factual (Written Case, e.g., at [58], [59.2]). In any event, the Court of Appeal did not find as a fact that it was the Club's failure to appear in Spain which resulted in the Spanish Court not upholding the pay to be paid clause (cf Club's Written Case, [59.2]): the Court of Appeal expressed the view that it was the treatment of the pay to be paid clause, not any failure to arbitrate, which resulted in a damages award against the Club in Spain. None of the three members of the Court blamed the Club for that, but they did express the common sense view that the Club's decision not to appear in Spain meant that the Spanish court did not benefit from full argument on the point. [4/89] [4/90] [4/90]

(c) **Third**: international comity, it did so because it potentially affected the question of whether equitable compensation was available as a matter of law in a conditional benefit case relating to an equitable obligation to arbitrate. That question of law is not hermetically sealed from the form of equitable compensation in fact granted: the costs of legal proceedings and indemnities designed to insulate the Club from future contingent loss arising out of enforcement of the Spanish Judgment in third countries. However, it is also clear from the Judgment that considerations of comity did not affect the Court of Appeal's resolution of the questions of law before it. Lastly and contrary to the submissions of the Club, it is simply incorrect that Butcher J refused the French State permission to appeal on the questions of comity considered by the Court of Appeal, which the French State had in any event raised before Dame Elizabeth Gloster. [22/752]

(b) Legal principles on a s.69 appeal

82. It is accepted by the States that on an appeal on a point of law under s.69(1) of the 1996 Act, the Court of Appeal does not have the power to make new findings of fact or findings of fact different to those found by the arbitrators, nor decide questions of law which were not before the arbitrators for decision: *Sharp Corporation Ltd v Viterra BV* [2024] 4 All ER 273, [50], [51], [61]–[62], [71]. [36/935] [84/2249] [84/2250] [84/2252] [84/2253]

83. However, where there exist mixed questions of fact and law which are in issue, review under s.69 is possible where the appeal court concludes that the tribunal has misdirected itself in law[13]: *Mustill & Boyd: Commercial and Investor State Arbitration* (3rd ed, 2024), §14.134, citing *BTP Tioxide Ltd v Pioneer Shipping ("The Nema") (No. 2)* [1980] QB 547 at 566 (which decision the DAC Report stated it was implementing in the 1996 Act), *Sylvia Shipping v Progress Bulk Carriers* [2010] 2 Lloyd's Rep 81 (the issue of remoteness is one of mixed fact and law [53]–[54][14]) and *EI Group Plc v Clarke, Minnett* [2020] EWHC 1858 (Ch), [31] (distinguishing an error of law where an arbitrator has [117/3019] [80/2143] [93/2432] [56/1486]

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[13] Or where the Tribunal reached a conclusion which no reasonable arbitrator applying the right legal test on the facts as found could reach.

[14] Applied *The Nema* but concluded that the arbitrators had not made an error of law ([83]). [93/2436]

addressed the point of law expressly, from one where the error must be a deductive inference).

84. The Court of Appeal in this case did not infringe those principles. It concluded that both Tribunals had erred as a matter of law on the key questions of whether they had the power to grant, or should properly grant as a matter of law, equitable compensation or equitable damages under s.50 SCA for breach of an equitable obligation to arbitrate arising out of [35/930] the conditional benefit principle. That is sufficient to dispense with Ground 2.

85. In addition to the errors of pure law on the part of the Tribunals identified by the Court of Appeal, the Court expressed the view that the Tribunals had erred in their analysis of causation (itself a mixed question of law and fact), which had led the Tribunals to grant indemnities against future enforcement loss, even had it been open to them as a matter of jurisdiction to grant such relief (which it was not). Given the errors of law made by the Tribunals in granting equitable compensation/damages at all, it was open to the Court of Appeal to provide its own analysis of causation. However, even if that is wrong, the Court of Appeal's comments on causation <u>did not affect</u> its central analysis: that equitable compensation and s.50 SCA damages were not available in this case as a matter of law, [35/930] whether loss was caused by a breach of an equitable obligation to arbitrate or the non-implementation of the pay to be paid clause in the Spanish Judgment.

(c) Scope of permission to appeal

86. The relevant Ground of Appeal for which permission was sought from Butcher J by Spain on the appeal to him was (see SOFI, ~~[28]):~~ [29]): [3/23]

> "*Does a tribunal or a court have jurisdiction to award 'equitable compensation' for breach of an 'equitable obligation to arbitrate' arising from the conditional benefit principle, when there is no power to grant injunctive or specific relief within s.50 of the Senior Courts Act, as applied by s.48(5) of the Arbitration Act?*"

87. The relevant Ground of Appeal for which permission was sought from Butcher J by the French State on the appeal to him was "*whether the arbitral tribunal has the power to* [3/23] *award equitable compensation for breach of an equitable obligation to arbitrate arising*

by application of the conditional benefit principle, or whether equitable compensation is otherwise available in those circumstances" (see SOFI, [31]). [3/23]

88. While the precise formulations differ slightly, the Grounds advanced by the States were materially similar.

89. Following the decision of Butcher J on the States' appeals, when he gave permission for a further appeal to the Court of Appeal, the relevant Grounds were reformulated slightly to reflect more accurately the scope of the arguments:

(a) In respect of Spain: "*the Judge erred by failing to find that the Tribunal did not have the power to award equitable compensation in the circumstances of the present case, or otherwise to grant it in the circumstances of this case*" (Ground 2 of Annex 1 to the Order (concerning Spain) of Butcher J dated 15 December 2023); [8/225]

(b) In respect of the French State: "*the Judge erred in finding that the arbitral tribunal … had the power to award equitable compensation for the French State's breach of an equitable obligation to arbitrate arising by application of the conditional benefit principle, or otherwise to grant it in the circumstances of this case. As a matter of law, equitable compensation is not available as a remedy for breach of an equitable obligation to arbitrate, either generally or in the specific case of a third party asserting rights against an insurer pursuant to a direct action statute*" (Ground 1 at Annex 1 to the Order of Butcher J (concerning the French State) dated 15 December 2023). [9/231]

90. The permission to appeal granted to the States therefore included consideration of:

(a) Whether the Tribunals had the jurisdiction or power (in the strict sense[15]) to grant equitable compensation for breach of an equitable obligation to arbitrate; and

[15] In *Fourie v Le Roux and Others* [2007] 1 WLR 320, the House of Lords held that the Court had jurisdiction, in the strict sense, to grant an injunction where it had *in personam* jurisdiction over the person against whom it was sought, but that an injunction would generally not be [66/1665]

(b) In the event the Tribunals did have such power/jurisdiction, whether they were otherwise entitled to grant such relief (as a matter of law), in the context of an equitable obligation to arbitrate, including such an obligation arising in the case of a third party asserting rights under a direct action statute.[16]

(d) Formulation of the issues by the Court of Appeal

91. The Court of Appeal answered directly the questions of law before it. Its analysis relating to equitable compensation and s.50 SCA equitable damages starts at Judgment, [165] within the judgment of the Master of the Rolls. There he framed the questions of law before the Court as follows: [7/192]

(a) Whether equitable compensation is available for breach of an equitable obligation to arbitrate; and

(b) Whether equitable damages are available in lieu of or in addition to an injunction under s.50 SCA.

92. He expressed the view at [165] that "*these questions are connected as they both go to the question of when, as a matter of current law and equity, compensation or damages are or ought to be available for breach of equitable as opposed to legal obligations, and specifically for breach of the type of equitable obligation in issue here*". [7/192]

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properly made in the absence of a formulated case for substantive relief which the applicant intended to seek. Thus, a distinction was drawn between jurisdiction in the sense of having a power to do something, and whether a particular form of relief ought properly to be granted as a matter of legal principle or authority or settled practice (see Lord Scott at [25] and [30]). [66/1674] [66/1677]

[16] The distinction between (a) and (b) is demonstrated by Judgment, [224] where the Master of the Rolls concluded that "*Even if such a jurisdiction* [to grant equitable compensation] *exists, it should not have been exercised here for the reasons I have given.*" [7/210]

93. These are fair and accurate statements of the questions of law for which permission to appeal was given by Butcher J (and which were heard by Butcher J), and they were matters which were squarely before the Tribunals and which they were asked to decide.[17]

(e) 'Circumstances of the case'

94. The 'circumstances of the case' referred to in the Grounds/Permission to appeal (both to Butcher J and to the Court of Appeal) were those related to the application of the conditional benefit principle, being:

(a) The nature of the obligation relied upon by the Club, which was an obligation not to act inconsistently with the arbitration agreement in the insurance policy (as explained in relation to Ground 1 above); and

(b) The fact that the principle arose in the present case by reason of the States having made claims against the Club in Spain pursuant to a Spanish direct action statute. That particular manifestation of the conditional benefit principle was fairly and squarely before the Tribunals, Butcher J and the Court of Appeal. In this respect, it is also relevant that the States were not the only such claimants in the Spanish proceedings[18] (although they were the only two who were State entities and were the only two claimants against whom the Club has pursued proceedings). The fact that there were both State and non-State claimants claiming under a direct action statute before the Spanish Court, and more generally that not all parties taking advantage of direct action statutes will be States, was important. Any decision about the availability of equitable compensation or equitable damages would affect both categories of claimant (Judgment, [206]). [7/205]

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[17] Even though Dame Elizabeth Gloster declined to decide whether equitable damages were available under s.50 SCA: see her First Award, [203]–[204]. [16/635]

[18] Judgment at [206], with the Club having informed the Court of Appeal that such claims fell within the CLC limit (although as a matter of principle such claimants are in no different position to the States – the States having claimed for larger sums because they had paid for most of the damage caused by the Club's insured). [7/205]

95. Nothing in those circumstances is controversial, and none of it goes beyond what was before or decided by the Tribunals. It is the essential background against which the questions of law arising had to be considered.

96. A further 'circumstance' relevant to the availability of equitable compensation in a case concerning an equitable obligation to arbitrate (arising because a non-party to an insurance contract had claimed against the insurer pursuant to a direct action statute), and which therefore falls within circumstance (a) above, was the decision of the CJEU in this case ([2023] 1 WLR 1). [113/2891]

97. The CJEU decided, applying *Assens Havn* (cited above), that: (i) an arbitration clause agreed between an insurer and insured party cannot be invoked against a victim of insured damage who, where permitted by national law, wishes to bring an action directly against the insurer, in tort, delict or quasi-delict, before the courts for the place where the harmful event occurred or before the courts for the place where the victim was domiciled (at [60]); and (ii) a court other than that first seised should not declare itself to have [113/2925] jurisdiction on the basis of such an arbitration clause ([61]), because any resulting judgment would infringe the provisions and fundamental objectives of Regulation No 44/2001, in particular the relative effect of an arbitration clause included in an insurance contract (at [73]). [113/2926]

98. Contrary to the Club's case, the Court of Appeal in the Judgment decided that the decision of the CJEU was binding on the English Court. The Master of the Rolls stated at Judgment, [148]:

> "[T]*he judge was wrong to think that he was not bound by the CJEU's decision on the grounds of any excess or want of jurisdiction. Article 89 and section 7A gave the CJEU's decision binding force in its entirety on and in the United Kingdom.*" [7/189]

99. Andrews and Falk LJJ held similarly at Judgment, [240]. Accordingly, the States remain [7/212] bound to arbitrate only by reason of the *res judicata* arising out of the Schaff Awards (which *res judicata* was found to give rise to a public policy reason within Article 34(1) [38/952]

of Regulation 44/2001 not to recognise the Spanish Judgment), which the Court of Appeal decided remained untouched by the decision of the CJEU.

100. The CJEU decisions in _Assens Havn_ and the present case form part of the circumstances of this case. They legitimately inform whether, as a matter of legal principle or authority, equitable compensation is available in conditional benefit cases involving direct action statutes (particularly in the context of proceedings in EU Member States where the equitable obligation to arbitrate is not recognised). [111/2875] [113/2925]

(f) The statements made by the Court of Appeal which are in issue

101. It is clear from the Judgment what the Court of Appeal decided and why, and those reasons did _not_ include considerations relating to the justice of the case, comity, or, to any material degree, causation.

(a) At Judgment, [217] the Master of the Rolls concluded, based on binding authorities, that "*an injunction and a declaration are the remedies that have, thus far, been established for a breach of the equitable obligation to arbitrate*". He proceeded to find that "*equitable compensation cannot be used to short circuit, for sovereign states, the well-established approach adopted under section 50*" ([218]). Further, he rejected the arbitrators' finding that "*equitable compensation could automatically be awarded in the same measure as common law damages*" ([219]), and rejected the notion that _Wolverhampton_ or _Broad Idea_ justified sweeping away the clear distinction that had survived in English law between common law damages and equitable damages and compensation ([223]). In addition and in concluding that indemnities of the kind granted by the Tribunals could not have been granted as a matter of law, the Master of the Rolls stated that the indemnities "*disregarded the nature of the conditional benefit principle as not creating a conventional cause of action*" ([221]). [7/208] [7/208] [7/208] [7/209] [7/209]

(b) The concurring judgment was equally clear that, at the level of _principle_, awards of equitable compensation in the context of cases such as the present "*would, in effect, ride roughshod over the jurisprudence that has developed in relation to both the conditional benefit principle and section 50, and accordingly would amount to* *an impermissible extension of the boundaries within which equitable compensation may be awarded*" and "*an unwarranted erosion of the principle of privity of contract*" ([251]). This is put beyond any possible doubt by the conclusion at [269] that "[e]*quitable compensation is not an available remedy in the context of the conditional benefit principle and in circumstances where damages cannot be awarded under section 50*". [7/215] [7/218]

102. These were the core findings which drove the conclusion that equitable compensation could not, as a matter of law and principle, be awarded in this case. In short, nothing said by the Court of Appeal relating to causation, culpability or comity made any difference to its findings on the law, which findings were plainly within the Grounds of Appeal. This section addresses the relevant comments made by the Court of Appeal, in context.

a. Causation

103. At Judgment, [208], the Master of the Rolls asked rhetorically how breach of an obligation to arbitrate was causative of the loss constituted by the Spanish Judgment (the Spanish court not having upheld the pay to be paid clause), his view being that it was the Club's failure to appear in Spain which had caused that loss. He returned to that theme at [220] where he said that the indemnities granted by the Arbitrators were supposedly to compensate the Club for future violations of the arbitration clause but that "*in reality* ... [the Tribunals] *were compensating the Club for the fact that the Spanish Supreme Court had overridden or ignored the pay to be paid clause and given judgment in breach of it*". Further, at [221] (and as one out of three reasons why equitable compensation was not available as a matter of law), he reasoned that the costs incurred by the Club and losses arising from any future enforcement flowed (if anything) from the Spanish courts not having applied the pay to be paid clause and not the States' equitable obligation to arbitrate. [7/206] [7/209] [7/209]

104. Andrews and Falk LJJ acknowledged that Sir Peter Gross had determined that the Club's non-participation in Spain had been reasonable due to the risk of submission, but also stated that the result was that the Spanish court was deprived of the benefit of the Club's arguments about the pay to be paid clause (Judgment, [266]). They further stated that, in reality, it was the fact that the Spanish courts did not apply the pay to be paid clause that [7/217]

resulted in the Club incurring costs in the quantum proceedings in an attempt to mitigate its exposure, and in the same way it will be the cause of any enforcement loss ([267]). [7/217]

105. In neither judgment was it found that the Club's non-participation in the Spanish proceedings <u>caused</u> the Club's loss (cf Club's Written Case, [59.2]). [4/90]

106. An issue of causation is one of mixed fact and law, and the Court is entitled to review and reach a different view to that of the Tribunal where the Tribunal has made an error of law (see the authorities cited at [83] above). The question of causation of any loss [5/135] suffered by the Club was, of necessity, squarely before the Tribunals; had it not been, they would not have been able to grant equitable compensation for the legal costs incurred by the Club or the indemnities in respect of future enforcement loss. The Court of Appeal took the view, as it was entitled to do, that what had caused any loss was the Spanish courts not having applied the pay to be paid clause. That is correct: had the Spanish courts upheld the pay to be paid clause, the Club would not have suffered loss in the form of the Spanish Judgment nor faced any enforcement risk, and a failure to arbitrate would have made no difference.

107. However, whatever is the correct position on causation and whether the Court of Appeal was entitled to comment on it, it did not form part of the core reasoning of any member of the Court, or form a part (let alone a material part) of their decision on the law:

(a) While the Master of the Rolls plainly disagreed with the rationale underlying the Tribunals' grant of the indemnities (including their view of causation), he also made expressly clear at [220] that: "*It does not matter who is to be blamed for what* [7/209] *occurred. … What matters is whether, as a matter of law, it was within the power of the Arbitrators to award the Club substantive indemnities against past costs and all future enforcement liability occasioned by the Spanish judgment.*"

(b) Andrews and Falk LJJ only made their comments on causation in a section [7/216] addressing the overall justice of the case, at Judgment [262]–[268]. By that point they had already reached a decision on the questions of law. In fact, they expressly stated that they were looking at whether equitable compensation <u>would</u> be appropriate "*even if it was possible to grant it as a matter of law*" ([263]), which they had already concluded it was not. [7/216]

b. Relative culpability

108. At Judgment, [209], the Master of the Rolls considered how the Spanish proceedings had come about in the first place: he noted that the CLC claims and the criminal proceedings against the Master of the vessel could only have been brought in Spain, together with the reality that lots of individual (non-State) claimants were not going to commence arbitrations against the Club when Spanish procedural law offered a route to potential redress via the criminal proceedings. He concluded by saying: "*Obviously, none of this completely justifies Spain and France acting in breach of the arbitration clause, but at least it explains in part why the Spanish proceedings occurred, and how they might not have been undertaken solely in an attempt to get over the pay to be paid clause.*" Similar views were expressed by Andrews and Falk LJJ at Judgment, [263]–[264]. [7/206] [7/216]

109. These comments did not cut across any findings of the Tribunals or constitute new findings of fact. They were simply a description of how it was that the Spanish proceedings had come to exist in the first place — none of which is in fact in issue. In this appeal, the Club does not take issue with how the Spanish proceedings came to be commenced; rather, it has taken issue with the Spanish proceedings having been continued following the Schaff Awards and their confirmation by the Court of Appeal in 2015. In the Judgment, the Court of Appeal drew a distinction between the commencement of the Spanish proceedings, and what had happened thereafter.

110. But in any event, the comments of the Master of the Rolls were expressly characterised as "*background*" (Judgment, [210]), and what followed at [211] was an uncontroversial statement of how the conditional benefit principle applied in this case based upon findings already made by the various tribunals, Hamblen J and the Court of Appeal in The Prestige (No. 2) [2015] 2 Lloyd's Rep 33. Similarly, at [262]–[267], Andrews and Falk LJJ stated that they wished to associate themselves explicitly with the Master of the Rolls' views about the overall justice of the case, but (as stated above) expressly dissociated this from their analysis of whether equitable compensation was available as a matter of law. [7/207] [95/2447] [96/2475] [7/216]

c. <u>Comity</u>

111. As set out above in relation to Ground 1, the Master of the Rolls drew an analogy between the nature of the indemnities granted by the Tribunals in respect of future enforcement and English Courts' approach to anti-enforcement injunctions, and at [268], Andrews and Falk LJJ agreed with that analogy. [7/217]

112. In both judgments, considerations of comity fell outside the core reasoning of the Court.

(a) At [234], the Master of the Rolls expressed the view that the Arbitrators and the Judge "*were wrong to think that equitable compensation could be granted in this case*". In the following paragraph, he observed that that decision accorded with the justice of the case, including with respect to the extraterritorial effect of an award of equitable compensation if the States sought to enforce the Spanish judgment in any third jurisdiction. [7/212]

(b) At [269] Andrews and Falk LJJ set out their conclusions, which were that: (i) the Schaff Awards prevented recognition of the Spanish Judgment in England; and (ii) equitable compensation was not available in the context of the conditional benefit principle and where damages cannot be awarded under s.50 SCA. They <u>then</u> stated: "*These conclusions also accord with the overall justice of the case <u>and with considerations of comity</u>*" (emphasis added). Thus, their decisions on the questions of law were arrived at <u>independently</u> of wider questions of justice or comity. [7/218]

113. There is no merit to the Club's suggestion (at Written Case, [61.1]) that the Court of Appeal taking account of comity considerations offends s.69(3)(b) of the 1996 Act. [4/94] [36/935]

(a) The French State <u>did</u> raise comity considerations (contending that they militated against a grant of equitable compensation which had the purpose of neutralising the Spanish Judgment) before Dame Elizabeth Gloster, who rejected that argument:

see her First Award, [91(17)], [113].[19] The Club's s.69(3)(b) complaint fails for this reason alone. [16/565] [16/586]

(b) The Club is wrong to allege (as it does at Written Case, [61.1]) that Butcher J denied the French State permission to appeal in relation to comity. The French State sought permission to appeal from Butcher J on the question of "*whether equitable compensation can be granted where its effect is to neutralise the effect of a foreign judgment* <u>*which is granted recognition under English law*</u>" (SOFI, [31]) (emphasis added). This Ground was therefore predicated on the Spanish Judgment having been granted recognition under English law and the incoherence which would follow were damages to be awarded in order to neutralise such a judgment. It was nothing to do with questions of comity. [4/94] [3/23]

(c) In any event, comity considerations were not a "*question*" for the purposes of s.69(3)(b). The "*question*" which was the subject of the States' appeals to the High Court and the Court of Appeal concerned the availability of equitable compensation. Of course, that question was "*one which the* [Tribunals were] *asked to determine*". The Club does not, and could not, suggest otherwise.

(d) Section 69(3)(b) does not capture any discrete line of argument which may inform the resolution of a "*question*". In <u>*Sharp*</u>, the Supreme Court found that the Court of Appeal had erred in valuing certain goods in light of an argument that the underlying contract had been varied, in circumstances where the argument concerning variation had not been raised before (let alone determined by) the tribunal. Thus, the entire question of whether variation had occurred was a new one. A similar point arose in <u>*Novasen SA v Alimenta SA*</u> [2013] 2 All ER (Comm) 162, [28]–[29]. There, buyers were precluded from running a new argument as to the effect of a prohibition clause in a contract (for the purposes of calculating damages) where: (i) it had not taken the point before the tribunal; (ii) the tribunal had proceeded on a different basis as to the effect of the prohibition clause; and [84/2240] [78/2058]

[19] The issue of comity also arose in relation to whether an anti-enforcement injunction should be granted as a matter of discretion: see First Award, [198]. [16/633]

(iii) the tribunal had not made the findings of fact which would have been necessary to support this argument.

(e) The issues of comity which the Court of Appeal in this case took into account were of a different nature altogether. They did not give rise to a new "*question*"; rather, they gave rise to a line of legal analysis going to the single "*question*" concerning the availability of equitable compensation. They also did not require any new findings of fact. They therefore do not fall within the scope of s.69(3)(b).

d. <u>Remittal</u>

114. Lastly, the Club complains that the Court of Appeal ought to have remitted matters to the Tribunals rather than setting aside the Awards (Written Case, [59.4]). There is nothing [4/92] in this. The Court of Appeal concluded the relevant relief granted by the Tribunals was not available as a matter of law, such that there was nothing to remit to them.

III. CONCLUSION

115. The States invite the Supreme Court to dismiss the appeal for the following reasons:

(a) The Court of Appeal was right to conclude that equitable compensation is not available in the case of conditional benefit against a State (or, indeed, any other party). This is principally because the conditional benefit principle, given its nature, does not support a grant of equitable compensation and because an award of equitable compensation would cut across the statutory scheme in s.50 SCA. An award of equitable compensation would not represent a principled development in this field.

(b) The Court of Appeal did not exceed the limits of the scope of the appeal under s.69 of the 1996 Act.

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11 May 2026