IN THE JUDICIAL COMMITTEE **JCPC/2025/0020 & 0021**

ON APPEAL FROM THE COURT OF APPEAL

OF GIBRALTAR

BETWEEN:-

ENTERPRISE INSURANCE COMPANY PLC (in liquidation)

Appellant & Respondent

AND

MR ANDREW FLOWERS

Appellant & Respondent

EIC'S CASE ON ITS APPEAL [JCPC/2025/021] AND IN RESPONSE TO MR FLOWERS' APPEAL [JCPC/2025/020]

Introduction

1. Both parties, Enterprise Insurance Company Plc (**"EIC"**) and Mr Flowers (**"AF"**), are appealing the Order of 29/1/25 (**"the CA Order"**) consequent on the judgment (**"AJ"**) of the Gibraltar Court of Appeal (**"CA"**) dated 4/4/24. The parties were granted final, unconditional, leave to appeal to the JCPC for their respective appeals by the CA Order. Page 116 Page 499

2. AF was a director of EIC. After a 41-day trial between 30 January 2022 and 30 June 2022, the first instance Judge, Mr Justice Restano, gave judgment for EIC against AF for equitable compensation, damages and interest thereon for various dishonest and non-dishonest breaches of fiduciary duty and breaches of his common law duty to exercise reasonable skill and care. The assessment of

damages and/or equitable compensation and any remedy by way of tracing claim or declaratory relief remain adjourned pending this appeal.

3. In summary:

   a. EIC's appeal concerns the issue of principle addressed by the CA at AJ [141]-[150] whether certain capital paid into EIC should be credited against its loss.[1] EIC respectfully submits that the CA was wrong at law to direct, at paragraph 1(b)(i) of the CA Order, that when the Judge carries out the assessment of (a) equitable compensation for AF's dishonest breach of fiduciary duty, and/or (b) damages for AF's breaches of common law duty, with respect to the MSA[2] and PIE[3] payments (**"the Payments"**) *"credit should be given for £32.3 million (comprising £8.3 million paid by EHL into EIC for new shares and £24 million paid for the subscription of new shares paid out of a loan which EHL had taken on the Frankfurt bond market where EIC was the original source of the funds."* The £8.3m is referred to in EIC's Grounds of Appeal dated 26 March 2025 as **"the Circular Payments"** and the £24m as **"the Bond Monies Payments"** and together **"the EHL Payments"**. Page 554

   b. AF's appeal concerns the CA's dismissal (at paragraph 1 of the CA Order) of the CA Grounds in respect of "Icebreaker"[4] (Grounds 5, 5A-5C) and his Grounds 5D and 5E in **"the Additional Icebreaker Grounds"** which AF was permitted by to rely on by the CA (together "**the Icebreaker Grounds"**). Page 117 Page 690

[1] This related to AF's Ground 9A(a) of his Grounds of Appeal to the CA dated 21/4/23 (**"the CA Grounds"**).
[2] AF has been found to be dishonestly in breach of his fiduciary duty to EIC and in breach of his common law duty to exercise reasonable care and skill in respect of payments ostensibly made by EIC to its sister company, EIG, under the MSA (a "Marketing Services Agreement" between those companies dated 1/9/23). See paragraph 1(a) of the Order of the trial judge, Restano J, dated 17/2/23 (**"the Trial Order"**) referencing paragraph 929 of Restano J's judgment (**"Restano J's Judgment"**).
[3] AF has been found to be in breach of his fiduciary and common law duties when overpayments were made in relation to PIE payments (see paragraph 1(c) of the Trial Order referencing paragraph 933 of Restano J's Judgment). The PIE payments were for use of the PIE system software which facilitated the selling of ATE insurance policies.
[4] This relates to policies issued by EIC underwriting the risks under a tax avoidance scheme known as Icebreaker 2.

More specifically, AF says the CA was wrong to uphold Restano J's ruling that AF had breached his common law duty to exercise reasonable care and skill when he wrote or caused EIC to write the Icebreaker business because the policies were void or unenforceable by reason of public policy or that clause 11.4 of the policies provided EIC with a defence to the claims by policyholders). EIC opposes that appeal on the basis that both Restano J and the CA were correct in finding as they did.

4. In accordance with JCPC PD5, paragraph 5.16, this Written Case sets out EIC's position on both its appeal on the credits and AF's appeal on Icebreaker and deals with both separately as there is no factual or legal overlap between the appeals.

EIC's Case on its Appeal on Credit

Introduction

5. EIC invites the Board to find that the CA erred in finding, as a matter of principle, that credit should be given for the EHL Payments when assessing damages/equitable compensation for AF's breaches relating to the Payments.

6. Restano J held that EIC did not have to give credit for the EHL Payments. The CA overturned that decision on AF's appeal and held that EIC must give credit. The CA dealt with this in four relatively short paragraphs (AJ [147]-[150]). With respect, the CA fell into error because, in stating their reasons in those four paragraphs they failed to take account of what they had held in other, earlier, sections of their Judgment. Page 555

7. The concept that common law damages or equitable compensation are compensatory has never been in dispute. The development by the courts of broad principles as to whether sums paid to a victim should be credited against sums stolen from (or losses caused to) that victim have been designed to reach a fair

conclusion. As will be seen,[5] the court applies one or both of two tests when deciding whether a benefit should be credited against a loss: (i) a benefit which is not attributable to the events which caused the loss will not be credited but one which is so attributable will be credited unless (ii) even though it is attributable it is properly to be treated as collateral. The two obvious examples of collaterality are insurance receipts and gratuitous payments by third parties but these are not closed or exclusive categories.

8. In reaching their conclusions in AJ [147]-[150], the CA failed to take into account a number of matters all of which can be found analysed in other parts of the AJ, but which evidently played no part in the CA's conclusions on credits. These include: (i) the special features of an insurance company, (ii) the regulatory constraints under which EIC was lawfully required to operate, (iii) the features and purpose of a lawfully operated triangular model (iv) the features and purpose of the dishonest and corrupted model operated by Mr Flowers (which was not a triangular model in the sense defined by the CA), and (v) the consequences of (i)-(iv) on the application of the legal principles to the facts of this case. Page 555

Restano J's Factual Findings as Upheld by AJ in respect of the MSA and PIE Payments

9. In view of the importance of the analysis and findings of the CA on AF's breaches and the facts underlying those breaches it is helpful to set out the relevant parts of the AJ in some detail before addressing where it is respectfully submitted the CA fell into error.

10. AJ [47]-[53] set out a summary of the MSA issues and these are a useful starting point (bold emphasis added): Page 518

    a. *"Under the terms of the MSA, EIC paid EIG for providing marketing services a fixed commission of 8% of its gross written premium ("GWP"). EIG then*

[5] See section on "Relevant Law" starting at paragraph 21 below

*in fact transferred part of those sums received to EHL which in turn used **part** of that money to provide capital to EIC, generally in return for shares in EIC. However, neither company was under any obligation to EIC to take these steps, whether under the MSA or otherwise."* (AJ [47])

Page 518

b. *"In total, over the 12 years from 2004 to 2016, EIC paid out some £50 million and received back from EHL some £33 million which took the form of payment for new shares."* (AJ [48])

Page 518

c. AJ [68] where it is recorded that: *"There was no dispute about how the money had been used once transferred to EIG. As indicated above, some had been transferred from EIG to EHL; some had been paid out to EHL's two shareholders, including Mr Flowers' own family trust, ostensibly as consultancy or directors' fees but in reality as dividends, and some had been returned to EIC."*

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d. EHL did not *"pay all the dividends it did receive from EIG into EIC. EHL received some £16.6 million from EIG as dividends and it secured loans by taking out bonds worth some £44 million. A major loan was raised when EHL issued bonds on the Frankfurt Stock Exchange which enabled it to inject some £21 million into EIC in 2013 when the Commission was seeking to increase the RMM percentage to 150%, in anticipation of the introduction of the Solvency II rules. Apart from the money invested in EIC, EHL used its assets for various purposes..."* (AJ [49])

Page 518

e. Restano J found that, *"to the knowledge of Mr Flowers, EIG had provided no services to EIC. In effect, therefore, it was simply giving money to EIG allegedly under the auspices of the MSA but in fact for no benefit whatsoever. In so far as there were capital injections into the business of EIC, this could not be controlled by EIC itself, and indeed a significant proportion of the fees paid was used for other purposes, including making a payment to Mr Flowers himself in excess of £6 million. This was*

ostensibly for consulting work, but the judge held that in reality it was a disguised dividend from EIG[6] *which could not have been paid had EIC complied with the regulatory safeguards imposed by the Commission…"* (AJ [52]]). Page 520

f. Restano J held that *"the real purpose of the arrangement was to enable Mr Flowers to decant money out of EIC in a way which could not possibly be said to be in its interests. It was also dishonest."* (AJ [53]) Page 520

11. The first of those points is tied to the definition of the 'Triangular Model' (a phrase used throughout the proceedings). The CA set out the operation of that model at AJ [13] as follows: Page 504

"A holding company is established to own both the insurance company and a sister service company. The latter provides services to the insurance company, and the payment for those services generates profits which the service company can pay to the holding company as a dividend. The holding company can then use the dividend to inject capital into the insurance company, either directly or by securing loans from third parties to raise capital for that purpose. This was the corporate structure adopted by EIC when it became licensed by the Commission…"

12. The CA went on at AJ [13] to recognise that: *"A fundamental issue in this appeal is whether EIG operated as a genuine service company and thus whether the payments made by EHL to EIC were made in accordance with a proper and lawful operation of the triangular model."* It concluded, as set out further below, that it was not. Page 504

[6] This must have been intended as a reference to EIC.

13. As set out at AJ [77]-[81], there were four heads of the *"root and branch attack"* by AF on the appeal on Restano J's analysis in respect of the Payments alleged to have been made under the MSA:

    a. Services were provided under the MSA which justified the Payments such that it was a *"perfectly proper triangular arrangement of a kind adopted by many insurance companies to facilitate the introduction of capital by unregulated companies."*[7]

    b. The creation of the capital facility itself justified the payments made and *"it was always the principal objective of the arrangement that a substantial part of the moneys paid out by EIC should be returned in the form of capital…The real purpose of the MSA arrangement had always been to facilitate the introduction of capital into EIC and circumvent the borrowing constraints on insurance companies, and this had been achieved."*[8]

    c. There was no loss because *"if the figures are properly analysed, the capital returned to EIC in the form both of reimbursements from EIG with respect to the PIE payments and regular capital injections by EHL virtually matched the sums paid to EIG (and possibly, it was suggested, might even have exceeded it)….The only question was whether the application of the triangular model benefitted EIC; and the directors, including Mr Floewrs, were fully entitled to take the view that they did."*[9]

    d. The Gibraltar Financial Services Commission (**"the GFSC"**) were always aware of how the arrangement operated and had raised no objection to it.

[7] AJ [78].
[8] AJ [79]. This was a new argument which had not been run before Restano J and was run for the first time before the CA (see AJ [85]-[88]).
[9] AJ [80].

14. The CA's findings on (b) are central to EIC's appeal to the Board in respect of the credits and are addressed in more detail therefore below. As to (a), (c) and (d) the CA, in dismissing AF's arguments, found:

    a. For the *"extensive reasons"* given by Restano J, he was *"fully entitled to conclude that EIG provided no services pursuant to the MSA."*[10]

    b. The assumption that there had been no loss was too simplistic, even if it could be shown that the sums paid back into EIC were equal to, or possibly greater than, the sums out and that was for the Judge to determine on any assessment (albeit in light of the CA's directions on what credits should be applied). Even if there was no loss, however, that would not absolve AF from the finding that he was in breach of his fiduciary duty with respect to the operation of the MSA and would only be relevant to the common law breach of duty.[11]

    c. There was no basis for upsetting Restano J's findings of fact that the GFSC witnesses did not appreciate that the source of the capital put back into EIC was EIC itself and did not realise that no services were being provided by EIG[12] but *"[e]ven were the judge to be wrong about that, it matters not."*[13]

15. The CA considered AF's new argument (summarised at paragraph 13(b) above) which it termed the *"capital facility submission"* at AJ [85]-[94]. Its findings on that submission are crucial in the context of EIC's appeal to the JCPC and therefore repeated in detail here for the Board's ease. In particular, the CA stated (emphasis added in bold):

    "89. At the heart of this newly framed argument is the contention that setting up a triangular model to facilitate capital investment back

[10] AJ [82] with the more detailed discussion on that topic following to AJ [94]. Page531
[11] AJ [95]-[96]. Page 537
[12] AJ [97]. Page 537 Page538
[13] AJ [98].

into EIC benefits EIC irrespective of whether any services are provided by EIG or not. Mr Poole submitted that the judge should simply have asked whether this was a triangular model and what were its essential features. He asserted that it plainly was, and that its essence was manifestly in EIC's interests: it allowed for the extraction of money from EIC in the context of an arrangement designed to enable capital to be injected back into the company as and when needed.

90. *I would reject that submission. There is no magic in the concept of the triangular model. It is not a term of art which somehow permits EIC gratuitously to give money to EIG in the hope that it might end up back in its own coffers. This arrangement is far removed from a legitimate agreement where services are provided for the fees paid. That is a proper arrangement whereby full value is gained for the consideration given. The profits generated by the service company might, in whole or in part, make their way back to the insurance company as fresh capital. By contrast, this argument claims that it is immaterial what the ostensible justification is for EIC transferring money to EIG: the fact that money is intended to be circulated is its own justification. This treats the provision of services as of no significance, an entirely peripheral feature of the model which can be dispensed with. That cannot be right. If it were, it is difficult to see what function the service company provides. One might as well by-pass the service company and pay the money back directly to the holding company to be put back as fresh capital. That would plainly be unlawful unless the money was paid to the holding company by way of dividend, and that could only be done with the relevant Commission consent and from distributable profits.*

91. *So even if the principal purpose were to provide capital finance, one would still have to ask whether Mr Flowers could genuinely believe*

that the payments to EIG, made for no consideration (except the provision of staff) and in breach of regulatory requirements, was in the best interests of EIC.

92. *In this context, and contrary to the submissions of Mr Poole, I consider that it is highly relevant that the arrangement was carried out in breach of EIC's obligations to the Commission.* ***It was deceived in two ways in particular. First, it was unaware that EIC was in substance paying a dividend to EHL, which would never have had the approval of the Commission. Second, it misrepresented the true nature of the capital being paid by EHL into EIC. It had the appearance of being unencumbered capital but in fact EIC was covertly paying for this capital. It is true that EIC would not be legally liable to meet any failure by EHL to meet the loan repayments, nor was it legally obliged to pay the interest on the loans. But the reality was that if EHL defaulted on the loan, that would put the whole Enterprise group in jeopardy. The repayments could only be made for so long as EIC continued to provide the payments to EHL via EIG. In substance, EIC was committed to continue paying for the loan in order to stay afloat****. Such an arrangement could never have passed muster with the Commission had it appreciated what its true nature was.*

93. *I would also reject Mr Poole's submission that the relationship with the Commission is irrelevant to the duty owed to EIC, as though EIC were unaffected by the deception. That is simply not the case. It was at real risk of having its business subject to all sorts of sanctions, including being shut down, if it had been discovered that the regulatory rules were being flouted in such a flagrant way. It cannot be in the best interests of EIC to be put in that position of insecurity. As Mr Jones aptly observed, it may be financially beneficial to a company not to pay its taxes, but it is difficult to envisage a director*

successfully being able to contend that he genuinely believed that it was in the best interests of the company for its directors to engage in tax evasion on its behalf in the hope that it will not be discovered and the company will benefit. At least, an experienced businessman like Mr Flowers could not seriously advance such a submission with any prospect of success.

94. Quite apart from these considerations, the premise of his rejigged formulation is unsustainable. The submission – or more accurately, the assertion – that the principal purpose was to facilitate the growth of capital to enable the company to develop is at odds with the facts found by the judge on the evidence he was entitled to accept. It is simply not an inference which could properly be drawn from the evidence. The judge's justified finding was that the aim was to siphon money from EIC in order to enable it to be used for a variety of purposes, some of which were wholly unrelated to any conceivable benefit to EIC. These included enabling both EHL and its shareholders, which included Mr Flowers, to receive payments which the judge found were akin to dividends, thereby circumventing the regulatory controls imposed by the Commission. ***Moreover, the contention that the purpose was to secure capital that would not otherwise be available because of the borrowing constraints on insurance companies is again inconsistent with the evidence. The company paid out more capital than it received back, if only marginally. Moreover, the deliberate strategy of keeping the company at a "break-even" basis meant that it was always intended to control its access to capital, not to maximise it.*** *EIC was simply giving money to another* ***unregulated*** *company which could deal with it as it saw fit without regulatory constraints. The fact that some capital was re-introduced into EIC as and when required is a far cry from the principal purpose of the arrangement being to facilitate its capital position."*

16. As a result, Restano J's finding on the nature and purpose of the transaction as set out at [696] of the Restano Judgment and quoted at AJ [73] was materially upheld by the CA, namely that: Page 397 page 528

> *"The proper conclusion to be drawn from all the evidence is that the MSA was not an agreement governing the provision of legitimate services by a service company to an insurance company, and which generated legitimate profits. The MSA was a fig leaf which, especially after 2010, allowed funds to be stripped out of EIC as if they were legitimate commercial expenses when they were not, and which were not in the best interests of EIC to make. The fact that large amounts of money, around £35.35 million, flowed back into EIC only illustrates the sham nature of the arrangements and that EIC was using the MSA as a conduit to pay substantial amounts of money out of EIC.* ***The payments which were paid back into EIC were a means of propping EIC up which allowed it to keep writing further premium, for greater losses to be incurred, whilst allowing for ongoing substantial payments to be made out to Mr Flowers and others along way."*** (Bold emphasis added)

17. Therefore, it has been found that:

a. The fundamental issue in the appeal as identified at AJ [13], i.e. whether EIG operated as a genuine service company and thus the payments made by EHL to EIC were made in accordance with a proper and lawful operation of the triangular model as defined in that paragraph was to be answered in the negative. In other words, the triangular model was a lawful model. By contrast, AF operated an improper and dishonest model. Page 504

b. The aim and purpose of the arrangement was in fact to siphon money from EIC in order to enable it to be used for a variety of purposes, some of which were wholly unrelated to any conceivable benefit to EIC.[14]

c. EIC was simply giving money to another unregulated company (EIG) which could deal with it as it saw fit without regulatory constraints.

d. Such capital as was being paid by EHL (after it received a dividend from EIG) to EIC was, in fact capital that EIC was covertly paying for and which had the GFSC known about would never have been permitted.

18. The CA reached the same conclusions in respect of monies Restano J had found were paid in dishonest breach of duty for the PIE software (i.e. the alleged triangular model provided no justification for them).[15] The CA's conclusion at AJ [119] in respect of breach generally therefore was that: Page 545

> *"119. The common theme of all these transactions is that they demonstrate a cavalier, one might say reckless, indifference to the regulator's requirements, and a willingness to treat EIC funds as available for whatever purpose was close to hand, whether or not that purpose was of any benefit to EIC. The MSA payments, and the excessive PIE payments, were the dishonest means of extracting the money from EIC. It was seen, as the judge put it, as a* ***"cash cow"*** *to be milked when necessary."* (bold emphasis added)

19. The above findings from the CA were in the context of considering the grounds of appeal relating to breach of duty in respect of the MSA and PIE. They do, however,

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[14] This point is repeated at AJ [99]: *"This was a conscious and cynical attempt to free capital from the constraints of the regulator to be used for a range of purposes some of which were wholly and manifestly unrelated to the interests of EIC. These included substantive payments in excess of £6 million to Mr Flowers himself and an investment by EHL into a gastro pub."* Page 538

[15] AJ [116]-[117]. Page 544

have wider application and it is EIC's respectful submission that the CA's decision on the question of credit is inconsistent with these findings.

The Issue before the CA on Credits

20. As stated above, the CA dealt succinctly with the issue of credit (at AJ [141]-[152]). No issue arises on this appeal in relation to the finding at AJ [151]-[152] as to whether there should be a credit given for part of the initial share capital of £2.5 million introduced into EIC by EHL before EIC started to trade. The CA rejected AF's submission that there should be any credit for that and that has not been challenged by AF. Equally, no issue arises as to whether credit should be given for monies illegally extracted but which were the subject of a formal rebate by EIG as EIC accepted at the start of the trial that they could be credited. The issue concerns: Page 554 Page 557

    a. The Circular Monies: It is common ground that the source of the Circular Monies were the Payments made from EIC to EIG (i.e. those for the MSA/PIE) which EIG in turn paid to EHL as a dividend.

    b. The Bond Payment Monies: It is common ground that these were funded from a loan which EHL had taken out on the Frankfurt bond market. The CA goes on to say at AJ [142] that EIC was the original source of those funds but, with respect, that finding is plainly wrong and is challenged on this appeal. page 554

The Relevant Law

21. The CA cited three key cases (at AJ [143], [144] and [148]) which EIC accepts set out the relevant law. Page 554

22. **Tiuta International Limited (In Liquidation) v De Villiers Surveyors Ltd** [2017] UKSC 77 at [12] per Lord Sumption (cited in part at AJ [143]) states: Page 2045

"The general rule is that where the claimant has received some benefit attributable to the events which caused his loss, it must be taken into account when assessing damages, unless it is collateral. In Swynson Ltd v Lowick Rose LLP [2017] 2 WLR 1161, para 11, it was held that as a general rule "collateral benefits are those whose receipt arose independently of the circumstances giving rise to the loss". Leaving aside purely benevolent benefits, the paradigm cases are benefits under distinct agreements for which the claimant has given consideration independent of the relevant legal relationship with the defendant, for example insurance receipts or disability benefits under contributory pension schemes. These are not necessarily the only circumstances in which a benefit arising from a breach of duty will be treated as collateral, for there may be analogous cases which do not exactly fit into the traditional categories. But they are a valuable guide to the kind of benefits that may properly be left out of account on this basis."

23. **Charles Villeneuve and Another v Galliard and Another** [2011] UKPC 1 at [93] per Lord Walker (cited at AJ [144]): Page 2049

"There is no general principle that in assessing either common law damages or equitable compensation for breach of fiduciary duty, losses should be reduced by adventitious gains in separate transactions between the same parties: Brown v KMR Services Ltd [1995] 4 All ER 598, 640-641 (Hobhouse LJ); Bartlett v Barclays Trust Co Ltd (No 1) [1980] Ch 515, 538 (Brightman J)."

24. EIC does not take issue with the fact that these are the general principles as to when credit should or should not be given, or with the CA's finding at AJ [145] that the *"adventitious gain in separate transactions"* falls within the scope of Lord Sumption's *"collateral benefits"*. Page 555

25. That is also to be overlaid with the point as far as equitable compensation is concerned that, as per **Target Holdings Limited v Redferns (a firm)** [1996] AC 421 (cited at AJ [148]), equitable compensation is designed to make good the loss suffered. More specifically, Lord Browne-Wilkinson stated (against the background of considering the case of a trustee who wrongly pays away trust money): page 2039

> *"At common law there are two principles fundamental to the award of damages. First, that the defendant's wrongful act must cause the damage complained of. Second, that the plaintiff is to be put "in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation:"* ***Livingstone v. Rawyards Coal Co. (1880) 5 App.Cas 25,*** *39 per Lord Blackburn....in my judgment those two principles are applicable as much in equity as at common law."* [423E-F]
>
> *"The quantum is fixed at the date of the judgment at which date, according to the circumstances then pertaining, the compensation is assessed at the figure then necessary to put the trust estate or the beneficiary back into the position it would have been in had there been no breach..."* [437D-E]
>
> *"The equitable compensation for breach of trust has to be assessed at the date of judgment and not at an earlier date."* [437H]
>
> *"Equitable compensation for breach of trust is designed to achieve exactly what the word compensation suggests: to make good a loss in fact suffered by the beneficiaries and which, using hindsight and common sense, can be seen to have been caused by the breach."* [439A-B]

"The amount recoverable in an action claiming an account of profits is dependent upon the profit made by the fiduciary, not the loss suffered by the beneficiary." [440D-E][16]

26. A helpful example of an earlier application of the principles now confirmed by the SC in **Tiuta** (and which was referred to and summarised at [14] of **Tiuta**), is **Komercni Bank AS v Stone and Rolls Ltd** [2003] 1 Lloyd's Rep 383[17]. In that case, there was a complex series of frauds against a bank under which part of the proceeds of one fraud found its way back to the bank via a third party to serve as pump priming for distinct, further frauds. Toulson J declined to reduce the damages by the amount of these circular payments, because they were not an intrinsic part of the relevant venture or transaction but were simply *"the result of* [the fraudster's] *independent choice how to use the opportunity created by his fraud"* (para 171). Page 1880

The CA's Findings on Credit

27. As stated above, the CA's specific findings are set out at AJ [147]-[150]. It held: page 555

    a. The effect of the capital payments was to provide *"a direct benefit to EIC"* (AJ [149]) because they *"increased the value of EIC and thereby reduced the amount of loss suffered from the MSA and PIE payments."* (AJ [148])

    b. AJ [147] and [149]: These were not collateral benefits. There was plainly a close link between the payments made to EHL via EIG and the sums paid back to EIC such that they were related transactions with the payments being directly attributable to the events which caused EIC's loss (with the

[16] There is a claim in these proceedings against AF for an account of all secret and unauthorised profits obtained by AF in breach of his fiduciary duties owed to EIC together with an order for disgorgement (see paras 84 and 85 and section G5 and para 88 (liability of AF to account) of EIC's ReAPOC and paras (3) and (4) of the prayer for relief.

[17] Permission to appeal to the English CA was granted on 3/3/23 [2003] EWCA Civ 311 but does not appear to have been pursued.

CA saying those events were the unlawful payments made indirectly to EHL) because:

i. *"This was always a feature of the triangular model, albeit that there was no legal obligation binding EHL to pay anything into EIC"*; and

ii. Restano J had found (in the context of rejecting the unlawful financial assistance claim at [863]) that *"the prospect of capitalising EIC from the MSA and PIE payments was on Mr Flowers' radar from the outset"*.

c. The payments into EIC by EHL were not made for good consideration giving EHL a commercial benefit because it was always the sole shareholder of EIC so receiving further shares gave it nothing of substance. (AJ [148])

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28. EIC respectfully submits each of the conclusions of the CA above was wrong for the reasons set out in its Skeleton Argument for the Appeal at [212]-[218], which it intends to re-argue before the Board, and as set out in its Grounds of Appeal.

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29. The following points will be explored under the separate headings below but there are two principal themes which emerge.

30. First, the later introduction of capital by EHL was never attributable to the events that caused the loss. The events that caused the loss were the creation and pursuit by AF of a dishonest scheme to syphon off money from EIC for AF's own purposes. The starkest example of this is the £12.25m which was syphoned off dishonestly and which went from EIG to EHL and thence into the pockets of AF and his fellow shareholder as an illegal and disguised dividend. When, in due course, the GFSC put EIC under pressure to obtain more capital EHL plainly had to borrow it on the Frankfurt stock exchange. While EIC then received £12.25m of capital it could be said to have received a benefit (subject to the second point below) but that benefit was not attributable to events which caused the loss (for

example in the way that payment under an insurance policy is attributable to the occurrence of the insured event). Rather, the benefit was directly attributable to the pressure from the GFSC (bearing in mind that it has been clearly held that EIC was directly writing business ahead of capital and had a policy of introducing capital only when necessary to keep the GFSC at bay) and also attributable to the independent decision of the directors of EHL to borrow money and inject it as new capital.

31. Thus the sequence plainly was: (i) illegal extraction, (ii) the payment up to EHL and out to the shareholders as illegal dividends, (iii) pressure from the GFSC to introduce new capital and (iv) the unavoidable decision of EHL that it had to borrow that money if it was to find the capital to appease the GFSC with the purpose, as the CA found, of keeping the dishonest scheme going.

32. Secondly, and furthermore, the introduction of the borrowed capital did not replace the illegally extracted capital (which is the assumption wrongly made by the CA): the latter was EIC's money which was owned by it without encumbrance; by contrast, as the CA held, the introduced capital came with the encumbrance that if EIC was to avoid collapse (because EHL was unable to meet the loan repayments and the group collapsed) EIC would have to keep making unlawful payments to EIG in order to pay not only the entire capital of £12.25m which had been borrowed but also the interest on that sum over the life-time of the bond).

33. Accordingly, the consequence would be that EIC was the subject of the dishonest extraction of an unencumbered £12.25m and later received £12.25m which it was required to repay plus interest. That cannot be said to be either a benefit or a benefit attributable to the events which caused the loss of the unencumbered £12.25m.

34. The fact that over £50m was unlawfully extracted and less than that was introduced as capital of which circa £22m had to be borrowed on the Frankfurt

Stock Exchange demonstrates that at least circa £22m had to be borrowed (and not just the £12.25m that disappeared in illegal dividends).

35. The above analysis is directly supported by the rule which prevented EIC from borrowing money directly to boost its capital balance sheet. That rule holds that the capital available to an insurance company to support its underwriting cannot include borrowed funds because the capital benefit of such funds is cancelled out by the obligation of repayment of those funds. That is precisely what the CA held to be the position in the case of EIC. It received capital which in a very real sense it had to repay (indeed it was the only source from which repayment could be met).

36. In so far as EIC received any benefit from the introduced funds (i.e. the ability to continue trading in the short-term by appeasing and tricking the GFSC) that was genuinely a benefit that was collateral under the definition in **Tiuta**.

Ground 1: The CA erred in finding the EHL Payments were not collateral benefits and were directly attributable to the events which caused EIC's loss

(i) <u>No Triangular Model</u>[18]

37. There is a material inconsistency between the CA's detailed analysis and findings on the MSA/PIE issues and its subsequent more cursory findings on credit. In particular:

    a. As set out in the section above dealing with the factual findings on MSA/PIE, the CA held that AF was **not** operating a triangular model, because that required it to be a proper and lawful arrangement with genuine services and not the arrangement.

[18] See [6]-[7] of EIC's Grounds of Appeal.

b. However, when considering credit, as set out in the section on the CA's findings on credit above, the CA relied on the EHL Payments being a feature of the triangular model.

38. The CA was plainly wrong to find the EHL Payments were a feature of the triangular model at AJ [147] (and thus that in its judgment there was plainly a close link between the payments made to EHL via EIG and the EHL Payments) when it had previously found and articulated (as had Restano J) that Mr Flowers was not operating the triangular model at all. Rather, he was operating a very different model, which had an entirely different purpose. That purpose being to benefit himself and not to benefit EIC. Page 555

39. This is not a case in which AF can be heard to say that he operated the triangular model in the way it should have been operated but siphoned off some money for himself. The clear findings of the CA (also found by Restano J) mean that the arrangement was never a triangular model and there was no intention to operate the triangular model. As the CA clearly and properly found *"the real purpose of the arrangement was to enable Mr Flowers to decant money out of EIC in a way which could not possibly be said to be in its interests* [and] *was also dishonest*" (AJ [53]). AF's model was founded on the lie that services were provided by EIG to EIC and in relation to £12.25m (the money extracted as illegal dividends by AF and his fellow shareholder) on the second lie that the EHL shareholders provided services to EIG. Furthermore, the purpose of a triangular model was to increase capital but AF plainly had no such intention. Page 520

40. Accordingly, a false, improper and unlawful arrangement was set up and made to *look as if* it was the triangular model which the GFSC had licensed when, in truth, it was nothing of the kind.

41. That should be sufficient for this Ground to succeed. However, additionally, we set out below the features and purpose of a lawfully operated triangular model

compared to the features and purpose of Mr Flower's dishonest model (which thus could not qualify as a triangular model in the sense understood at AJ [13]). Page 504

The features and purpose of a lawfully operated triangular model

42. It was perfectly possible for the triangular model to be used to realise unencumbered capital (AJ [13]). What was required was a genuine service company carrying out a genuine service at a genuine price from which it made a genuine and legitimate profit which it could pay to EHL who could use it to create new capital (AJ [13]). Page 504

43. A lawfully operated triangular model would work as follows:

    a. EIC would only write business within the capital and RMM restraints imposed by its initial start-up capital unless it could add to that by making a genuine profit.
    b. Thereafter, it would need to have additional capital to cover new business before writing that new business.
    c. It could enter into a genuine service agreement with EIG which would be paid a reasonable fee for genuine services: i.e. services that EIC would have to provide itself or pay an unrelated party to provide and from which it would benefit.
    d. EIG could thus make a genuine profit from the provision of those services which it was free to dividend up to EHL or (with EHL's permission) to invest in other ventures.
    e. If genuine EIG dividends reached EHL the latter would be able to use them as it wished, and that could include, if it wished, putting new capital into EIC using the dividends or by using the dividends to borrow money which could produce new capital.
    f. However, AF's case was that the triangular model was a way of resolving the inability of EIC to borrow money. But merely paying EIG to provide a service that EIC could provide for itself would never in reality *increase* the

capital base of EIC and thus would never be a way of getting round the insurer borrower constraint.

g. Thus, properly analysed, the only genuine purpose of the triangular model was to *increase* capital by using genuine profits in EIG to dividend to EHL who could borrow *new* money.

h. However, if EIG did not make a dividend to EHL or EHL did not borrow to inject new capital, EIC could not complain because it had received value for money for the 8% it paid to EIG for a genuine service (AJ [50]). Page 519

i. It therefore follows inexorably that a properly operated triangular model would mean that capital would never be stripped out of the company for no benefit and that if operated properly it should neither reduce nor even maintain capital in EIC but only ever *increase* it.

The features and purpose of Mr Flowers's dishonestly operated model

44. The true features and purpose of the EIC model as operated by AF was far removed from a lawful and commercial one. The key points are as follows:

a. EIC was operated never to make a profit (and was run so that it *"effectively breaks even"* (AJ [69])) and it deliberately wrote business ahead of capital and ignored attempts by the GFSC to limit new underwriting and premium: AJ [18]-[21]. Page 526 Page 504

b. The deliberate policy of growing premium irrespective of capital went hand in glove with a policy of doing *"just enough by further injection of capital to keep the Commission at bay"*: AJ [22]. Page 505

c. It must therefore follow inexorably that it was never AF's intention to use his corrupt model to *increase* EIC's capital as envisaged by the proper triangular model

d. EIG never provided any services to EIC and EIC paid away over £50m *"for no benefit whatsoever"*: AJ [52] for the eight reasons set out in AJ [58]-[65]. The services *"arrangement was a sham"*: AJ [71] and [73]. Page 520 Page 523 Page 527

e. In so far as EHL put any capital into EIC the GFSC was deceived in the two ways set out at AJ [92] as quoted at paragraph 15 above. page 535

f. It follows from AJ [92], that the commitment by EIC to continue paying for EHL's loan which funded the Bond Payment Monies was a commitment to continue to pay 8% of GWP (under the MSA) for no services and no benefit.

g. Just under 25% of that sum was used to pay dishonest and unlawful fees to AF and RHL (his fellow 50% shareholder in EHL) under the fraudulent guise of directors' fees and consultancy fees for work allegedly provided by them to EIG when no such services were provided: AJ [49] Page 519

h. Those payments were in fact disguised and unlawful dividends (AJ [54]), because *"it* [was] *much easier for the shareholders to take profit from the unregulated entity than the regulated one"* (AJ [69]). Page 524

i. *"The real purpose of the arrangement was to enable Mr Flowers to decant money out of EIC in a way which could not possibly be said to be in its interests* [and] *was also dishonest"* (AJ [53]). Page 520

j. *"The aim* [of AF] *was to siphon money from EIC in order to enable it to be used for a variety of purposes"* and *"to control its access to capital not to maximise it"*, and *"the fact that some capital was re-introduced into EIC as and when required is a far cry from the principal purpose of the arrangement being to facilitate its capital position"* (AJ [94] and see the further summary of the true purpose at AJ [99]. Page 536 Page 538

(ii) Voluntary and separate transaction[19]

45. The only other reason given to support the CA's conclusion at AJ [147] that the EHL Payments were not collateral benefits is the Restano Judgment finding at [863] that the prospect of capitalising EIC from the MSA and PIE payments *"was on Mr Flowers' radar from the outset"*. Page 555 Page 456

[19] See [8]-[9] of EIC's Grounds of Appeal. Page 656

46. Restano J did so find; however, that fails to take into account the abundance of other evidence and findings which made it clear that that was, in fact, a separate, voluntary decision taken by EHL (not by AF) to inject the capital into EIC, and that EHL had no obligation to do so. In particular, at trial and on the appeal, EIC agreed that AF was correct in making the assertion he repeatedly made during the trial that what EIG and EHL did with the MSA/PIE money was irrelevant because what happed to the money once the payments had left EIC was uniquely a matter for the directors/owners of EIG/EHL. In other words, it was nothing to do with him personally and the decisions taken by EIG and EHL were not part of his scheme and they were the equivalent of third parties whose boards took decisions from which, it is therefore submitted, AF should not personally benefit.

47. Further, the CA fails to take into account its **own** finding at AJ [47] (set out at paragraph 10 above), (consistent with Restano J) that EIG was under no obligation to transfer monies received under the guise of the MSA/PIE to EHL, and equally EHL was under no obligation to use those or any other monies to provide capital to EIC, whether in return for shares or otherwise. Page 518

48. On that basis, the EHL Payments were not attributable to events which caused EIC's loss. They were attributable to an independent, voluntary decision of EHL to inject capital into EIC for its own reasons. Alternatively, the EHL Payments are properly to be regarded as collateral.

49. It should be borne in mind precisely what the *"events which caused* [EIC's] *loss"* or *"circumstances giving rise to the loss"* are in this case to which the EHL Payments must be attributable (if credit is to be given) or not be so attributable to / arise independently of (if no credit is to be given) in applying the general legal principles.

50. The loss in this case is the Payments made out for no services (in the case of the MSA), or the excessive Payments made (in the case of PIE).

51. The events that caused the Payments or the circumstances giving rise to the Payments were the dishonest creation and operation of a scheme in respect of the MSA which was dressed up to look as if it was a triangular model when it was not, i.e. primarily setting up and operating a scheme where it was made to look like EIC was receiving services under the MSA when it was not. In respect of PIE, setting up and operating a scheme where EIC was paying for more than it was receiving.

52. The EHL Payments were, on a proper analysis and applying the CA's own findings in AJ, prior to its consideration of the credit issue at AJ [147]-[150], in no way attributable to or dependent on those events or circumstances. Page 555

53. Even if the "events" causing the loss were given a wider interpretation than setting up and operating a scheme where it was made to look like services were received that justified the receipt of the MSA / PIE Payments when they were not, e.g. that the events were the dishonest creation and operation of the entire scheme, that would be a scheme which was never designed to increase EIC's capital and did not do so (see AJ at [94] "*the company paid out more money than it received back"*) and its true purpose was not to benefit EIC but to allow AF to decant money and siphon it off under the dishonest guise of consultancy payments and directors' fees for the holding company shareholders when it was nothing more than unlawful and disguised dividends. Accordingly, and with respect to the CA, on any rational basis, the fact that some money came back to EIC was entirely collateral to the purpose and operation of the arrangement which was *not* the triangular model. EHL never put money into EIC for EIC's benefit but only for the benefit of AF so that he could keep the dishonest scheme going. The benefit was therefore not attributable to the dishonest scheme but collateral to it. Page 536

54. The starkest way of seeing this is to examine the particular example of the c. £12.25m which was paid as improper and impermissible dividends from EIG to AF and its other shareholder, RHL, under the guise of untrue director's emoluments and consultancy payments. That £12.25m was monies improperly extracted from

EIG, of which AF took half. Why should AF receive a credit against those monies for money several years later paid by another party, EHL, to EIC which it has obtained by borrowing from investors on the German stock exchange? The absurdity of that ought to be readily apparent.

55. It is clear that this was a dishonest scheme operated for a dishonest purpose which had nothing to do with a true triangular model and in respect of which such money as EIC received was collateral to the events giving rise to the loss. This is because the events giving rise to the loss were, as stated above, the dishonest extraction of money for purposes unconnected with EIC's benefit and the repayments were just the means by which AF as the fraudster attempted to generate a further gain for himself and were thus collateral to the earlier events that gave rise to the loss.

56. Where the CA has gone wrong is to conflate what would have been the position in the case of a true triangular model in the middle of which AF had paid himself an unlawful dividend: in that case the CA may well have a fair point that there was a triangular model whose purpose was properly the benefit of EIC but during the course of which some wrongdoing occurred. That is not what happened. The CA has made it abundantly clear in its findings that this was not a triangular model at all but a scheme with an entirely different purpose where any benefit to EIC was properly said to be collateral to the fraud.

(iii) Payment for consideration or as a gift[20]

57. There was in each case of capital introduction a separate transaction in the form of a share subscription agreement between EIC and EHL. CA erred in law in identifying the issue as to whether the EGL Payments were *"payments made for good consideration giving a commercial benefit to EHL"* (AJ [147]) and then Page 555

[20] See [10]-[13] of EIC's Grounds of Appeal.

determining that it was *"unreal to say that when EHL received consideration for the shares, it received something of value"* (AJ [148]). Page 556

58. The question of value of a commercial benefit is irrelevant as Gibraltarian law (like English law) does not investigate whether adequate value has been given, only that *some* value has been given. In other words, the court will not judge the adequacy of the consideration as long as there is consideration which is realistic and not entirely without value.[21]

59. It is submitted that the fact that shares were provided in exchange for capital is sufficient consideration alternatively that there was both sufficient and adequate value / commercial benefit (to the extent that is considered necessary notwithstanding the submission above) in that the EHL Payments allowed EIC to continue trading to EHL's benefit.

60. In the alternative, the EHL Payments were gratuitous payments from a third party for the reasons set out at paragraphs 46 to 48 above which were therefore necessarily independent of any circumstances giving rise to EIC's loss / not attributable to the events which caused EIC's loss.

(iv) <u>EIC was not the source of the Bond Monies Payments</u>[22]

61. The CA erred in holding at AJ [142] that *"EIC was the original source of funds"* in respect of all of the Bond Monies Payments. With respect, this finding is unsustainable. Page 554

62. In fact, the original source of the first bond monies were the bondholders. By way of further summary:

First bond issued	€35,000,000

[21] This should be uncontroversial but see, for modern authority, <u>Hill v Haines</u> [2008] 2 WLR at [79] referring to <u>Harman v Glencross</u> [1986] Fam 81 at [97]-[98] and earlier authorities. Page

[22] See [14] of EIC's Grounds of Appeal. Page 657

Redeemed	€8,945,625
Redemption discount	€229,375
Transferred to 2015 bond issue	€6,301,000
Face value 1st bond outstanding	€19,524,000
Face value 2nd bond outstanding	€30,941,500

63. It is therefore incorrect to say that EIC was the source of the £24 million if that is suggesting that payments made via the MSA found their way back to EIC. At most this could only be the €8,945,625 redemption sum paid from the EHL "special account" which must have been sourced from EIC via the MSA Payments.

EIC's Ground 2: Allowing credit would produce an inequitable result [23]

64. The fact that insurance and third party gratuitous payments generally qualify as collateral benefits for which the court will not require credit to be given demonstrates that it is recognised that profit can be made by a victim (e.g if the insurer indemnifies the insured, the victim recovers from the wrongdoer and the insurer does not seek to recover the double payment from the victim). Nonetheless, the court does not permit the wrongdoer to be the one that profits from the third party's intervention. This recognises that what lies behind the court's general principles as set out in **Tiuta** and **Villiers** is the concept of fairness, at their core seeking to achieve a fair balance between the interests of the victim and the wrongdoer.

65. The CA was wrong to find that it would be inequitable not to give credit for the EHL Payments (AJ [148] or [150]) primarily because they ought to have found that the EHL Payments did not amount to a benefit at all in the first place (i.e. Ground 3), or were not attributable to the events which caused loss (i.e. Ground 1) or collateral benefits. Page 556

[23] See [15] of EIC's Grounds of Appeal. Page 657

66. However, even if the EHL Payments were not collateral benefits the inequity of giving credit on the particular facts of this case should, as that is the policy behind the general rules, give rise to no credit being permitted given the perverse outcome that that would otherwise give rise to.

67. That inequitable and perverse result is exemplified by the particular facts of the £12.25m payment as discussed above. Further and in any event, it is submitted it cannot be just for a director to set off his personal liability for dishonest breach monies received:

    a. from a third party's decision, it was not obliged to make, to choose to use some of the dishonestly extracted money to make an investment and purchase shares in EIC;

    b. from a third party's decision, it was not obliged to make, to choose to borrow monies from third party investors and invest some of those monies in EIC in return for shares;

    c. where, in both cases, that director (AF) has always had an ownership interest in the third party (EHL) and therefore already had the **double** benefit of having (i) dishonestly extracted monies for his own benefit and (ii) indirectly receiving more shares in EIC and then **further** being given credit for that against his own dishonest breach.

68. Particularly, when that is all set against the scene that that capital input into EIC permitted AF to perpetuate the scheme further and use EIC as his 'cash cow' to continue to extract further money for dishonest purposes.

69. The perverse effect of the CA decision is that a person who, in effect, steals money from a company can take the benefit from using that stolen money to buy shares in the victim company. As submitted by EIC on the appeal:

a. The absurdity of this would mean that a director would be able to steal cash from a company and then use the cash to subscribe for new shares in the company (which shares he will then own) and always deploy that as a complete answer to the theft on the basis there was no loss. Were this permissible, any director who wrongfully took money out of the company would have a defence to that claim by using that same money to subscribe for shares in the company (i.e. using the company's own money to acquire something from the company).

b. Another way of testing the flaw in this is by considering the position of a shareholder in liquidation. AF is the 50% beneficial owner and shareholder of EHL. In the liquidation, he remains the 50% beneficial shareholder of EHL. A shareholder cannot obtain any distribution from a liquidation unless there is a surplus. In this case there is no surplus. And yet, on CA's finding on credits, AF obtains a 100% credit for the monies paid in by a shareholder to acquire shares against the loss which he has caused.

EIC's Ground 3: The EHL Payments were not a benefit at all[24]

70. Whilst the previous grounds have focused on whether any benefit was collateral/attributable to the events which caused EIC's loss; it is submitted that the CA fell into error in finding, at AJ [148] that the EHL Payments were a benefit to EIC at all. The CA ought to have found, based on its own earlier analysis that they were not and that they were, in fact, introduced only to keep EIC afloat and thus directly produced additional claims liabilities. Page 556

71. In particular, EIC relies (as set out in the Grounds of Appeal) on the following paragraphs of the CA's, correct, analysis and findings:

[24] See [15.5] pf EIC's Grounds of Appeal. Page 658

a. EIC's only income to meet claims was from premiums for issued policies: AJ [8]. Page 501

b. The required regulatory capital solvency margin (RMM) should be in place *before* policies are written: AJ [12] and [20]. Page 504

c. An insurance company cannot improve its RMM by borrowing money because the appropriate solvency margin must be free and unencumbered: AJ [12]. Page 504

d. AF established a deliberate policy where premium was always written ahead of capital; as his finance director, Keith Newing, wrote to him *"We have now been playing this game with* [the GFSC] *for nearly two years and premium growth has always been ahead of capital"*: AJ [20] and [21]. Also described by them as a *"break even"* basis where they only put in capital on a drip feed basis to try to achieve break-even: e.g. AJ [99]. Page 506 Page 538

e. This meant that EIC failed to meet the RMM in almost every year: AJ [294]. Page 612

f. The Bond Monies Payments had the appearance of being unencumbered capital because EIC was covertly paying for this capital and the repayments by EHL could only be made for so long as EIC continued to provide the payments to EHL and in substance EIC was committed to repay the loan to stay afloat. Such an arrangement could never have passed muster with the GFSC had it appreciated what its true nature was: AJ [92]. Page 611

EIC's Case on Mr Flowers's Appeal on Icebreaker

Introduction

72. Icebreaker was *"a complex tax avoidance scheme designed to secure tax advantages for investors who joined that scheme"* and EIC *"wrote some 400 policies"* with respect to Icebreaker between May 2009 to April 2013 which *"insured the policy holder against certain investment losses which might result from the operation of the scheme. They were closely interlinked with the scheme*

itself and the policy was one of the documents made available to prospective investors, although it was not obligatory for an investor to take out a policy". (AJ [156]). Page 559

73. It has never been suggested by AF that Icebreaker was a tax evasion scheme. There was no allegation made at the trial that the Icebreaker scheme constituted tax evasion (that has to be seen in light of the fact EIC specifically drew that distinction to the attention of the Court in its submissions). No appeal was attempted before the CA to the effect that Restano J had wrongly considered Icebreaker to be a tax avoidance scheme as opposed to a tax evasion scheme.[25]

74. As summarised by the CA at AJ [157], *"EIC did not provide for any reserves against the potential liabilities arising from these policies. Mr Flowers asserted that this was justified because EIC was, for various reasons not at risk by incepting them."* The principal reasons relied on by AF for asserting there was no risk under the policies and thus he could not have been negligent in relation to the issues of risk and reserves were (a) the application of clause 11.4 of the policies and (b) the fact they were void or unenforceable by reason of public policy. Page 559

75. Restano J dealt with Icebreaker at [775] to [844] of the trial judgment, concluding that AF was negligent when he arranged for EIC to write the policies, but not in breach of fiduciary duty because, as the CA summarised at AJ [158], *"Mr Flowers appeared to have convinced himself, however foolishly, that EIC would not be liable under the policies, and therefore he had not acted in bad faith.."*. Page 442

76. In the CA, AF argued that Restano J did not actually decide whether the defences of clause 11.4 and public policy applied when he addressed them at [832]-[840] of the judgment. It was not necessary for the CA to decide whether Restano J did Page 444

[25] All that AF said (see his written submissions on clause 11.4 and public policy to CA) was that the line between avoidance and evasion *"may well have been crossed"*. The CA addressed that entirely properly at AJ [200] and that finding is not appealed. Page 577

make such decisions because the parties agreed the CA could consider them afresh.[26]

77. The arguments were fully ventilated in the CA. The CA permitted AF to set out his case in an Addendum to his Grounds of Appeal and both parties filed detailed written submissions on the applicability or otherwise of the defences.[27] EIC will refer to the detail of those submissions insofar as it is necessary to argue the detail of any point in front of the Board.

78. The CA upheld Restano J's decision on negligence and determined conclusively in EIC's favour that neither clause 11.4 nor public policy applied to mean EIC was not at risk on the policies.

79. By his Grounds of Appeal to the Board dated 24 April 2024(**"AF's Grounds"**) and his subsequent 'Grounds of Appeal: Further Explanation' (**"AF's Further Explanation"**) served on 12 December 2025, AF, in essence, contends the CA:

    a. erred in law in its interpretation and application of clause 11.4 of the policies; and

    b. erred in failing to apply public-policy principles under **Patel v Mirza** [2017] AC 467. Page 1929

80. AF contends that those errors materially underpin the CA's conclusion that AF was negligent and that had the CA properly applied clause 11.4 and/or public policy principles it ought to have found AF was not negligent because EIC was not on risk.

[26] See AJ [189]-[193] for the discussion on this issue. Page 573
[27] See AJ [193]. Page 575

81. EIC's position, in short, is that the CA made no errors of law, whether as contended or otherwise, and that the judgment should be upheld for the same reasons given by the CA.

82. The CA starts its discussion about Icebreaker at AJ [156] and deals with it as follows: Page 559

    a. AJ [161]-[166]: details of the Icebreaker scheme Page 561
    b. AJ [167]: the terms of the policies Page 563
    c. AJ [168] – [186]: the judge's findings of negligence Page 564
    d. AJ [187]-[188]: AF's grounds of appeal Page 572
    e. AJ [194]-[212]: construction of clause 11.4 Page 575
    f. AJ [213]-[230]: public policy Page 581

AF's Ground 1 – Clause 11.4

83. AF contends that, properly construed, clause 11.4 meant that EIC *"carried no real insurance risk in respect of Icebreaker and that underwriting such policies could not be negligent"*.[28] AF therefore contends that the policies *"were simply put part of the* [Icebreaker] *scheme requirements and did not have any real value"* and that EIC understood that.[29]

84. Clause 11.4 is set out in various places in the documents before the Board[30] but for ease of reference it provided:

> *"The Insurer shall have no liability to the insured under this Policy where the Insurer reasonably believes, and has reasonable grounds for his belief, that the LLP and the Insured have colluded in an attempt to engineer the*

[28] Paragraph 2 of AF's Further Explanation. Page 663
[29] Paragraph 8 of AF's Further Explanation. Page 665
[30] Including at AJ [194]. Page 575

failure of the LLP leading to insufficient income being generated causing a claim to arise on this Policy."

85. There are certain facts, found by Restano J, and either not appealed by AF or left undisturbed by the CA, which form the necessary objective facts which must necessarily inform the proper construction of clause 11.4. Those incontestable facts can be summarised as follows:

    a. The Icebreaker scheme was fully disclosed to and known by EIC (via AF) before it created and sold the insurance policy[31] which was an optional extra available to investors when they joined the scheme.

    b. As AF subjectively knew, the way in which the IB scheme was intended to work was fixed before a member joined and the member had no ability to alter it before or after joining.[32]

    c. On the facts as presented to the court (and AF never asserted to the contrary) there is no evidence to show that any policyholder actually took any decision open to them which was designed to engineer the failure of the LLP they joined.[33]

86. Therefore, AF's case on the proper construction of clause 11.4 has to be as follows:

    a. It was always an option to take out a policy and taking a policy was not a mandatory part of the scheme.

    b. The person could become a policyholder only if they entered the Icebreaker scheme.

[31] [169]-[171] and [173] AJ.
[32] [196] AJ.
[33] [196] AJ.

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