JCPC/2025/0021

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
ON APPEAL FROM THE COURT OF APPEAL OF GIBRALTAR

BETWEEN:

ENTERPRISE INSURANCE COMPANY PLC
(IN LIQUIDATION)

Appellant

-and-

MR ANDREW FLOWERS

Respondent

RESPONDENT'S CASE

References are given as [**XX**], in which **XX** is the electronic bundle page.

A. INTRODUCTION AND OVERVIEW

1. This appeal concerns the proper application of the settled principles governing credit and avoided loss when assessing damages and equitable compensation.

2. The issue is whether, in assessing the loss said to arise from payments made by Enterprise Insurance Company PLC ("**EIC**") under the Marketing Services Agreement ("**MSA**") and related arrangements, credit must be given for £32.3 million subsequently introduced into EIC as capital by its holding company, Enterprise Holdings Limited ("**EHL**").

3. The Court of Appeal held that credit must be given. It concluded that those capital injections were causally connected with the very transactions said to have caused the loss, and therefore could not be disregarded when assessing EIC's recoverable loss.

4. The Liquidator seeks to overturn that conclusion and restore the trial judge's approach, under which EIC would recover the full amount of the payments made under the MSA and related arrangements without giving credit for the capital returned to the company through the same group structure.

5. That approach cannot be reconciled with established principles governing both common law damages and equitable compensation, which require the court to assess the claimant's actual net loss.

6. The Court of Appeal was right because the capital injections were part of the same overall course of dealings, increased EIC's assets, and reduced the loss actually suffered. The appeal seeks to avoid that straightforward compensatory analysis by re-characterising the same transactions as collateral or non-beneficial. That attempt should be rejected.

B. RELEVANT BACKGROUND

7. The relevant payments arose from the operation of the Enterprise group's corporate structure, described in the proceedings as a "*triangular model*".

8. Under that arrangement: EIC paid a fixed commission of 8% of its gross written premium under the MSA to its sister company, EIG Services Limited ("**EIG**"); EIG transferred part of those sums received to EHL; EHL introduced capital into EIC, generally in return for shares in EIC.

9. The Liquidator's claim in respect of the MSA and related payments was pleaded on the basis that damages and/or equitable compensation were capped at the total amount of payments made by EIC to EIG pursuant to that structure. That total was pleaded as c.£48.7 million, representing the aggregate of the impugned payments during EIC's trading history (2005–2017) (Reply ¶54A [**838**]).

10. It was also the Liquidator's pleaded case that the capital introduced into EIC by EHL was itself generated through the operation of the same triangular model and would not have occurred but for the payments made by EIC to EIG (Reply ¶20(e)–(f) [**794**]).

11. The undisputed financial position is therefore as follows: (a) EIC paid c.£48.7 million to EIG over the relevant period; (b) £32.3 million was introduced into EIC by EHL by way of capital subscriptions, out of funds generated directly or indirectly through the same group structure; and (c) a further £12.4 million was returned to EIC by way of rebates, which the Liquidator accepts must be credited. In short, a substantial proportion of the funds paid out by EIC returned to the company through the same group structure.

12. The Court of Appeal recognised that commercial reality when addressing the issue of credit and held that the capital injections could not properly be characterised as unrelated or collateral transactions.

13. As a result, the Court of Appeal held that credit must be given for the £32.3 million returned to EIC, with the consequence that the Liquidator's damages claim was reduced from c.£48.7 million to c. £4 million, subject to the outcome of the inquiry as to damages

14. It is also common ground that the Liquidator has received settlement payments from a number of the other defendants to the proceedings. The figures placed before the Court of Appeal showed that, even on the Liquidator's own summary of the payments received to date, those settlements amount to c.£5.3 million. The precise allocation of those settlements between the different heads of claim will fall to be considered at the inquiry into damages. However, the figures illustrate the practical effect of the Court of Appeal's ruling on credit. On the Liquidator's own figures, the settlements already received exceed the amount of the remaining MSA and related payments claim following the Court of Appeal's decision.

15. In those circumstances, once proper credit is given for payments returned to EIC through the triangular model, the financial position of the estate is fundamentally different from that originally asserted by the Liquidator.

C. LEGAL PRINCIPLES

C.1 Compensation must reflect the claimant's net loss

16. The starting point is the fundamental compensatory principle governing both damages and equitable compensation. The purpose of the remedy is to restore the claimant to the position it would have occupied but for the breach, and therefore to compensate for the actual loss suffered.

17. That principle was authoritatively stated by the House of Lords in *Target Holdings Ltd v Redferns* [1996] 1 AC 421, where Lord Browne-Wilkinson at [439] explained that equitable compensation must reflect the true loss caused by the breach, rather than operate as a mechanism for imposing strict restitution irrespective of the outcome of the transaction. Page 2039

18. The same principle was reaffirmed by the Supreme Court in *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503, where Lord Toulson held that the court must examine the transaction as a whole in order to determine the loss actually caused.

19. As the editors of *Snell's Equity* (35th Ed.) observe at [20-021], drawing on these authorities, equitable compensation is designed to make good the loss caused by the breach of equitable duty. Accordingly: Page 1850

> "In every case … equitable compensation may only be awarded in respect of losses the claimant can show would not have occurred but for the breach in question. Such losses are to be assessed at the time of trial, using the full benefit of hindsight".

20. These authorities therefore make clear that the court must assess the real economic consequences of the breach, rather than isolate individual payments from the overall transactional context.

21. The same approach is reflected in the Supreme Court's recent decision in *Stevens v Hotel Portfolio II UK Ltd (In Liquidation)* [2025] UKSC 28, which confirms that equitable compensation is directed to the loss in fact suffered and requires comparison between the claimant's actual position and the position which would have obtained but for the relevant breach.

C.2 Avoided loss must be taken into account

22. The corollary of the compensatory principle is that loss which has in fact been avoided cannot be recovered as damages. The modern statement of this principle is found in the judgment of Lord Sumption in *Swynson Ltd v Lowick Rose LLP* [2018] AC 313. Lord Sumption at [11] explained the rule in the following terms: Page 2031

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

23. This reflects the longstanding principle articulated by Viscount Haldane LC in *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673, namely that benefits arising from the consequences of the breach must be taken into account when assessing damages. The rule ensures that damages reflect the net financial effect of the relevant events.

C.3 The exception for collateral benefits

24. The general rule that avoided loss must be taken into account is subject to an exception for collateral benefits (*res inter alios acta*). As Lord Sumption explained in *Swynson* at [11], the critical question is the character of the benefit.

25. Collateral benefits are generally those whose receipt arises independently of the circumstances giving rise to the loss. Classic examples include insurance receipts and gratuitous payments by third parties.

26. By contrast, where a benefit is attributable to the events which caused the loss, it must ordinarily be taken into account (*Tiuta International Ltd (In Liquidation) v De Villiers Surveyors Ltd* [2017] 1 WLR 4627, per Lord Sumption at [12]). Page 2045

27. The Board's decision in *Villeneuve v Gaillard* [2011] UKPC 1 does not detract from that analysis. It is concerned with "*adventitious gains in separate transactions between the same parties*"; it does not assist where, as here, the alleged benefit formed part of the same overall course of dealings.

28. Nor does *Stevens v Hotel Portfolio II UK Ltd (In Liquidation)* assist the Liquidator. That decision confirms the strictness of the no-set-off principle between distinct breaches, but the present case is not concerned with gains from a separate breach: it concerns whether payments made back into EIC through the same overall course of dealings reduced the loss in fact suffered.

C.4 The issue is one of causation

29. Whether a benefit must be credited therefore turns on a question of causation. In *ED & F Man Capital Markets Ltd v Come Harvest Holdings Ltd* [2022] EWCA Civ 1704, Males LJ at [52] emphasised that the inquiry is one of effective or proximate causation. Page 1864

30. The Supreme Court adopted the same approach in *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC and others* [2020] Bus LR 1196 at [215], emphasising that the relevant question is whether the benefit is causally connected with the circumstances giving rise to the loss. Page 2024

D. APPLICATION OF THE PRINCIPLES: THE COURT OF APPEAL WAS CORRECT

D.1 The capital injections were causally connected with the loss-generating transactions

31. Applying the principles set out above, the Court of Appeal was correct to conclude that the capital introduced into EIC was causally connected with the very transactions said to give rise to the loss.

32. The payments from EIC to EIG under the MSA and related arrangements formed part of the operation of the Enterprise group's "triangular model". Under that model: funds flowed from EIC to EIG; those funds were transferred within the group to EHL; and EHL could in turn introduce capital into EIC.

33. The Court of Appeal therefore correctly held that the capital injections were not independent transactions but part of the same economic structure through which the payments said to constitute the breach were made.

34. In the language of Lord Sumption in *Tiuta International Ltd v De Villiers Surveyors Ltd*, the capital injections were plainly "*benefit[s] attributable to the events which caused the loss*."

D.2 <u>The Liquidator's own pleaded case depended on that connection</u>

35. Importantly, the interrelationship between the payments out of EIC and the capital subsequently introduced into EIC was not merely a finding made by the Court of Appeal. It was the foundation of the Liquidator's own pleaded case.

36. The Liquidator consistently pleaded that the capital introduced into EIC represented money, which had originally been extracted from EIC and then returned through the triangular model. Thus:

(a) the Reply expressly alleged that the "*so-called capital simply represents the asset (or worse, only part of the asset) previously removed*" (Reply, ¶5 [**777**]); Page 1050

(b) the Liquidator objected to the directors' reliance on the capital injections on the basis that the arrangements involved the company using its own assets to give the appearance that new capital was being provided (Reply, ¶20(c) [**793**] and Reply, ¶47.i.ii [**833**]); and Page 1067

(c) the Liquidator pleaded that the funds paid to EIG were transferred to EHL and used to fund the acquisition of shares in EIC (RAPOC, ¶65(e) [**634**]). Page 906

37. That pleaded position was central to the Liquidator's allegation that the triangular model involved unlawful financial assistance (RAPOC, ¶61ff [**631**]). Page 903

38. The allegation depended upon establishing precisely the causal link which the Liquidator now seeks to deny: namely that money paid by EIC to EIG ultimately reached EHL and was used to fund the acquisition of shares in EIC.

39. The trial judge accepted that factual premise. He found that EHL received funds originating from EIC through EIG which were used either directly or indirectly to fund the acquisition of shares in EIC (Restano J's Judgment, ¶860 [**352**]). The judge rejected the unlawful financial assistance claim only because, as a matter of Gibraltar law, the relevant statutory prohibition did not apply to the subscription of shares. The factual premise of the Liquidator's case was therefore accepted: namely that the capital introduced into EIC was funded by monies which had originally flowed out of EIC through the triangular model. Page 452

40. Moreover, the Re-Amended Particulars of Claim contained no allegation that the capital injections were independent transactions which could not be credited against loss. The only pleaded suggestion to that effect appeared in the Reply and was not properly developed (Reply, ¶53(g) [**838**]). Page 1111

41. The Liquidator's own case therefore depended upon establishing that the payments out and the payments back were part of the same chain of transactions. It is not open to him now to re-characterise them as unrelated or independent when the issue turns to loss.

42. Once that factual premise is accepted, the conclusion reached by the Court of Appeal follows directly. The capital injections were benefits causally attributable to the events said to cause the loss and must therefore be taken into account when assessing EIC's loss.

D.3 The payments were not collateral

43. EIC seeks to characterise the capital injections as collateral benefits which should be disregarded when assessing loss. That submission cannot be reconciled with the authorities.

44. As explained in *Swynson Ltd v Lowick Rose LLP*, collateral benefits are those whose receipt arises independently of the circumstances giving rise to the loss. Typical examples include insurance recoveries or gifts from third parties. The capital injections into EIC bear none of the characteristics of such benefits. They were not independent of the relevant transactions. On the contrary, they were generated by the same flow of funds within the group structure through which the MSA payments were made. They were therefore causally linked to the very transactions which EIC says caused the loss. Page 2031

45. The Court of Appeal was therefore correct to conclude that they were not collateral.

D.4 The issue of shares does not alter the analysis

46. The Liquidator contends that the capital injections should be disregarded because they were made in exchange for shares. That argument was rightly rejected by the Court of Appeal.

47. The relevant question is not whether the payments were formally structured as share subscriptions, but whether they were causally connected with the events said to give rise to the loss.

48. The authorities emphasise that the court must examine the substance and economic reality of the transaction. As the Supreme Court explained in *AIB Group (UK) plc v Mark Redler & Co Solicitors*, the court must analyse the transaction as a whole rather than isolate individual steps.

49. The Court of Appeal correctly recognised that the issue of shares did not represent a genuine commercial exchange conferring any meaningful benefit on EHL. EHL was already the sole shareholder of EIC. The issue of additional shares therefore conferred no new economic interest.

50. In substance, the capital injections simply increased the capital of EIC. The share subscriptions were merely the mechanism by which that capital was introduced.

51. That mechanism reflected ordinary accounting and corporate practice. Where capital is introduced into a company it is typically reflected either as loan capital or share capital (*HMRC v Blackburn* [2008] EWCA Civ 1454 per Lord Neuberger at [29]-[30]). In the present case, the capital could not be introduced as loan capital because of regulatory constraints on borrowing by the insurer. It was therefore introduced as share capital (Amended Defence, ¶¶36ff [**713**]). Page 1862

52. The issue of shares was therefore simply the formal means by which the capital contribution was recorded, rather than a transaction conferring any substantive commercial benefit on EHL.

53. As the Court of Appeal recognised, the economic effect of the payments was simply to increase the capital of EIC. The fact that shares were issued as part of that process does not transform what was economically a capital contribution into a transaction independent of the payments which generated the funds.

54. To treat the accounting form of the transaction as determinative would elevate form over substance and would be inconsistent with the compensatory principles governing damages and equitable compensation.

D.5 <u>The injections reduced EIC's loss</u>

55. The Court of Appeal correctly recognised that the capital injections increased the value of EIC and therefore reduced the financial consequences of the MSA and related payments.

56. The effect of the injections was to restore part of the capital which EIC says had previously been removed. In those circumstances, the injections plainly ameliorated the loss. Under the avoided-loss principle, such benefits must be taken into account when assessing damages.

57. EHL was throughout the relevant period the sole shareholder of EIC. The issue of additional shares therefore did not alter its economic interest in EIC or confer any new benefit on it. In substance, the transactions increased the capital of EIC without conferring any countervailing commercial benefit on EHL.

58. As the Court of Appeal recognised, the payments therefore had the direct effect of increasing the assets of EIC and correspondingly reducing the financial consequences of the payments made under the MSA and PIE arrangements.

59. In those circumstances, the capital injections necessarily reduced the loss suffered by EIC and must be taken into account when assessing damages.

D.6 EIC's approach would produce over-compensation

60. The Liquidator's approach is inconsistent with the compensatory nature of both damages and equitable compensation.

61. The Liquidator's approach would allow EIC to recover the full amount of the payments made under the MSA and PIE arrangements while ignoring substantial capital subsequently introduced into the company through the same structure.

62. That would place EIC in a significantly better position than if the transactions had never occurred.

63. As the Court of Appeal correctly observed, if the Liquidator were right, the entirety of the funds could have been returned to EIC and yet EIC would still be entitled to recover the same sums again as damages. That would be an inequitable windfall, not compensation for loss.

64. The Court of Appeal's conclusion was therefore correct.

E. GROUNDS OF APPEAL

65. The Liquidator's written case identifies two "principal themes": first, that the capital injections were not attributable to the events causing the loss; and second, that they were "encumbered" because EHL borrowed the funds (Appellant's Written Case, ¶¶30-36). Page 32 Neither point undermines the Court of Appeal's analysis. The first merely re-describes the same course of dealings; the second confuses EHL's balance sheet with EIC's. Those arguments are addressed under Grounds 1 and 3 below.

E.1 Ground 1 - the Court of Appeal was correct to conclude that the EHL payments were not collateral

66. Ground 1 challenges the Court of Appeal's conclusion that the capital introduced into EIC by EHL was not collateral and was attributable to the events giving rise to the loss. The ground advances a number of overlapping arguments. None withstands analysis.

The absence of a "lawful triangular model" is irrelevant

67. The Liquidator first submits that the Court of Appeal's reasoning was inconsistent because it had previously found that Mr Flowers was not operating a lawful triangular model. That submission misunderstands the Court of Appeal's reasoning.

68. The Court of Appeal did not hold that a lawful triangular model was in fact being operated. On the contrary, it accepted the judge's findings that the arrangements were dishonest and that the MSA was a sham.

69. But the fact that the arrangements were dishonest does not prevent the court from asking whether money later introduced into EIC through that same structure reduced its loss.

The fact that EHL was not obliged to inject capital does not render the payments collateral

70. The Liquidator next submits that the capital injections were voluntary decisions taken by EHL and therefore constituted independent third-party transactions. That submission again misidentifies the relevant inquiry.

71. The authorities do not require the benefit to arise from a legally enforceable obligation. The question is whether the benefit is causally connected with the events giving rise to the loss.

72. The Court of Appeal found that there was "*plainly a close link*" between the payments made through the group structure and the capital subsequently introduced into EIC (Court of Appeal Judgment, ¶147 [**452**]). The fact that EHL retained a discretion as to whether and when to introduce capital does not break that causal connection. Many benefits which reduce loss arise from discretionary decisions. What matters is whether the benefit arises from the same transactional context. Page 555

73. The Court of Appeal was therefore entitled to conclude that the capital injections were attributable to the events giving rise to the loss.

The capital injections were not "adventitious gains" or separate transactions

74. The Liquidator also suggests that the capital injections should be disregarded as gains arising from separate transactions. That contention cannot be sustained.

75. As explained at Section E above, the injections were neither adventitious nor separate. They formed part of the same course of conduct relied upon by the Liquidator himself.

76. The authorities relied upon by the Liquidator concern adventitious gains in separate transactions. The classic statement of the principle appears in the Board's decision in *Villeneuve v Gaillard*, where Lord Walker at [93] observed that there is no general principle requiring losses to be reduced by adventitious gains in separate transactions between the same parties. Page 2049

77. The capital injections in the present case cannot plausibly be described either as adventitious or as separate transactions.

78. First, they were not adventitious. An adventitious gain is one occurring by chance rather than design. The capital injections were the opposite. The group structure was deliberately designed so that funds generated within it could be used to introduce capital into EIC when required.

79. Second, the injections were not separate transactions. As explained above, the Liquidator's own pleaded case depended upon establishing that the payments made by EIC ultimately reached EHL and were used to fund the acquisition of shares in EIC. The alleged recirculation of funds through the group structure was therefore the very basis upon which the Liquidator advanced his claim. Once that factual premise is accepted, the capital injections cannot sensibly be characterised as independent or collateral benefits.

80. As Brightman J explained in *Bartlett v Barclays Bank Trust Co (No 1)* [, where gains and losses arise from the same underlying course of conduct, it would be wrong to disregard the gains when assessing the overall financial consequences of that conduct. The same principle applies here. The capital injections formed part of the same course of conduct which the Liquidator alleges constituted the breach.

The issue of shares does not render the payments collateral

81. The Liquidator further argues that the capital injections constituted separate transactions for value because shares were issued to EHL in return. For the reasons set out at Section D.4 above, that argument was correctly rejected by the Court of Appeal.

The source of the bond funds is immaterial

82. The Liquidator finally challenges the Court of Appeal's observation that the funds ultimately originated from EIC. Nothing turns on that point.

83. Even if the capital introduced into EIC was obtained by EHL from external borrowing, the injections nevertheless increased the capital of EIC. The relevant inquiry concerns the financial position of EIC, not the source from which its shareholder obtained the funds. The fact that EHL may have borrowed the funds therefore does not negate the benefit received by EIC.

84. The Liquidator also suggests that the Respondent cannot rely on the capital injections because he was not personally a party to the transactions by which EHL subscribed for shares in EIC. That submission misunderstands the nature of the inquiry.

85. If the capital injections are properly characterised as benefits attributable to the events giving rise to the loss, they must be taken into account when assessing damages regardless of the formal structure of the transactions by which they were made.

86. In any event, it is artificial to suggest that the Respondent was unconnected with those transactions. It is common ground that he was a director of both EIC and EHL and was alleged by the Liquidator to have been one of the controlling minds behind the relevant arrangements.

Conclusion on Ground 1

87. Ground 1 therefore rests on a series of arguments which either mischaracterise the Court of Appeal's reasoning or misidentify the relevant legal inquiry. The Court of Appeal correctly concluded that the capital injections were benefits attributable to the events giving rise to the loss and were not collateral benefits. Ground 1 should therefore be dismissed.

E.2 <u>Ground 2 – allowing credit does not produce an inequitable result</u>

88. Ground 2 contends that allowing credit for the capital introduced into EIC would produce an inequitable result. That submission rests on a misunderstanding of the principles governing damages and equitable compensation.

89. The object of both remedies is compensatory. The court must identify the loss actually suffered by the claimant, taking into account benefits which have reduced that loss.

90. The authorities relied upon by the Liquidator do not suggest that the court should disregard benefits which have in fact reduced the claimant's loss simply because the defendant has acted dishonestly. On the contrary, the principle articulated in *Tiuta* is that benefits attributable to the events giving rise to the loss must be taken into account unless they are collateral. The Court of Appeal correctly applied that principle.

The Liquidator's fairness argument misidentifies the relevant question

91. The Liquidator submits that it would be unfair to permit the Respondent to rely on capital introduced into EIC by EHL. However, the relevant question is not whether the Respondent benefits from those payments. The relevant question is whether the payments reduced the loss suffered by EIC.

92. If the payments increased the capital of EIC, they necessarily reduced the financial consequences of the payments said to constitute the breach. To disregard those payments would therefore permit EIC to recover damages for losses which it did not in fact suffer. The Court of Appeal was correct to describe such an outcome as inequitable.

The collateral benefit cases do not assist the Liquidator

93. The Liquidator relies on examples such as insurance payments to suggest that fairness sometimes permits a claimant to recover more than its net loss. Those cases are explained by the doctrine of collateral benefits, which reflects specific policy considerations concerning benefits derived from independent arrangements such as insurance or contributory schemes. They do not support the proposition that the court may disregard a benefit which is causally connected with the events giving rise to the loss.

94. The capital injections in the present case were not independent third-party benefits of that kind. As the Court of Appeal held, they were part of the same sequence of transactions through which the relevant payments occurred.

The Liquidator's "perverse outcome" argument is misplaced

95. The Liquidator further suggests that allowing credit would permit a director to extract money from a company and then avoid liability by subscribing for shares using that same money. That submission mischaracterises the position in the present case.

96. The issue before the Board is not whether the Appellant obtained shares in EIC. The issue is whether the capital introduced into EIC increased its assets and therefore reduced its loss.

97. Where funds are returned to a company through a capital injection, the company's financial position is improved regardless of the mechanism by which the funds were introduced.

98. Giving credit in those circumstances simply reflects the principle that damages must correspond to the claimant's actual loss.

Conclusion on Ground 2

99. Ground 2 therefore seeks to replace the established compensatory principles governing damages with a discretionary assessment of fairness. The authorities do not support such an approach. The Court of Appeal correctly concluded that the capital injections reduced the loss suffered by EIC and must therefore be taken into account. Ground 2 should accordingly be dismissed.

E.3 <u>Ground 3 - the Court of Appeal was correct to conclude that the capital injections constituted a benefit</u>

100. Ground 3 contends that the Court of Appeal erred in concluding that the capital introduced into EIC constituted a benefit to the company. The Liquidator submits that the capital injections merely enabled EIC to continue trading and therefore led to further liabilities, and that they should not therefore be regarded as a benefit. That submission cannot be sustained.

The injections increased EIC's assets

101. The capital introduced into EIC increased the company's capital by the amount injected. That increase in capital represented a direct improvement in EIC's financial position. Whether or not the company subsequently continued trading, or subsequently incurred further liabilities, does not alter the fact that its assets were increased at the time the capital was introduced.

Regulatory capital rules do not determine whether a benefit was received

102. The Liquidator places reliance on the regulatory framework governing insurers and the requirement that regulatory capital should not consist of borrowed funds. But that does not answer the present question, which is whether EIC received money that increased its assets.

103. The issue before the Board is the assessment of loss suffered by EIC, not whether the capital introduced into EIC satisfied regulatory capital requirements.

104. Even if the capital injections were structured in a way which concealed the underlying borrowing by EHL, the fact remains that the funds were introduced into EIC and increased its capital.

The argument wrongly treats continued trading as a detriment

105. The Liquidator's argument proceeds on the basis that the capital injections enabled EIC to continue writing business and thereby incur additional liabilities. That submission misunderstands the nature of the benefit.

106. The capital injections enabled EIC to continue operating as an insurer and to continue generating premium income. Whether the company's subsequent trading ultimately proved profitable or loss-making is irrelevant to the question whether the capital injections themselves constituted a benefit at the time they were made.

107. The authorities on avoided loss require the court to consider whether a payment improved the claimant's financial position. The capital injections plainly did so.

Conclusion on Ground 3

108. The Court of Appeal was therefore correct to conclude that the capital introduced into EIC constituted a benefit to the company. The Liquidator's attempt to characterise the injections as detrimental because they enabled the company to continue trading confuses the regulatory and commercial context of the case with the legal inquiry into loss. Ground 3 should therefore be dismissed.

F. CONCLUSION

109. This appeal raises a narrow issue concerning the proper application of well-established principles governing avoided loss and collateral benefits. The Court of Appeal applied those principles correctly.

110. Once it is recognised that the capital introduced into EIC increased its assets, formed part of the same overall course of dealings, and was not collateral, the appeal necessarily fails.

111. Accordingly, it is respectfully submitted that the Appellant's appeal should be dismissed, for the following (among other):

REASONS

(a) BECAUSE the governing principle is that compensation must reflect the claimant's actual net loss;

(b) BECAUSE benefits received by a claimant which are attributable to the events causing the loss must be taken into account when assessing damages, unless they are collateral;

(c) BECAUSE the capital injections into EIC were causally connected with the very transactions said to give rise to the loss, forming part of the same economic structure through which the payments were made;

(d) BECAUSE those payments were not collateral benefits but capital contributions which directly increased the assets of EIC;

(e) BECAUSE the issue of shares in exchange for those payments did not confer any meaningful commercial benefit on EHL and does not alter the causal analysis;

(f) BECAUSE the effect of those payments was to reduce the loss suffered by EIC, and the avoided loss principle therefore requires that they be credited;

(g) BECAUSE failure to give credit would result in over-compensation and an inequitable windfall to EIC, contrary to the fundamental compensatory principles governing damages and equitable compensation;

(h) BECAUSE for those reasons, the Court of Appeal was correct to hold that credit must be given for the £32.3 million returned to EIC.

TOM POOLE KC

3 Hare Court

JCPC/2025/0020

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
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MR FLOWERS' CASE ON HIS APPEAL [JCPC/2025/020]

A. INTRODUCTION AND OVERVIEW

1. This appeal is made on the basis that the Court of Appeal erred in upholding the finding that the Appellant breached his duty of reasonable care and skill in causing the Respondent ("Enterprise") to underwrite insurance policies in respect of a tax scheme (later held to be an avoidance scheme) called "Icebreaker 2" ("Icebreaker").

2. The issue is that upon taking legal advice from Gibraltar's leading Insurance KC who drafted a policy of insurance that included a clause when properly construed, (clause 11.4) meant that Enterprise carried no real insurance risk in respect of Icebreaker and that underwriting such policies could not be negligent.

3. The approach and findings of the Court of Appeal cannot be reconciled with both the appellants conduct in taking the initial advice, taking further advice when presented with claims and the findings of the Financial Services Compensation scheme (FSCS) all of whom agreed that the Clause 11.4 effectively responded as it was intended.

4. Prior to liquidation, EIC never admitted (on advice of Timothy Dutton KC) a single claim. No payment was ever made out on a policy. No policyholder ever sued or secured a favourable judgment. EIC's lawyers, Ozon solicitors (on the advice of Timothy Dutton KC), wrote to policyholders telling them they had no claim, on several grounds including misrepresentation, public policy, and clause 11.4 of the policies.

5. It is also not clear why policyholders, having previously been told (and, it appears, accepted) that EIC was not going to pay, would change their minds and make claims in the liquidation many years later.

6. The first indication from the liquidator that he had admitted a provision for claims was in August 2021 some five years after his appointment. The liquidator refused to disclose the advice at trial he relied upon, denying any scrutiny and furthermore the liquidator accepted that the advice he had relied on was provided by his own trial Counsel Mr Jones.

7. It is a convenient truth that the liquidator's case on the alleged insolvency of EIC at all material times was heavily assisted by admitting into the estate an alleged liability, or potential liability, of £31.45m under the Icebreaker 2 policies. This alleged insolvency, in turn, was said to give grounds to resist the ratification defences advanced by the director Defendants.

8. The policies were integral to the Icebreaker scheme. The scheme was designed to secure to participants the tax advantages of "trading losses" that were, found by Tax Tribunals to be

artificially engineered. Enforcing such policies would be contrary to the public interest in maintaining the integrity of the tax system and preventing the court's processes being used to give effect to a scheme found to be unlawful or abusive.

9. Independently or cumulatively, the Court of Appeal erred in holding that public policy did not render the Icebreaker policies void or unenforceable. The principles in *Patel v Mirza* [2017] AC 467 required the Court to deny enforcement of transactions which formed part of, or furthered, a scheme found to be contrary to law and the public interest. Page 1929

B. RELEVANT BACKGROUND

10. Icebreaker 2" (so called because it was a revised version of an earlier scheme called "Icebreaker"), was a scheme designed to exploit the availability in principle of "sideways tax relief" on investment in the performing arts and publishing. Icebreaker 2 was relevant in two ways. First, the liquidator caused EIC to bring a claim in negligence, contending that it was negligent to write the business (and or to do so without setting reserves of £13.8m in 2010, increasing to £19.5m, £22.2m, £24.5m, £28.2m and £28.2m for the years 2011 to 2015 respectively, figures vastly exceeding the modest reserve in fact set), and that this negligence had exposed EIC to a potential liability in the region of £31.45m[1] (RAPoC, paras 45 to 56, 72 and 80 [471/533]). Page 898

11. The Icebreaker 2 policies were a small part of EIC's business. The total premium charged to the policyholders was around £900,000 this reflected the risk that was underwritten, and as with any insurance contract the insurer accepts the premium as an amount to allow for its total costs which include claims, expenses and profit. The premium charged (as with all insurance contracts) includes the reserve for anticipated losses, an insurers minimum regulatory capital provides both the ability to write the business and an additional reserving buffer.

12. The suggestion by the liquidator that upon writing the business the appellant should have created additional reserves goes to the heart of the Appellants belief and the argument of alleged negligence. The appellant was a 50% shareholder in EIC at the time of writing the business, he had relied on legal advice and policy wordings drafted by Gibraltar's Leading

[1] See reference to Liquidators reports to creditors see Para 36, 37,38 of this statement of case

Insurance KC. The proposition argued by the liquidator that in effect Mr Flowers should have immediately created reserves of many multiples of the premium when incepting the business goes to the heart of Mr Flowers honest believe.

13. As a 50% owner of EIC it was not in the Appellants interest to write a book of business that on Day 1 required reserves of ten times the premium written as the liquidator suggests. The proposition is absurd. It is akin to an arsonist burning down his own house. As will be explained below Mr Flowers relied on advice and a specific policy clause 11.4 drafted by a leading insurance Silk, giving him the reasonable belief that the scheme carried zero risk and was priced appropriately. Such actions do not support the allegations of negligence made by the Liquidator.

14. The relevant background, summarised in paras 156ff of the Court of Appeal judgment, is that Icebreaker 2 was a tax-motivated investment structure in which taxpayers invested through LLPs in the creative sector. Sideways tax relief depended upon the LLPs conducting genuine trading ventures and incurring genuine trading losses. HMRC and the tax tribunals ultimately held the Icebreaker schemes to be ineffective: the losses were found not to be real because amongst other things only a fraction of the funds were ever truly invested, the balance being protected or recycled through guaranteed arrangements.

15. Enterprise issued policies indemnifying participating taxpayers against loss of their investment or (relevantly) the disallowance of the anticipated tax relief. The policies therefore only responded if: (a) the LLP failed to generate sufficient income to return the investor's contribution, or (b) the scheme was rejected by HMRC so that sideways tax relief was denied. Either outcome removed Enterprise from risk: success of the scheme plus sufficient profits meant no claim; failure of the scheme for want of genuine trading meant clause 11.4 excluded liability.

16. The appellant instructed a leading insurance lawyer in Gibraltar, Nigel Feetham (now KC and the current Gibraltar Minister for Finance), to draft a policy and devise a specific clause (the terms of which were agreed by the Icebreaker management team and, of course, each policyholder) to address any risk that the arrangements were engineered not to generate sufficient income to repay the member's contribution.

17. Clause 11.4 of the policy was the result of Mr Feetham's advice (judgment, para 426) [6729]: Para 293

> "The Insurer shall have no liability to the Insured under this Policy where the Insurer reasonably believes, and has reasonable grounds for such belief, that the LLP and the Insured have colluded in an attempt to engineer the failure of the LLP leading to insufficient income being generated causing a claim to arise on this Policy."

18. Attempts by the LLPs to contend that they had made relevant trading losses, and by scheme participants to claim sideways tax relief on their contributions to such "losses", went to the First-tier Tribunal ("FTT") and the Upper Tribunal ("UT"). They were resoundingly unsuccessful: see AcornwoodLLP v HMRC [2016] UKUT 361 (TCC) ("Acornwood") as regards the LLPs and Seven Individuals v HMRC [2017] UKUT 132 (TCC) ("Seven Individuals") as regards scheme participants (both being decisions of Nugee J). (There are other decisions about other very similar schemes, all to the same effect.) Page 1852 Page 1767

19. The FTT held that the reason given for the LLPs' entitlement to the income stream was a "pretence" (see *Acornwood* at para 20). It held that

> "the purpose of the borrowing coupled with the notional gross payment to each production company, was to create the *illusion* that the expenditure incurred by the partnerships in the first year was much greater than it truly was, in order to inflate the intended tax benefit"
> (ibid at para 28, emphasis added); and that the LLPs knew perfectly well that the borrowing would be used merely to secure its own repayment (ibid at para 33).

20. As regards the participants in the Icebreaker 2 schemes, the FTT held as follows:

> "any profit which did result would be little, or even nothing, more than a potential incidental benefit of an activity in reality pursued for other reasons. The partnerships embarked on their trades without projections of likely income; projections produced later showed that, in the absence of outstanding success,

> no partnership could reasonably expect even to recover the capital invested; *trading losses were considerably more likely than profits*; the principal exploitation agreements into which the partnerships entered allowed the principal exploitation company to alienate all of the income stream; and *the members of each partnership could have had no genuine expectation on joining that partnership that trading profits would be received.*

21. Thus the partnerships were *virtually guaranteed to make a trading loss* on their music projects.

> "The underlying, and fundamental, conclusion we have reached is that the Icebreaker scheme is, and was known and understood by all concerned to be, a tax avoidance scheme. *The aim was to secure sideways relief for the members* [i.e., to make a loss], and to inflate the scale of the relief by unnecessary borrowing, coupled with the *illusion* that the borrowed money was available for use in the exploitation of intellectual property rights by the *device* of the purported payment of a large production fee offset by the equally purported payment of a fee for a share of the resulting revenue"
>
> (see *Seven Individuals* at paras 31-32 and 106, emphases added). Page 1781

22. The FTT further held that none of the scheme participants before it could rationally have believed that the scheme was a serious commercial investment, and that the individual participant whose evidence it considered "knew that it was not a prudent investment absent tax relief" (see *Seven Individuals* at para 110). Page 1809

23. The FTT's analysis was upheld in all material respects by the UT. Nugee J referred at para 40 in *Seven Individuals* to an earlier decision on a similar scheme, in which he had said that "a trade that involved transactions that were *intended to produce a loss* in net present value terms, with no compensating collateral benefits, was not conducted on a commercial basis" (emphasis added), and had added that "the reason why the partnerships were willing to do this was because they believed that tax relief would be available to the partners." Page 1785

24. The short point from EIC's perspective was that (as pleaded at para 67 of the Re-Amended Defence **[577]**) the policies were zero-risk (which explains why the policy premiums were inexpensive). In the most unlikely event that an LLP made profits sufficient to enable a participant's "Member Proceeds" (i.e. share of those profits) to equal 20 per cent. of that member's Capital Contribution (counsel in the UT used the metaphor "moonshot": see *Seven Individuals* at para 61), no insured event would have occurred. But if, as indeed proved to be the case, the schemes were exposed as contrivances to generate a loss, clause 11.4 precluded recovery. "Failure of the LLP leading to insufficient income being generated causing a claim to arise on this Policy" must mean failure to earn profits sufficient to enable each participant's "Member Proceeds" to equal 20 per cent. of that member's Capital Contribution. As the findings of the FTT show, the whole scheme was set up on the basis that it would not make a profit, so as to facilitate (it was hoped) sideways tax relief. It was, as Nugee J put it in *Seven Individuals* at para 46, "run in a way which no-one seriously interested in profits (or seriously interested in making a commercial success of the trade) would run it". The failure to make a profit (let alone profit sufficient to repay the policyholder's personal contribution) was not mischance but an inherent property of the scheme, the consequence of deliberately not investing any of the borrowed money and of investing the non-borrowed money on terms that permitted the production company to keep most of any profits. It was thus a failure "engineered" by the scheme participants and the LLPs "colluding" together.

25. Clause 11.4, moreover, does not require these propositions to be definitively established in order for EIC not to be liable. It requires only that EIC "reasonably believed" them to be established and have "reasonable grounds for such belief". It is respectfully submitted that this hurdle was amply cleared.

C. NO SUCCESSFUL CLAIMS ON THE POLICIES – UNTIL THE LIQUIDATOR CHOSE TO ADMIT THEM

26. Prior to liquidation, EIC never admitted (advice of Timothy Dutton KC) a single claim. No payment was ever made out on a policy. No policyholder ever sued or secured a favourable judgment. EIC's lawyers, Ozon solicitors, wrote to policyholders telling them

they had no claim, on several grounds including misrepresentation, public policy, and clause 11.4 of the policies. The judge found that the letter was "based on advice from [EIC's] lawyers at the time Ozon solicitors and Timothy Dutton KC" (judgment, para 786). In respect of clause 11.4, the letter stated: Page 426

> "Enterprise reasonably believes that under the Icebreaker Scheme, notwithstanding the declared intention of "*trading*" for "*profit*", the reality is that Participants entered the Icebreaker Scheme with a view to manufacturing "*loss*" thereby engineering the failure of the relevant Icebreaker LLP. The trading "*failure*" of the LLPs was an essential component and central to the tax avoidance scheme under the Icebreaker Scheme arrangements."

27. A Mr Kennedy, whose claim had been thus rejected by EIC, failed in his complaint to the Financial Ombudsman about this rejection, on the basis of clause 11.4. The Ombudsman wrote:

> "I would find it difficult to disregard the findings in the *Acornwood* judgment, when considering this exclusion in Mr Kennedy's policy. The Tribunal said, 'the underlying, and fundamental, conclusion we have reached is that the Icebreaker scheme is, and was known and understood by all concerned to be, a tax avoidance scheme'. The Tribunal was also satisfied that 'all concerned knew perfectly well' that the 'capital contributions' were a pretence and rejected claims that Icebreaker participants had a genuine investment motive. As a result, I think it is fair and reasonable for Enterprise to rely on this exclusion in light of the *Acornwood* judgment to decline Mr Kennedy's claim."
>
> (See the Ombudsman's letter of 4 September 2015 **[8827-8833]**.) Page 1721

28. Mr Kennedy and others nonetheless (and unknown to the appellant) made claims under the Financial Services Compensation Scheme ("FSCS"), which can provide compensation to customers of authorised financial services firms that fail. The claim was rejected on the ground (among others) that the insurance policies were, as a matter of law, void as contrary to public policy, so that EIC's failure had not caused policyholders any loss. A claim for judicial review of that decision failed at the permission stage: *R*

(Kennedy) v Financial Services Compensation Scheme Ltd [2021] EWHC 3039 (Admin). Page 2017
Lang J held as follows:

> "[9] In my judgment, ground 1 does not come close to establishing an arguable case of irrationality. The Icebreaker schemes have been considered in detail by the specialist tax tribunals. The Upper Tribunal in *Acornwood LLP v HMRC* found that the schemes were a tax avoidance scheme. It is not possible for the claimants to re-open or go behind this finding, and they do not seek to do so. They argue, however, that the insurance policies themselves were not, per se, unlawful as contrary to public policy and the defendant erred in finding that the policies were an integral or critical part of the Icebreaker schemes, particularly as investors were not required to take out the policies and the policies were not offered at all in the earlier Icebreaker schemes.
>
> "[10] I consider that these submissions are unarguable. The defendant was entitled to take the view that contracts which seek to avoid tax legislation can engage the illegality doctrine (see the defendant's summary grounds of resistance at para.4.1 and 4.2)".
>
> "[11] As to the scope of the scheme, the policies were in place to provide an incentive to investors to join. The policies provided protection at low premiums for the personal capital contribution component of the investment, which was the only part of the investment that was at risk. All these claimants took out these policies. It was open to the defendant in the exercise of its specialist judgment to conclude that the policies were constituent components of an investment scheme deliberately designed to facilitate tax avoidance. In effect, the claimants were seeking to recoup from the defendant the value of their failed investments in a tax avoidance scheme."

29. It is true, of course, that the challenge here was to the rationality of the FSCS's decision that the insurance policies were void as contrary to public policy. But whether they were void or not was a question of law, and there is no indication in the decision of Lang J that she considered the FSCS to have answered that question wrongly.

30. The Court of Appeal held Lang J's decision to be inarguably right. As Coulson LJ put it in his decision refusing permission to appeal, the claim against the FSCS was a claim "to recoup from the respondent the value of their failed investments in a tax avoidance scheme". The challenge to the FSCS's decision was "absurd":

> "The Icebreaker Schemes have been considered in detail and have been identified as a tax avoidance scheme. Accordingly, whatever the position as to the lawfulness of the policies, if – as the respondent found – those policies were a critical part of the Icebreaker Schemes, then those policies too would be contrary to public policy".

31. In the liquidator's initial progress report of 14 August 2017, no reserves were made for possible payments on Icebreaker policies. The same position was taken in two further reports from 2018, and two further reports in 2019. In his second report from 2019, dated 15 August 2019, the liquidator said, "No reserves have yet been included in the above claims figures in respect of the Icebreaker investment scheme business".

32. Unsurprisingly in these circumstances, Icebreaker did not feature at all in EIC's claim as first pleaded by the liquidator.

33. But, following the filing of his application to amend the claim to introduce for the first time, in answer to the defendants' ratification defence, the contention that the company had been insolvent at all material times (see paras 31ff **[452]**]), the liquidator filed a further report dated 16 March 2020 saying, for the first time and some years after his appointment as liquidator, that he had commenced the process of adjudicating upon individual claims in respect of Icebreaker.

34. The first time the liquidator explained to the court the basis upon which he had admitted or made provision for claims on the Icebreaker policies was in para 191 of his supplementary witness statement dated 23 August 2021 **[982]**. He said simply that he had instructed Clyde & Co to assist him to "make a decision about the policyholders' claims and whether they should be admitted into the estate", though he refused to disclose the advice (which, accordingly, none of the experts saw either). The liquidator accepted that the advice relied upon had in fact been provided by trial counsel, Mr Jones.

Page 1244

35. It is not clear when the policyholders made these claims, but there were no extant claims in 2016, so the appellant infers the claims must have been made after the liquidator took over in 2017 or thereafter. As at the date of trial, the liquidator said he had decided to admit claims from policyholders in the sum of £5.3m, and that there was potential for up to a further £26m (judgment, para 786). Para 426

36. The liquidator's progress report dated 18th December 2025 states the following;

> "I previously reported that following my determination that these claims were admissible as insurance claims in the Estate, thirty-four claims totalling £5.3 million had been adjudicated upon. The reserve for these claims is included in the total United Kingdom claims amounts referred to above at paragraph 11. Following the Court of Appeal judgment dated 4 April 2024(referred to in more detail below) Mr Flowers a former director of EIC is exercising his constitutional right to appeal to the Privy Council challenging the decision made by the Court of Appeal (in respect of Icebreaker) and the admission of any liability in respect of the Icebreaker policies issued by EIC. Given the ongoing appeal process and Mr Flowers's appeal to the Privy Council. I have suspended, temporarily, the adjudication process for claims arising from these policies"

37. The liquidator subsequently appears to change tack in his reports to creditors dated 15th August 2025 and 10th February 2026 when he states;

> "The reserve for these claims is included in the total United Kingdom claims amounts referred to above at paragraph 11 and amounts to £24.7million. Following the Court of Appeal judgment dated 4 April 2024 (referred to in more detail below) Mr Flowers a former director of EIC is exercising his constitutional right to appeal to the Privy Council challenging the decision made by the Court of Appeal (in respect of Icebreaker) and the admission of any liability in respect of the Icebreaker policies issued by EIC. Given Mr Flowers's ongoing appeal to the Privy Council, I have suspended temporarily the adjudication process for claims arising from these policies"

38. Gone is the suggestion that the liquidator has now adjudicated on £5.3M of claims as he is now stating that he is carrying a reserve of £24.7M (Which is a difference of £6.75M to the figures presented at the original trial). Despite his absolute assurances to the court that he had advice to admit the claims he is now suggesting that he is suspending adjudication of the reserved claims with the inference being that despite assurances as to the veracity of his advice he is awaiting the Board's interpretation seemingly of Clause 11.4 (drafted by Nigel Feetham KC) which the FSCS together with Mr Dutton KC's advice suggest bites and ironically the only advice before the court.

39. It is also not clear why policyholders, having previously been told (and, it appears, accepted) that EIC was not going to pay, would change their minds and make claims in the liquidation. One wonders what steps the liquidator had taken to contact the policyholders and enquire into their potential claims. It will not have escaped this court's attention that the liquidator's case on the alleged insolvency of EIC at all material times was heavily assisted by admitting into the estate an alleged liability, or potential liability, of £31.45m under the Icebreaker 2 policies. This alleged insolvency, in turn, was said to give grounds to resist the ratification defences advanced by the director Defendants.

40. In summary the liquidator was saying – on advice he refused to disclose and with the result of giving to himself a significant advantage on the insolvency issue – that he was intending to pay out up to £31.45m in policyholder claims that no one else (apart from his own counsel) seemed to think gave rise to a liability contrary to the only advice before the court.

41. Given the COA ruled on the insolvency point the purpose of relying on unseen advice by the liquidator can be dispensed with hence the liquidators change of tack. Surely, the liquidator must either rely on his advice and admit the claims or as he seems to accept now the advice does not suggest anything of the sort and his stance on the liability was simply self-serving to achieve other trial goals.

D. LEGAL PRINCIPLES

42. It is genuinely recognised good practice that when an individual instructs a solicitor, they may research and make various enquiries to establish which solicitor is best suited to their matter, seeking to find an expert in that field.

43. The appellant was aware of Mr Feetham's expertise in the field of Gibraltar Insurance and indeed Mr Feetham when instructed had a policy draft he had previously drafted to be used as a template.

44. Email exchanges and notes of the conversations show that Mr Feetham was fully briefed of the facts and indeed the promoter of the scheme Icebreaker Management where also party to the exchanges and did not provide any objections to the correctness of the information exchanges.

45. The appellant submits not withstanding his Grounds of Appeal that he is entitled to relief under Section s.477 of the Gibraltar Companies Act 2014 which allows for the court to preclude directors from liability where they act honestly and reasonably: "477.(1). If, in any proceedings for negligence, default, breach of duty or breach of trust against a person to whom this section applies it appears to the court hearing the case that that person is or may be liable in respect of the negligence, default, breach of duty or breach of trust, but that he has acted honestly and reasonably, and that, having regard to all circumstances of the case, including those connected with his appointment, he ought fairly to be excused for the negligence, default, breach of duty or breach of trust, that court may relieve him, either wholly or partly, from his liability on such terms as the court thinks fit.". Page 2093

46. The appellant's case is he meets the tests widely understood by under S1157 of the UK Companies Act (which is mirrored by S477 of the Gibraltar Companies Act 2014) which are as follows

- **The Scope of the Advice:** Did the director ask the right questions? If the advice was narrow (e.g., "Is this contract valid?") Answer Yes. This is apparent from the emails between himself Mr Feetham KC exhibited in the original trial bundle.

- **Full Disclosure of Material Facts:** This is the most common pitfall. For the advice to protect a director, they must have provided the solicitor with all relevant information. Answer Yes. This is supported by the email exchanges exhibited in the original trial bundle including with the scheme promoter with whom Mr Feetham had direct contact.

- **The Reputation and Suitability of the Advisor:** Reliance is more likely to be deemed reasonable if the firm is reputable and possesses the specific expertise required for the matter. Answer Yes Mr Feetham KC is regarded as Gibraltar's leading insurance lawyer.

- **The Clarity of the Advice:** Was the advice clear and unequivocal. Answer yes, the drafting of the policy was undertaken by Mr Feetham KC with clear instructions, and he was specifically instructed to consider the point covered by Clause 11.4.

- **Independent Judgment:** A director cannot be a "cipher." They must still apply their own mind to the advice. If the advice contradicts common sense or the director's own knowledge of the business, they have a duty to question it. Answer Yes debate took place with Mr Feetham KC who drafted and a specific policy following detailed discussion both with the Appellant and the Promoter of the scheme as is apparent from the original trial bundle.

47. In addition to the Five Pillar Test there are two further points which should be considered in the appellant's application for relief.

48. The court should also have consideration to the Appellants state of mind in this transaction. Mr Flowers proceeded with absolute caution in writing this business. He was the 50% owner of the shares in EIC and would not have negligently committed "his" business (which he had started from scratch and risked his own capital) to a scheme that he knew would make catastrophic losses as suggested by the liquidator.

49. The point has already been made hat "Prior to liquidation, EIC never admitted (on advice of Timothy Dutton KC) a single claim. No payment was ever made on a policy. No

policyholder ever sued or secured a favourable judgment". In addition, the FSCS had held that Clause 11.4 worked as per the advice/policy wording received from Mr Feetham KC and Mr Dutton KC. The trial judge upheld by the COA made no findings of dishonest breach in respect of the underwriting of IB. The Board must therefore surely accept that a position created many years later based on advice that has not been made available to either court or indeed to the Board which therefore cannot be challenged should not be weaponised to create a liability for the appellant, over which he had no control.

50. In summary the Appellant acted honestly, (in good faith no finding in either court of dishonesty in the IB matter) reasonably (objective standard of care specialist advice was taken at all stages from leading KC's), it must be fair to excuse the appellant based on a global assessment of the circumstances, including the fact that the appellant did not personally benefit from the breach nor is he able to challenge the liquidators advice.

51. If the Board is with the Appellant on the application of s477 relief then we need not go further. However, I turn now to Grounds 1 and 2 of the Appeal.

52. The commercial purpose of clause 11.4 was to ensure that Enterprise would not respond if the LLP's loss was contrived rather than commercial – precisely the situation ultimately found by HMRC and the tribunals.

53. The Appellant argues that clause 11.4 meant that Enterprise carried no real risk. The policies were simply part of the scheme requirements and did not have any real value. Everyone understood this reality. In summary, the argument is straightforward:

(a) The LLP might fail to generate sufficient income, either because the venture performed poorly or because its expenses were inflated (or a combination of the two).

(b) Such failure could occur naturally in a genuine business or be deliberately engineered. Clause 11.4 was designed to address the latter situation — where apparent commercial loss is contrived.

(c) Icebreaker was of that kind. Only a small fraction of the investors' money was truly invested, yet the full amount was treated as a trading expense to create artificial losses.

(d) Investors necessarily presented their returns to HMRC on the basis that the LLP's losses were genuine. In truth, the scheme guaranteed insufficiency of income: its structure ensured the LLPs would "fail" to generate returns.

(e) Enterprise therefore agreed to clause 11.4 on the footing that it could not lose — either the scheme would succeed and no claim would arise, or, if exposed as artificial, the clause would exclude liability.

(f) On that basis, underwriting the policies could not rationally be characterised as negligent.

54. The Court of Appeal rejected this reasoning, holding in particular:

(1) There was no "misrepresentation" by the LLPs or members, since both Enterprise and HMRC knew the true structure (Court of Appeal judgment, para 200).

(2) Accordingly, there was no "collusion" or deception relevant to clause 11.4 (paras 202-203).

(3) Statements made by counsel before the tax tribunals were advocacy, not misstatement (para 206).

(4) The LLPs' conduct was not aimed at failure, because both investors and Enterprise depended on that "failure" to obtain tax relief and thus come off risk (para 208).

55. The Appellant submits that the Court of Appeal misdirected itself in law by treating clause 11.4 as inapplicable because there was "no misrepresentation" or "dishonest concealment" by the LLPs or their members. The proper question was one of objective contractual construction: whether, viewed in context, the Icebreaker arrangements were of the very nature described in clause 11.4 – i.e. a collusive attempt to engineer failure to trigger insurance cover. Misrepresentation in the technical sense was irrelevant.

56. Objectively construed, the LLPs and their members did collude to create artificial losses so as to obtain sideways tax relief. The tribunals' findings necessarily entailed that the

purported trading losses were fabricated and that the LLPs were designed to "fail" in the sense required by clause 11.4. That the structure was transparent to HMRC does not negate collusion: it was an agreed mechanism between participants to secure a fiscal result inconsistent with genuine commercial trading.

57. The Court of Appeal further erred in dismissing as "irrelevant" the judicial observations in the tax cases that the Icebreaker arrangements involved deception or artifice. Those findings formed part of the evaluative context for determining whether the LLPs had "colluded in an attempt to engineer failure." The Court's conclusion that clause 11.4 could only apply where dishonesty was concealed was an unduly narrow and incorrect construction.

58. Had clause 11.4 been correctly applied, Enterprise would have been entitled to deny liability under all Icebreaker policies. One policyholder took the matter to the Financial Ombudsman Service, which held that clause 11.4 excluded liability. No other claims were ever paid or admitted by Enterprise until the liquidator decided mid-litigation that there was a £34 million-odd liability. It is submitted that there was either no loss to Enterprise, or any loss was caused by the liquidator's subsequent decision to admit claims which were never payable. It follows that the finding of negligence cannot stand. Which returns the argument full circle to the S477 relief point.

E. EIC'S SUPPOSED LOSS

59. It is elementary (but see, e.g., Kiddle & Son v Lovett (1885) 16 Q.B. 605) that if A sues B, complaining that B's negligence has exposed him to a liability to C, A must (absent an admission) prove that he is indeed liable to C.

60. This was especially important in the present case, given the extraordinary fact that EIC had not suffered a single adverse claim in relation to the Icebreaker 2 policies (and had been supported by the Financial Ombudsman in its stance of rejecting claims), and the liquidator himself appeared to have taken no interest in the Icebreaker policies until around the time it became desirable from the liquidator's point of view to show that EIC had been insolvent at all material times, since when he had been admitting millions of pounds' worth of claims.

61. The original trial judge referred at para 833 to the liquidator's statement (the reference there to "Mr Flowers" is an error) that he "has taken legal advice and has been advised that these claims should be admitted into EIC's estate contrary to the position taken by EIC before it went into liquidation", and to the liquidator's refusal to disclose that advice; from which refusal, the judge said, "adverse inferences cannot be drawn". That must be incorrect when considering Kiddle & Son v Lovett to which I refer above. Para 445

62. The original trial judge stated (a point left undisturbed by the COA (at para 840), "If [the appellant] or any person aggrieved by the liquidator's decision wishes to challenge the decision to admit the claims, that should form part of a separate challenge. That assessment is separate however to the question of whether [the appellant] breached fiduciary and/or common law duties to EIC when the policies were underwritten." page 448

63. It is respectfully submitted that in his consideration of this issue the judge went seriously wrong. He simply abdicated his judicial function in favour of the liquidator. There is no principle of law by which, when A sues B alleging that B has negligently exposed him to liability to C, A's liability to C – the very foundation of the claim – is established by A's own say so.[2] It is no different where the claimant is A Ltd and the say so is that of A Ltd's directors. Nor where, as here, the claimant is A Ltd (in liquidation) and the say so is that of A Ltd's liquidator.

64. It is also not clear what the judge had in mind by the "separate challenge" that the appellant had to make if he was to displace the liquidator's conclusion that he had exposed EIC to loss. There is no provision in the insolvency laws of Gibraltar that entitles a defendant to a claim brought by a company in liquidation in respect of a supposed third-party liability of the company to challenge the liquidator's decision (under section 201(3) of the Insolvency Act 2011) to admit the third party's proof of debt. And in any event the majority of the supposed £31.45m was put forward as a potential liability (still unresolved), in respect of which there was therefore no step in the insolvency process capable of being challenged and how could any challenge be realistically brought without the disclosure of the Liquidators advice prepared by his own Counsel Mr Jones.

[2] This is why A, facing C's claim said to arise from B's actions, will often be wise to defend C's claim (albeit unsuccessfully) and then include his costs of doing so in his damages claim against B, for if A had simply paid out "one can well imagine what the parties higher up the line would have said": *Kasler & Cohen v Slavouski* [1928] 1 K.B. 78 at 88, and see *McGregor on Damages* at 21-062. Page 1868

65. The Appellant is left in a vortex by the decision of the judge and the COA. He is facing a claim that has not be crystalised by the liquidator. Despite the liquidator's steadfast assurances to the courts (under oath) that his advice was sound, he refuses to make his advice available so that the Appellant can mount a proper defence or challenge. This position is unjust and must impinge the Appellant's right to a fair trial under Article 6 of the Human Rights Act 1998 adding further support to Mr Flowers request for relief under S477 of the Gibraltar Companies Act 2014.

F. PUBLIC-POLICY UNENFORCEABILITY

66. Independently or cumulatively, the Court of Appeal erred in holding that public policy did not render the Icebreaker policies void or unenforceable. The principles in Patel v Mirza [2017] AC 467 required the Court to deny enforcement of transactions which formed part of, or furthered, a scheme found to be contrary to law and the public interest.

67. The policies were integral to the Icebreaker tax-avoidance mechanism. Their function was to secure to participants the tax advantages of "trading losses" that were, in truth, artificially engineered. Enforcing such policies would be contrary to the public interest in maintaining the integrity of the tax system and preventing the court's processes being used to give effect to a scheme found to be unlawful or abusive.

68. By declining to apply Patel v Mirza and related authorities, the Court of Appeal failed to address the essential question of proportionality: whether enforcement of these policies would cause inconsistency with the purpose of the law defeated by the scheme. On the findings of the tribunals, the answer could only be affirmative. The policies were tainted by illegality and unenforceable.

69. If, as the Appellant submits, the policies were void or unenforceable on public-policy grounds, there was again no recoverable loss by Enterprise and therefore no breach of duty causing damage.

70. The Appellant accordingly submits that:

(1) The Court of Appeal erred in law in its interpretation and application of clause 11.4;

(2) It further erred in failing to apply public-policy principles under *Patel v Mirza*; and
(3) Properly applying either ground, there was no negligence and no loss.

G. CONCLUSION

71. The Court of Appeal erred in upholding the finding that the Appellant breached his duty of reasonable care and skill in causing the Respondent ("Enterprise") to underwrite insurance policies in respect of a tax scheme (later held to be an avoidance scheme) called "Icebreaker 2" ("Icebreaker"). The main point is that, properly construed, clause 11.4 meant that Enterprise carried no real insurance risk in respect of Icebreaker and that underwriting such policies could not be negligent.

72. Independently or cumulatively, the Court of Appeal erred in holding that public policy did not render the Icebreaker policies void or unenforceable. The principles in Patel v Mirza [2017] AC 467 required the Court to deny enforcement of transactions which formed part of, or furthered, a scheme found to be contrary to law and the public interest.

73. Additionally, the Appellant is entitled to Relief under S477 of the Gibraltar Companies Act 2014 for the reasons stated at Para 45-50 of this Statement of Case. Further support for the Appellant's entitlement for S477 Relief is found at Para 65 of these submissions it is simply unjust to be faced with an unquantified claim based on advice that has not been seen and therefore cannot be challenged. This position the Appellant respectively suggests has been created for the advancement of the liquidator's case thus far and as previously stated it is a position that Mr Flowers suggests prevents a fair trial by any standard.

H. SUMMARY

74. Mr Flowers should be granted Relief Under S477 of the Gibraltar Companies Act 2014.

75. The Appellants Appeal should be allowed for the reasons set out under Ground 1 and Ground 2 of this Statement of Case.

ANDREW FLOWERS