Neutral Citation Number: **[2022] EWCA Civ 1169**

Case No: CA-2021-001933 & CA-2021-000691

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
Sir Michael Burton GBE (sitting as a Judge of the High Court)
[2021] EWHC 1327 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/08/2022

Before:

LORD JUSTICE MALES
LORD JUSTICE PHILLIPS
and
LADY JUSTICE ANDREWS

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Between:

ANDREW JAMES BARCLAY-WATT & Others	**Claimants/ Respondents and Cross-Appellants**
- and -	
1)ALPHA PANARETI PUBLIC LIMITED **2) ANDREAS IOANNOU**	**Defendants/ Appellants and Cross-Respondents**

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Paul Parker (instructed by **Spector Constant & Williams**) for the **Defendants/Appellants**
Stephen Nathan QC and Nicholas Yell (instructed by **GSC Solicitors LLP**) for the **Claimants/Respondents**

Hearing dates: 26 & 27 July 2022

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APPROVED JUDGMENT

Remote hand-down: This judgment was handed down remotely at 10.30am on 19 August 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Males:

1. This is an appeal from a decision of Sir Michael Burton GBE in which he held that the first defendant, Alpha Panareti Public Ltd ("APP") was liable to the claimants as a result of its marketing of luxury properties in Cyprus, but that the second defendant, Mr Andreas Ioannou, a director of APP and the driving force behind the marketing plan, was under no personal liability for doing so. APP appeals the finding of liability against it, while the claimants cross appeal, contending that the judge ought to have held Mr Ioannou personally liable as an accessory to the wrongdoing of APP in accordance with the principles set out by the Supreme Court in *Fish & Fish Ltd v Sea Shepherd UK* [2015] UKSC 10, [2015] AC 1229.

2. The trial before Sir Michael Burton extended over 29 days and was the trial of liability of eight sample claims out of a total of some 280 claims by purchasers of apartments and villas at three development sites in the Paphos area, at St Nicolas, St George Hills and Arcadia Gardens, for which planning permission was given in 2005, 2007 and 2007 respectively. APP was the developer of the properties, which were marketed and sold to the claimants between 2005 and 2007. However, the economic downturn following the financial crisis intervened and there were substantial delays in completing the developments. St George Hills was largely completed by December 2011 and St Nicolas by April 2013, while Arcadia remains only 30-60% completed. None of the claimants received completed properties.

3. This led to litigation against numerous defendants, most of which has now been settled, with APP and Mr Ioannou the only remaining defendants. The claims against them were claims in tort for misrepresentation and the giving of negligent advice, any claims they may have in contract having been assigned pursuant to settlement agreements reached with other defendants. They seek to recover the monies paid out to purchase the properties, including reservation fees and deposits, the sums paid to Alpha Bank Cyprus ("the Bank") pursuant to loan agreements for the purchase of the properties, and other out of pocket expenses.

The facts

4. The claimants were individuals resident in the UK who were persuaded to put most, if not all, of their personal savings into what was for them an unusual investment. They were not sophisticated investors and did not have a detailed understanding of financial matters.

5. APP is a property developer in Cyprus and was the developer of the three sites in question. The judge described Mr Ioannou as the managing director of APP, although there was some evidence that this is not a term recognised in Cyprus. At all events, he was one of only two directors, the other being his father, and was the driving force behind the company. In particular, the plan for the marketing of the properties to UK residents, which involved the recruitment of a network of salesmen, the production and supply of literature and DVDs, and a programme of training sessions for salesmen in the UK and in Cyprus, was his plan and his responsibility. He was closely involved with all aspects of marketing the properties.

6. The properties were marketed through contractual arrangements entered into by APP, initially with a company called Universal Vacations Realty Limited ("UVR"), and

later with another company called Rosebery Overseas Property Ltd or ROPUK Ltd ("ROPUK"). These described UVR and ROPUK as the agents of APP for the purpose of selling the properties, with APP undertaking to provide all necessary promotional material, and ROPUK in particular agreeing to use its best endeavours to achieve the maximum possible sales. APP agreed to pay UVR and ROPUK a commission of 8% of the purchase price of any property sold through them. There was an incentive scheme for the individual salesmen.

7. It was UVR and ROPUK who recruited the salesmen. These were independent financial advisers who, for the most part, had previously given financial advice to the claimants. It was this which enabled the salesmen to target potential purchasers who were likely to show interest in purchasing the properties, which gave them access to those purchasers in their homes, and which enabled the salesmen to take advantage of the relationships which they already had with potential purchasers. Thus APP was in a sense "piggy-backing" on those previous relationships of trust while carrying out what the judge described as a "hard sell". As the judge put it at [14]:

> "It is clear to me, having heard the evidence from the Claimants that they were indeed daunted [i.e. by the proposed investment in a property in Cyprus], and that their concerns were set to rest by the salesmen, who were only selling to them the Defendants' properties. The fact that some of them may also have previously given other advice to the Claimants in respect of mortgages and pensions was only the springboard to the hard sell of the Cyprus properties, in accordance with their training by APP and with the DVDs and brochures, armed with which they were not simply canvassers, as the Defendants suggest."

8. What was sold to the claimants was a package involving the purchase of an apartment or villa (or in some cases, more than one) as an investment, with a view to its being let to tourists in Cyprus. Apart from payment of a deposit of 15% of the price, the purchase would be funded by a loan from the Bank secured by a mortgage on the property, with money being drawn down from the Bank to pay for the construction of the property as the work progressed; income from letting the property would enable the investment to "wash its face", as rental payments would match or exceed the sums payable by way of mortgage outgoings.

9. It was an important feature of the marketing of the properties that they were "armchair" investments, which would be easily lettable with rent receipts covering the cost of the mortgage. The mortgage was described in brochures and on the APP website as the "Alpha Panareti Mortgage Scheme" (or "Alpha Panareti Housing Loan") and was said to be "exclusive" to customers of APP, at a low cost which was made possible by borrowing the funds in Swiss francs:

> "… if you do not wish to purchase a property outright, an Alpha Panareti Housing Loan is available at an interest rate of approximately 2.75%. This is possible by denominating the mortgage in Swiss francs (CHF), a practice becoming more popular in the UK. Switzerland is a low inflation economy and a haven for foreign currency."

10. Another APP document provided to salesmen emphasised the benefit of this Swiss franc mortgage:

> "Mortgages are managed in Swiss francs by Alpha Bank. … The Swiss franc is used because it is exceptionally stable by comparison with other currency, allowing a low interest rate."

11. The judge found that the availability of a cheap mortgage in Swiss francs was (in the words of one witness) a "big selling point" of the package offered to prospective customers:

> "34. The Defendants plainly set out to induce and purportedly advise potential customers in their homes, in accordance with the training (attended also by representatives of the Bank) given to the agents and sub-agents; and the exclusive Alpha Panareti Mortgage Scheme was an integral part of that package."

12. However, for UK residents to borrow money in Swiss francs involved a currency risk. This risk was well summarised in a decision of the Cyprus Consumer Council dated 24th October 2016, following an investigation into the business practices of the Bank:

> "In this case, the Bank granted mortgage loans in … Swiss francs, i.e. in a currency other than the currency of the country where consumers, mostly residents of Cyprus or the UK, receive their income. Loans in foreign currency involve risks stemming both from the fluctuations of the exchange rates between two currencies [and] the interest rate fluctuations. These risks may result in a significant financial charge on the borrower, due to the increased payable instalments and unexpired loan capital. This is particularly true for mortgage loans that have long repayment periods. Thus, it is significantly affecting the ability to repay the loan and thus the economic data relied upon by the consumer to decide on whether to conclude a loan agreement and under what conditions. Furthermore, the average consumer does not have the necessary technical, specialised knowledge of foreign exchange and interest rate risk assessment."

13. All of this, the judge found, should have been obvious to APP and its salesmen. That was so irrespective of a circular letter to all banks in Cyprus from the Central Bank of Cyprus dated 11th October 2006, which the judge found was likely to have been provided to APP at a training session for salesmen in October 2006, attended by Mr Ioannou. This circular drew attention to a large increase in foreign currency lending which the Central Bank had observed during the first eight months of 2006 and pointed out that this exposed borrowers to interest and foreign exchange risks. It called upon all banks to advise their clients about these risks and, if the borrower decided to proceed, to obtain a signed statement confirming that he understood the risks.

14. The judge found, however, that none of the claimants was ever warned about these currency risks, which they did not understand.

15. In the event there was a substantial fall in the value of both sterling and the Cyprus pound against the Swiss franc, so that the cost of the mortgages spiralled; as the claimants never received the completed properties, there were no rent receipts, but even if there had been, these would not have been sufficient to enable the bank's loan to be repaid. The fall in the value of sterling led to what the judge described as "the increasing and overwhelming indebtedness of the Claimants to the Bank".

The claimants' claims

16. The claimants alleged that APP had made (or was responsible for) numerous misrepresentations and negligent advice in the course of marketing the properties. These were distilled to nine heads of claim for the purpose of the trial, all but one of which were rejected by the judge. For the purpose of this appeal it is sufficient to mention two of them.

17. The first, which succeeded, was that in trumpeting the supposed benefits of the Swiss franc mortgage, APP had failed to warn the claimants of the foreign currency risks which they were undertaking by borrowing in Swiss francs when the anticipated rental income would be in Cyprus pounds or sterling. The judge found that, in marketing the mortgage as a fundamental part of their offering, APP owed a duty of care to put the claimants on notice of the currency risks, and that they were in breach of this duty. It is this decision which APP challenges on its appeal.

18. The second head of claim, which failed, described as the "lettability" representation, was that APP had represented that the properties were lettable to tourists on short-term lets. The claimants' case was that this representation was untrue because the developments needed (and could not obtain) a licence from the Cyprus Tourism Organisation in order for such letting to be lawful. Having considered evidence of Cypriot law, the judge concluded that the properties could be let on short-term lets to holidaymakers from Cyprus or the European Union (then including the UK), which represented 82% of the tourist footfall in Cyprus, but they could not be let to non-EU residents for periods of a month or less. In those circumstances the judge found, applying *Avon Insurance Plc v Swire Fraser Ltd* [2000] EWHC 230 (Comm), [2000] CLC 665 at [17], that the representation was substantially correct; and that in any event neither the claimants nor any reasonable person would have regarded the fact that they were only lettable to 82% of the potential market as a reason not to enter into the purchase contract. The claimants seek to challenge this conclusion by a Respondents' Notice in the event that APP's appeal on the currency risks issue succeeds.

The appeal – liability of APP

19. For APP Mr Paul Parker advanced four grounds of appeal. In summary:

    (1) The judge was wrong to regard the salesmen who persuaded the claimants to buy properties as agents of APP in making the representations which they made. Rather, the purpose of the arrangements between APP and the salesmen was for

the salesmen to make their client lists available to APP; the salesmen owed no fiduciary duties to APP, and had only an execution-only function.

(2) Even if they were agents of APP, the salesmen had no authority to sell the Bank's loan product as if it were APP's own product; it was the Bank's product and it was the Bank, not APP, which had provided training to the salesmen about it.

(3) The judge's conclusion that the currency risk of a loan in Swiss francs was obvious was unsupported by any evidence and was at least subconsciously influenced by the hindsight experience of the global recession caused by the 2008 financial crisis; accordingly the judge was wrong to hold that APP owed a duty to warn the claimants about this risk.

(4) The judge was wrong to place heavy reliance on the contents of the Central Bank circular because there was no evidence that its contents were communicated either to APP or to individual salesmen.

20. Developing these grounds, Mr Parker relied on the different kinds of agent described in *Bowstead & Reynolds on Agency*, 22nd Ed (2021) at para 1-001, and on the warning in the majority judgment in *UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmbH* [2017] EWCA Civ 1567, [2017] 2 Lloyd's Rep 621 at [89] "against forcing into an agency relationship a relationship better explained in some other way, in particular where the supposed agent is already an agent of another party to the contemplated transaction". He submitted that the salesman here were no more than "canvassing" agents, with no power to affect APP's legal relations with the claimants, and whose only role was to introduce the claimants to APP, not to make representations or to give advice on behalf of APP; and that, to the extent that they did have any advisory role so far as the mortgage was concerned, their failure to advise about the currency risks should not be attributed to APP.

Analysis

21. The way in which the properties were marketed and the respective roles of APP and the salesmen who engaged directly with the claimants on its behalf were central issues at the lengthy trial before the judge. The appeal challenges the judge's findings that the statements made by the salesmen in promoting these properties, and in particular in extolling the benefits of the Alpha Panareti Mortgage Scheme, involving as it did a loan denominated in Swiss francs, were statements which APP authorised and encouraged the salesmen to make. This is a challenge to findings of fact which, in my judgment, is hopeless. It was APP which entered into contractual arrangements intended to maximise sales of the property which described UVR and ROPUK as its agents; which incentivised the salesmen by generous commission payments; which devised promotional materials emphasising (among other things) the benefits of a cheap loan which could be achieved by borrowing in Swiss francs; and which organised training sessions for the salesmen.

22. After setting out these features of the marketing of the properties, the judge put it this way:

> "14. The combination of the above features is entirely sufficient to persuade me that the agents and sub-agents had authority to

> make the representations which they then made by handing over the DVDs and brochures and making statements as to buy to let and rentals and the special mortgage arrangements, in accordance with their training …"

23. This was a finding of fact which the judge was entitled to make. Whether the salesmen owed any fiduciary duty to APP is irrelevant, just as it is arid to debate whether the salesman fell within one category of agent rather than another. What matters is that they were sent out by APP to maximise sales by (among other things) emphasising the benefits of a cheap loan in Swiss francs, with APP trading on the benefit of the salesmen's existing relationships with the claimants.

24. It is unrealistic to submit, as Mr Parker did, that it was the Bank and not APP which undertook responsibility for warning the claimants about the currency risks. Whether or not the Bank had any responsibility for doing so (and I note that the claimants' claims against the Bank have been settled on terms of which we are not aware), it was APP which included the promotion of this "exclusive" mortgage in the material provided to salesmen as a key part of the overall package for the sale of the properties. It makes no difference that the detailed explanation of the working of the mortgage at training sessions organised and attended by APP was given by representatives of the Bank.

25. The complaint that there was no evidence that the currency risk was obvious to APP and to the salesmen (who were after all experienced independent financial advisers) is without substance. The fact is that it was obvious, and this should have been understood by APP and the salesmen.

26. This is confirmed by the terms of the October 2006 circular from the Central Bank of Cyprus. Contrary to Mr Parker's proposed interpretation of that circular, the Central Bank had not suddenly appreciated that borrowing in a foreign currency gave rise to a currency risk; rather, it was concerned about the recent high volume of such borrowing which meant that this already apparent risk was being run to a much greater extent than hitherto, in circumstances where some borrowers would not appreciate the risk which they were running. If necessary, therefore, the circular demonstrates that the judge's view of the obviousness of the risk was not affected by hindsight.

27. Contrary to the final ground of appeal, the judge did not place heavy reliance on the terms of the circular. Rather, he stated in terms that it was unnecessary to do so (emphasis added):

> "37. The question for me is whether the Claimants from 2005 onwards should have been so advised by the Defendants, *even without the impact of the advice by the Central Bank of Cyprus*, given the following: –
>
> i) The information about the mortgage as an integral part of the package was being given to the potential customers, as the Defendants well knew, by those who would be trusted by the Claimants, many of them former or actual financial advisers, to give recommendations and advice. The

> Defendants in their Defence at paragraph 11.8 accept that they 'understood that the third-parties engaged by ROPUK and/or UVR to introduce prospective purchasers were usually independent financial advisers who had long-standing and close relationships with their own clients, which they had built up over many years and who were able to offer their clients a range of different products for investment purposes.'
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> ii) In that same subparagraph of their Defence they deny that these salesmen were their agents or sub-agents, but I have already concluded in all the overwhelming circumstances that they were their agents and had actual or apparent authority to deliver, explain and expand upon the package they were selling on the Defendants' behalf. The package was the result of the unusual and specific training given by the Defendants to the salesmen, which had included involvement by representatives of the Bank, and the advantages of the exclusive mortgage were right in the very forefront of the delivered package, which the salesmen, and not the Claimants, were in a position to understand. To advise on the benefits carried with it the duty (and authority) to advise on the detriments and risks.
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> iii) The central aspect of the package was that the loan was to be in Swiss francs, sold as an advantage, when it was in fact an obvious risk, *not needing the Central Bank letter to point it out*, to be considered and assessed by anyone delivering their sales talk to ordinary consumers, wholly inexperienced in finance.
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> iv) The duty of care of the Defendants was the clearer when they were training the salesmen and arming them with the DVDs and brochures. Even if the currency risk had not been obvious, it required to be carefully researched before it could be sold as a positive advantage and as a central part of the deal. The low cost mortgages, financed by the (sterling or Cyprus pound) rent receipts, were a fundamental part of the Masterplan."

28. It is impossible for this court to say that the judge was not entitled to reach these conclusions. I would therefore dismiss the appeal.

The Respondents' Notice – lettability

29. It is therefore unnecessary to decide whether the claimants are entitled to challenge the judge's conclusion on the lettability issue. However, as we heard argument on that question, I propose to decide it.

30. Initially the claimants sought to challenge the judge's conclusion by serving a Respondents' Notice in which they acknowledged "that, in accordance with CPR

52.13(3), White Book Paragraph 52.3.2 and *Wolff v Trinity Logistics USA Inc* [2018] EWCA Civ 2765, [2019] 1 WLR 3997 at [89], they need permission from the Court of Appeal to appeal against the dismissal of their claim for misrepresentation as to lettability by the Judge". I considered that application for permission on paper and refused it on the ground that an appeal would have no real prospect of success.

31. Despite that discouragement, Mr Stephen Nathan QC for the claimants submitted that they are entitled to pursue this argument without needing permission because they are seeking to do no more than to uphold the judge's order. He acknowledged, however, that this submission could only succeed if *Wolff* was wrongly decided.

32. I would reject this submission for three related reasons, which can be briefly stated. First, we are in my judgment bound by *Wolff* and any change to what that case decided should be made by the Rules Committee. In a judgment with which Lord Justices Longmore and Newey agreed, Sir Timothy Lloyd held as follows:

> "89. Thus, in my judgment, if a claimant asserted two claims against the appellant of which one was successful and the other was dismissed (whether or not so stated in the resulting order) and the defendant appeals against the judgment on the first claim, then if the respondent wishes to argue that the court below was wrong to dismiss its other claim against the appellant and that the order below should be upheld on that basis, that assertion amounts to an appeal against the order, and is not within the category of seeking to contend that the order of the court below should be upheld for reasons other than those given by that court, even if the relief sought would be the same on either claim. Such a respondent falls within paragraph 8(1) of PD52C, not within paragraph 8(3), and therefore requires permission to appeal."

33. That paragraph precisely describes this case.

34. Second, I see no reason to think that *Wolff* was wrongly decided. Mr Nathan submitted that it is inconsistent with the earlier case of *Compagnie Noga d'Importation et d'Exportation SA v Australia & New Zealand Banking Group Ltd* [2002] EWCA Civ 1142, but I do not agree. *Noga* was concerned with a different issue, whether it is possible to appeal against a finding of fact. It has no bearing on the present issue.

35. Third, in substance the claimants' challenge to the judge's conclusion on the lettability issue does amount to seeking to vary the judge's order. The order which the judge made in this case was that "there be judgment for the Claimants against Alpha Panareti with damages to be assessed". What that means can only be understood by reference to the judgment in which one cause of action (i.e. failure to advise as to the currency risks of the Swiss franc mortgage) succeeded and all other causes of action (including the lettability misrepresentation claim) failed. The order can only mean that judgment is given on the cause of action which succeeded, not the causes of action which failed, and that damages are to be assessed accordingly. If the claimants' challenge to the judge's dismissal of their lettability misrepresentation claim were to succeed, they would need a different order, ordering damages to be assessed for that

claim also. While it may be that the damages for both claims would be the same, that is not necessarily so, and in any event they are different causes of action.

36. I conclude, therefore, that the claimants are not entitled to run this case without permission, which has been refused. I would add that we heard no oral submissions as to the merits of the lettability case, but I see no reason to change the view which I formed when refusing permission that the claim would not have any real prospect of success.

The claimants' cross appeal – personal liability of Mr Ioannou

The judgment

37. The judge dealt with the issue whether Mr Ioannou should be held personally liable with extreme brevity. I set out in full what he said about this issue:

> "58. This is put by the Claimants in two ways, first he is said to have owed a personal duty to the Claimants, and secondly he was a joint tortfeasor. As to the latter, I consider that this can only amount to a case that he was a joint tortfeasor with the First Defendant APP, as I have not been tasked to find, and do not find, that the agents and sub-agents such as Messrs. Pollard, Shaw and Heath, Mrs Welsby, and all the others were liable in negligence to the Claimants. But, even then, I would need to be satisfied that he was a joint tortfeasor personally as opposed to APP, so the question is the same.
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> 59. Mr Ioannou is said to be personally liable to the Claimants all because he was a Svengali, because the marketing scheme was his masterplan or brainchild, and he was its hub, that he micromanaged at least UVR if not ROPUK, that he approved the content of the brochures and DVDs, and that he has been the only witness for the Defendants, and no other witnesses have been called, although others have featured on behalf of APP, not just Ms Nurse, and his sister and father, but Ms Skordi, Ms Ireland and Ms Birkin. It was not put to him that APP is or was a one-man company and indeed in the light of at least those individuals it would seem it plainly was not, although that of itself would not be enough. No board minutes or articles of association were produced, though I do not know if discovery of them was sought.
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> 60. The question is whether he has become liable as well as the company of which he is managing director. This is not a case of a joint tortfeasor ancillary to another independent party, such as in *Fish & Fish Ltd v Sea Shepherd UK* [2015] UKSC 10. I have been referred to the following authorities: *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 890 esp at 835–6, *MCA Records Inc v Charly Records Ltd* [2001] EWCA Civ 1441 esp at [49]–[53], *Koninklijke Philips Electronics NV v Princo Digital Disc GmbH* [2003] EWHC 2588 (Pat) esp at [23],

> *Contex Drouzhba v Wiseman* [2006] EWHC 2708 (QB) asp at [60] and [97]–[98], *Global Crossing Ltd v Global Crossing Ltd* [2006) EWHC 2043 (Ch) esp at [44]-[45] and *Societa Esplosivi Industriali SpA v Ordnance Technologies (UK) Ltd* [2008] 2 AER 622 esp at [103].
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> 61. It is not suggested that the company does not have any independent existence, nor that it is a facade or a sham to cover a personal adventure by Mr Ioannou. It obviously owns substantial property in Cyprus, and there was no cross-examination of Mr Ioannou in relation to the company's accounts. There is no arguable basis for 'piercing the corporate veil'.
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> 62. Even assuming all the matters set out in paragraph 59 above, though I am not convinced that he is a Svengali, I am not at all persuaded that in relation to the one issue which I have found in favour of the Claimants, the negligent failure to give advice to the Claimants in relation to foreign currency risks, nor even if I had found the other misrepresentations as to lettability, drawdown or ease of resale, that he undertook or had personal liability. There was certainly no 'singular feature which would justify belief that [he] was accepting a personal commitment, as opposed to [a] company obligation' nor 'crossing the line which conveyed to the plaintiff that the defendant was assuming personal liability', such as Lord Steyn looked for in *Williams* at 836E, nor his 'participation or involvement in ways which go beyond the exercise of constitutional control' of APP, referred to by Chadwick LJ in *MCA Records* at [50]. When these Claimants were induced to contract, it was with APP, and I am satisfied that the existence or role of Mr Ioannou would not have crossed their mind, notwithstanding the wording in their 2020 witness statements. What there has been in my judgment is an understandable attempt by the Claimants, who have suffered loss and distress over a period of more than 10 years, to ensure a solvent defendant. I have no idea whether APP will be sufficiently solvent to meet the claims by the present Claimants or those who form part of the cohort of 280, but there must be a ground for personal liability of Mr Ioannou, and I find none."

38. This is, with respect, not as clear as it might have been. In particular, it does not distinguish clearly between the two ways in which the claimants put their case.

The two routes to personal liability

39. The first way in which the claimants put their case against Mr Ioannou was that he personally was in breach of a duty to warn them about the currency risks. The judge rejected that case, finding that there was no assumption of responsibility by Mr Ioannou personally, and that this claim against him therefore failed, applying *Williams v Natural Life Health Foods Ltd*. *Williams* was a case in which the

individual defendant (D2) was the managing director and principal shareholder of the corporate defendant (D1). The claimants dealt with D2, who provided them with a brochure advertising his experience in the health food trade and played a prominent part in preparing misleading financial projections. The claimants sued D2 for misrepresentation, saying that he had assumed personal responsibility to them. Mr Justice Langley and the Court of Appeal held D2 liable, but the House of Lords reversed this decision. Giving the only reasoned speech, Lord Steyn held that in order to establish the personal liability of an individual acting on behalf of a company, there had to have been such an assumption of personal responsibility by him as to create a special relationship between him and the claimant:

> "Whether the principal is a company or a natural person, someone acting on his behalf may incur personal liability in tort as well as imposing vicarious or attributed liability upon his principal. But in order to establish personal liability under the principle of *Hedley Byrne*, which requires the existence of a special relationship between plaintiff and tortfeasor, it is not sufficient that there should have been a special relationship with the principal. There must have been an assumption of responsibility such as to create a special relationship with the director or employee himself."

40. He added that an objective test must be applied to this issue, with the primary focus being on exchanges crossing the line between the parties. Moreover, it was necessary to prove that the claimant had relied upon the individual defendant's assumption of personal responsibility:

> "If reliance is not proved, it is not established that the assumption of personal responsibility had causative effect."

41. Applying these principles, it was held that although the company had held itself out as having expertise, and had made clear that this expertise derived from D2's experience, this was insufficient to amount to an assumption of responsibility by D2 himself. This would be so even in the case of a small one-man company where, almost inevitably, it will be the managing director who is possessed of the qualities essential to the functioning of the company and who acts on behalf of the company. But this does not by itself convey that the managing director is willing to be personally answerable to the customers of the company.

42. In the light of the judge's findings that there was no assumption of personal liability by Mr Ioannou and that it would not have crossed the claimants' minds that there was, the claimants no longer pursue this first way of putting their case against Mr Ioannou. It follows that he is under no personal liability as a primary tortfeasor – or to put it another way, because assumption of responsibility by the defendant and reliance by the claimants are essential elements of the tort, that Mr Ioannou himself did not commit any tort in this case.

43. The second way in which the claimants put their case is that Mr Ioannou is liable as an accessory to the tort committed by APP. The leading case on accessory liability in tort is the decision of the Supreme Court in *Fish & Fish v Sea Shepherd*. The claimant's vessel was rammed by a vessel commanded by D3, who was both the

founder of D2 (a United States conservation society) and a director of D1 (an English conservation charity). D1 held legal title to the attacking vessel as the registered owner, but the beneficial owner and operator of the vessel was D2. In order to establish jurisdiction against D2 and D3, the claimant had to show that it had a claim against D1. This was the subject of a preliminary issue, the issue being whether D1 was liable as an accessory in circumstances where it had passed on the names of some volunteers willing to take part in the operation and had been involved in raising funds to support it, but had otherwise played no effective part in the commission of the tort. The majority of the Supreme Court held that the role played by D1 was of minimal importance in the commission of the tort and that the judge had been entitled to conclude that it was therefore not capable of being liable. Despite disagreeing on the application of the legal principles to the facts, however, the members of the court agreed what those legal principles were. I can take them as stated and explained by Lord Neuberger:

> "55. It seems to me that, in order for the defendant to be liable to the claimant in such circumstances, three conditions must be satisfied. First, the defendant must have assisted the commission of an act by the primary tortfeasor; secondly, the assistance must have been pursuant to a common design on the part of the defendant and the primary tortfeasor that the act be committed; and, thirdly, the act must constitute a tort as against the claimant. As Lord Toulson says, this analysis is accurately reflected in the statement of the law in *Clerk and Lindsell on Torts*, 7th ed, p 59, cited by all members of the Court of Appeal in *The Koursk* [1924] P 140, 151, 156, 159.
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> 56. Because this type of tortious liability is so fact sensitive and needs to be kept within realistic bounds, there is a danger that further analysis of these three requirements will serve to confuse. Bankes LJ made that point in *The Koursk* at p 151, when he said that 'It would be unwise to attempt to define the necessary amount of connection', and that each 'case must depend on its own circumstances'. To the same effect, Mustill LJ in *Unilever Plc v Gillette (UK) Ltd* [1989] RPC 583, 608, warned against over-analysis of the cases on this topic. The wisdom of those observations is borne out by the subsequent cases on this area of law, which are discussed by Lord Toulson and Lord Sumption. However, it is, I think, worth saying a little about each of the three conditions.
>
> 57. So far as the first condition is concerned, the assistance provided by the defendant must be substantial, in the sense of not being *de minimis* or trivial. However, the defendant should not escape liability simply because his assistance was (i) relatively minor in terms of its contribution to, or influence over, the tortious act when compared with the actions of the primary tortfeasor, or (ii) indirect so far as any consequential damage to the claimant is concerned. Nor does a claimant need to establish that the tort would not have been committed, or

> even that it would not have been committed in the precise way that it was, without the assistance of the defendant. I agree with Lord Sumption that, once the assistance is shown to be more than trivial, the proper way of reflecting the defendant's relatively unimportant contribution to the tort is through the court's power to apportion liability, and then order contribution, as between the defendant and the primary tortfeasor.
>
> 58. As to the second condition, mere assistance by the defendant to the primary tortfeasor, or 'facilitation' of the tortious act, will not do, as explained by Lord Templeman in *CBS Songs Ltd v Amstrad Consumer Electronics Plc* [1988] AC 1013, 1057B-C, and 1058G-H, and by Hobhouse LJ in *Credit Lyonnais Bank Nederland NV v Export Credit Guarantee Department* [1998] 1 Lloyd's Rep 19, 46. There must be a common design between the defendant and the primary tortfeasor that the tortious act, that is the act constituting or giving rise to the tort, be carried out, as suggested in *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2013] 1 WLR 1556, para 34.
>
> 59. A common design will normally be expressly communicated between the defendant and the other person, but it can be inferred, a point which is clear from Lord Mustill's reference to 'agreed on common action' and 'tacit agreement' in *Unilever* at p 609. I have some concerns about the notion that the defendant has to "[make the tortious act] his own", as Peter Gibson LJ put it in *Sabaf SpA v Meneghetti SpA* [2003] RPC 264, para 59. While it can be said that it rightly emphasises the requirement for a common design, this formulation is ultimately circular and risks being interpreted as putting a potentially dangerous gloss on the need for a common design.
>
> 60. As to the third condition, it is unnecessary for a claimant to show that the defendant appreciated that the act which he assisted pursuant to a common design constituted, or gave rise to, a tort or that he intended that the claimant be harmed. But the defendant must have assisted in, and been party to a common design to commit, the act that constituted, or gave rise to, the tort. It is not enough for a claimant to show merely that the activity, which the defendant assisted and was the subject of the common design, was carried out tortiously if it could also perfectly well be carried out without committing any tort. However, the claimant need not go so far as to show that the defendant knew that a specific act harming a specific defendant was intended."

44. It is worth noting three points at this stage. First, Lord Neuberger emphasised the fact sensitive nature of the issue and the need to keep accessory liability within reasonable

bounds. Second, the torts in question in this case were torts of strict liability, trespass to goods and conversion. Third, the case had nothing to do with whether an individual director or senior manager would incur personal liability as an accessory to torts committed by the company in circumstances where he had no liability as a primary tortfeasor.

The claimants' case

45. The claimants' case, advanced by Mr Nathan, is that the three conditions for accessory liability described by Lord Neuberger and other members of the Supreme Court were satisfied in this case: (1) Mr Ioannou assisted in the commission of an act by APP, his assistance being substantial and not merely trivial; (2) he did so pursuant to a common design between him and APP to sell as many properties as possible by marketing them through the network of salesmen who were intended and directed to promote the merits of taking a mortgage in Swiss francs; and (3) the way in which the properties were marketed constituted a tort committed by APP against the claimants because of their failure to warn them about the currency risks. Mr Nathan pointed to the judge's findings as to Mr Ioannou's substantial involvement in all aspects of marketing the properties. He submitted that there can be, and was here, a common design between a director and his company (cf. *Ottercroft Ltd v Scandia Care Ltd* [2016] EWCA Civ 867). He acknowledged (at any rate in this court) that a company director who does no more than participate in board meetings would not thereby incur a personal liability, but submitted that this is a narrow exception and that the role of Mr Ioannou in the present case went far beyond this.

A finding of fact?

46. For Mr Ioannou, Mr Parker sought to foreclose argument on this issue by submitting that the judge had made findings of fact when saying (at [60]) that "This is not a case of a joint tortfeasor ancillary to another independent party, such as in *Fish & Fish Ltd v Sea Shepherd UK* …" and (at [61]) that there had been no participation or involvement by Mr Ioannou "in ways which go beyond the exercise of constitutional control of APP". However, such a shortcut is not open to Mr Ioannou. These were the judge's conclusions, not findings of fact.

47. Mr Nathan submitted that they were unreasoned conclusions. Certainly the reasoning is very brief, but this may be too hard on the judge. It may be that what the judge is saying at [62] is that, in the circumstances of this case, the absence of any assumption of responsibility by Mr Ioannou is fatal to both the ways in which the claimants put their case against him.

The defendant's case

48. Mr Parker submitted also that Mr Ioannou's role in approving the content of marketing material and attending training sessions for salesmen amounted to no more than his exercise of control over the business of APP in accordance with the company's constitution. On the judge's findings, Mr Ioannou had not taken deliberate or active steps to conceal the currency risks from prospective purchasers such as the claimants and, that being so, it would not be right to characterise his conduct as assisting in the commission of a tort. This was a case of a negligent omission, the negligent failure to include a warning about the currency risks, which was a very

different situation from that considered in *Fish & Fish v Sea Shepherd UK*. Although the judge had dealt with the matter briefly, he had reached the right conclusion.

The judge's factual findings

49. On the judge's findings of fact, Mr Ioannou personally was fully involved in the plan to market the properties as the driving force of APP, as I have already described, albeit that he had no personal contact with any of the claimants, whose dealings were with the salesmen recruited by UVR and ROPUK pursuant to the contractual arrangements negotiated between them and APP. It is also important that the basis on which APP was held liable was that it negligently failed to ensure that the claimants were warned about the currency risk which they were undertaking. It was not suggested, and in particular it was not suggested to Mr Ioannou in cross examination, that he consciously and deliberately prevented the salesmen from giving this warning, merely that the failure to do so was negligent. It was a case of negligent failure to warn, not deliberate deceit.

Some basic principles

50. When considering the personal liability of an individual director or senior manager of a company as an accessory to a tort committed by the company, it is necessary to have in mind a number of basic principles, as explained in the cases to which I shall refer. One such principle, going back to *Salomon v A. Salomon & Co Ltd* [1897] AC 22, is that individuals are entitled to limit their liability by incorporating a company, which is a distinct legal entity, to carry on their business. As Lord Macnaghten put it at page 51:

> "The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same and receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act. That is, I think, the declared intention of the enactment."

51. He continued at p.52:

> "By means of a private company, as Mr Palmer observes, a trade can be carried on with limited liability, and without exposing the persons interested in it in the event of failure to the harsh provisions of the bankruptcy law."

52. Another principle is that a tortfeasor should be liable for his tortious acts and should not escape liability merely because he is a director or officer of a company. That principle, however, is more concerned with whether an individual whose conduct incurs personal liability should have a defence by reason of his status as a director or officer than with whether conduct should incur personal liability in the first place.

53. The need to strike a balance between these two principles has been recognised in the cases. In *MCA Records Inc v Charly Records Ltd* [2001] EWCA Civ 1441, [2002] BCC 650, Lord Justice Chadwick (with whom Lord Justices Simon Brown and Tuckey agreed) said this:

> "47. In *Mentmore Manufacturing Co Ltd v National Merchandising Manufacturing Co Inc* (1978) 89 DLR (3d) 195 the Federal Court of Appeal of Canada described the question whether, and if so in what circumstances, a director should be liable with the company as a joint tortfeasor as 'a very difficult question of policy'. At page 202, Mr Justice Le Dain, delivering the judgment of the court, said this:
>
> > 'On the one hand, there is the principle that an incorporated company is separate and distinct in law from its shareholders, directors and officers, and it is in the interest of the commercial purposes served by the incorporated enterprise that they should as a general rule enjoy the benefit of limited liability afforded by incorporation. On the other hand, there is the principae that everyone should be answerable for his tortious acts.'
>
> Plainly, it is necessary, in the individual case, to achieve a balance. Equally plainly, the judge appreciated that. As he put it in paragraph 15 of his judgment: 'inquiries into the matter will or may involve an "elusive question" turning on the particular facts of the case, and whose resolution may in turn involve the making of a policy decision as to the side of the line on which the case ought to fall'.
>
> 48. It is because there is a balance to be struck on the facts of each case that it is dangerous for an appellate court to appear to attempt a formulation of the principles which may come to be regarded as prescriptive. …"

54. Again, therefore, as in *Fish & Fish v Sea Shepherd UK*, the need to strike a balance on the facts of each case between competing principles was emphasised.

Accessory liability in *Williams v Natural Life Health Foods*

55. As I have already explained, the way in which the claimants in *Williams* put their case was that the individual defendant, D2, was liable having assumed responsibility for the negligent advice given in the corporate defendant's financial projections. That case was rejected for the reasons explained above. In the House of Lords, however, the claimants sought for the first time to run an alternative case that D2 "had played a prominent part in the production of the negligent projections and had directed that the projections be supplied" to the claimants, so as to incur personal liability as a joint tortfeasor. Lord Steyn held that this case, which had not been run in the courts below, was not open to them. However, he went on to reject it on its merits, at pages 838H to 839A, in a section of his judgment which is admittedly *obiter*, but with which nevertheless the other members of the House of Lords agreed:

> "In any event, the argument is unsustainable. A moment's reflection will show that, if the argument were to be accepted in the present case, it would expose directors, officers and employees of companies carrying on business as providers of services to a plethora of new tort claims. The fallacy in the argument is clear. In the present case liability of the company is dependent on a special relationship with the plaintiffs giving rise to an assumption of responsibility. [D2] was a stranger to that particular relationship. He cannot therefore be liable as a joint tortfeasor with the company. If he is to be held liable to the plaintiffs, it could only be on the basis of a special relationship between himself and the plaintiffs. There was none. I would therefore reject this alternative argument."

56. Much the same could be said in the present case. If Mr Ioannou is liable as an accessory to the tort committed by APP, many directors and senior managers who are heavily involved in the marketing of investments by the companies for which they work will find themselves incurring personal liability for negligent but non-fraudulent failures by those companies, even though (as the judge found in the present case) those individuals assume no responsibility to the purchasers of such investments and have no direct contact with them, and even though the purchasers do not in any way rely on any such assumption of responsibility by those individuals.

57. Nevertheless, Mr Nathan submits, by reference to the cases which I shall now consider, that this is the conclusion which the law demands. The judge listed these cases at [60] of his judgment (with the exception of the last, *Lifestyle Equities CV v Santa Monica Polo Club Ltd* [2021] EWCA Civ 675, [2021] Bus LR 1020, which was only decided after he had reserved judgment), but did not attempt to analyse them.

The intellectual property cases

58. The first such case is *MCA Records v Charly Records*, to which I have already referred. It was a claim for copyright infringement in which it was alleged that the individual defendant ("JY") was the moving spirit behind the corporate defendants and was personally liable for their acts. Mr Justice Rimer held that JY was not liable for some of the activities of the corporate defendants, but was personally liable for having procured or participated in copying and issuing to the public recordings which infringed the claimant's copyright. An appeal was dismissed.

59. Lord Justice Chadwick referred to previous authority (e.g. *Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd* [1921] 2 AC 465 and *C Evans & Sons Ltd v Spritebrand Ltd* [1985] 1 WLR 317) in which it had been held that an individual may be jointly liable with a company which he controls, or of which he is a director or officer, if he directs or procures the commission of the tortious act in question. But he recognised, in the passage which I have already cited, that it may be a difficult question, involving issues of policy and the striking of a balance between different principles, to determine whether there is such liability on the facts of any given case. He addressed what Lord Steyn had said in *Williams* as follows:

> "43. In my view it is impossible to read into that passage a general proposition that a director can never be liable as a joint

> tortfeasor with the company. The basis of Lord Steyn's rejection of joint liability in that case, as it seems to me, is that [D2] could not himself be liable to the plaintiffs, whether jointly or severally, because he was not party to the special relationship which had given rise to an assumption of responsibility and upon which, alone, liability could be founded."

60. Thus Lord Justice Chadwick rejected a somewhat ambitious submission that Lord Steyn had held that a director could *never* be liable as a joint tortfeasor with the company. Rather, he had held that there was no accessory liability on the facts of *Williams* because the nature of the particular tort in issue in that case was such that only those who were party to the special relationship giving rise to the assumption of responsibility upon which liability depended could be liable as a joint tortfeasor with the company.

61. In what has become an oft-cited passage, Lord Justice Chadwick went on to recognise the danger of attempting to formulate general principles, but nevertheless ventured four propositions as follows:

> "48. It is because there is a balance to be struck on the facts of each case that it is dangerous for an appellate court to appear to attempt a formulation of the principles which may come to be regarded as prescriptive. But I think it can be said with some confidence that the following propositions are supported by the authorities to which I have referred.
>
> 49. First, a director will not be treated as liable with the company as a joint tortfeasor if he does no more than carry out his constitutional role in the governance of the company – that is to say, by voting at board meetings. That, I think, is what policy requires if a proper recognition is to be given to the identity of the company as a separate legal person. Nor, as it seems to me, will it be right to hold a controlling shareholder liable as a joint tortfeasor if he does no more than exercise his power of control through the constitutional organs of the company – for example by voting at general meetings and by exercising the powers to appoint directors. Lord Justice Aldous suggested, in *Standard Chartered Bank v Pakistan National Shipping Corporation and others (No 2)* [2000] 1 Lloyd's Rep 218, 235 – in a passage to which I have referred – that there are good reasons to conclude that the carrying out of the duties of a director would never be sufficient to make a director liable. For my part, I would hesitate to use the word 'never' in this field; but I would accept that, if all that a director is doing is carrying out the duties entrusted to him as such by the company under its constitution, the circumstances in which it would be right to hold him liable as a joint tortfeasor with the company would be rare indeed. That is not to say, of course, that he might not be liable for his own separate tort, as Lord Justice Aldous

recognised at paragraphs 16 and 17 of his judgment in the *Pakistan National Shipping* case.

50. Second, there is no reason why a person who happens to be a director or controlling shareholder of a company should not be liable with the company as a joint tortfeasor if he is not exercising control through the constitutional organs of the company and the circumstances are such that he would be so liable if he were not a director or controlling shareholder. In other words, if, in relation to the wrongful acts which are the subject of complaint, the liability of the individual as a joint tortfeasor with the company arises from his participation or involvement in ways which go beyond the exercise of constitutional control, then there is no reason why the individual should escape liability because he could have procured those same acts through the exercise of constitutional control. As I have said, it seems to me that this is the point made by Mr Justice Aldous (as he then was) in *PGL Research Ltd v Ardon International Ltd* [1993] FSR 197.

51. Third, the question whether the individual is liable with the company as a joint tortfeasor – at least in the field of intellectual property - is to be determined under principles identified in *CBS Songs Ltd v Amstrad Consumer Electronics Plc* [1988] AC 1013 and *Unilever Plc v Gillette (UK) Limited* [1989] RPC 583. In particular, liability as a joint tortfeasor may arise where, in the words of Lord Templeman in *CBS Songs v Amstrad* at page 1058E to which I have already referred, the individual 'intends and procures and shares a common design that the infringement takes place'.

52. Fourth, whether or not there is a separate tort of procuring an infringement of a statutory right, actionable at common law, an individual who does 'intend, procure and share a common design' that the infringement should take place may be liable as a joint tortfeasor. As Lord Justice Mustill pointed out in *Unilever v Gillette,* procurement may lead to a common design and so give rise to liability under both heads.

53. In the light of the authorities which I have reviewed I am satisfied that no criticism can be made of the test which the judge applied. But, in my view, the test can, perhaps, be expressed more accurately in these terms: in order to hold [JY] liable as a joint tortfeasor for acts of copying, and of issuing to the public, in respect of which CRL was the primary infringer and in circumstances in which he was not himself a person who committed or participated directly in those acts, it was necessary and sufficient to find that he procured or induced those acts to be done by CRL or that, in some other way, he and CRL joined together in concerted action to secure that those acts were done."

62. I respectfully agree that there are dangers in attempting to formulate what may come to be regarded as prescriptive principles of general application in this fact sensitive and policy-driven area. There are, perhaps, even greater dangers if, having sounded this warning, an appellate court goes on to do just that. It is, however, important to note that Lord Justice Chadwick was careful to say at [51] that he was dealing with cases "in the field of intellectual property".

63. This passage was cited and applied by Mr Justice Pumfrey in *Koninklijke Philips Electronics NV v Princo Digital Disc GmbH* [2003] EWHC 2588 (Pat), another case of copyright infringement. Mr Justice Pumfrey added:

> "7. The essential part of this analysis is the emphasis on the need in a case such as the present to show on normal principles that Mr Kuo was a joint tortfeasor with the company. The question is whether Mr Kuo is sufficiently involved in the company's torts, bearing in mind that the whole course of the company's course of trading, so far as CD-R's are concerned, was potentially infringing. As I understand it, the fact that he was an officer of the company is not a factor in his liability save to the extent to which it afforded him the opportunity to participate in the acts of the company to the extent necessary to fix him with liability as a joint tortfeasor."

64. On the facts, Mr Kuo's activities extended beyond participation in board meetings. He was the business manager of the company, in control of its commercial decisions, and had given an indemnity to the company's customer, the effect of which was to encourage it to continue to infringe in the United Kingdom. On this basis, Mr Justice Pumfrey concluded at [23] that the case was "near the line", but that Mr Kuo's close involvement with the daily actions of the company were sufficient to show that he had worked to bring about the continued importation of infringing goods into the United Kingdom so as to be liable as a joint tortfeasor with the company.

65. *Contex Drouzhba v Wiseman* [2006] EWHC 2708 (QB) was a misrepresentation case where the representations made by a director on behalf of the company were fraudulent. Mr Justice Irwin cited the same passage from *MCA Records v Charly Records*, and referred also to what Lord Justice Chadwick had said about Lord Steyn's approach in *Williams*. He added:

> "96. … However, it seems to me clear that Lord Steyn cannot have intended his remarks to apply to the factual situation which I have found in the instant case. It cannot ever have been the policy of the law that a director of a company who commits acts amounting to deceit and at the same time procures acts amounting to deceit by the company of which he is a director, should be able to claim exemption from tortious action because of his status as director. On the contrary, the clear policy of the law must be – and must always have been – in favour of a remedy for fraud. It is in my view inconceivable, where fraud is proved, that the status of director could act as an effective shield from personal liability by a director."

66. I respectfully agree. That different considerations apply in the case of fraud is unsurprising. It illustrates that the liability of a director or senior manager may differ according to the nature of the tort in question.

67. *Societa Esplosivi Industriali SpA v Ordnance Technologies (UK) Ltd* [2007] EWHC 2875 (Ch), [2008] 2 All ER 622 was a claim for infringement of the claimant's design right. The individual defendant (D3) was the sole director and shareholder of the corporate defendant (D1). Applying *MCA Records v Charly Records*, Mr Justice Lindsay held that D3 had shared a common design with D1 and was personally involved in the commission of the tort to an extent sufficient to render him personally liable as a joint tortfeasor. Dealing with the requirement for a common design, he placed some emphasis on the fact that what Lord Justice Chadwick had said in *MCA Records v Charly Records* was concerned with intellectual property cases and that infringement of design right was a tort of strict liability:

> "82. Chadwick LJ's third proposition, at page 424, is as follows:
>
> > 'Third, the question whether the individual is liable with the company as a joint tortfeasor – at least in the field of intellectual property – is to be determined under principles identified in *CBS Songs Ltd v Amstrad Consumer Electronics Plc* [1988] AC 1013 and *Unilever Plc v Gillette (UK) Limited* [1989] RPC 583. In particular, liability as a joint tortfeasor may arise where, in the words of Lord Templeman in *CBS Songs v Amstrad* at page 1058E to which I have already referred, the individual "intends and procures and shares a common design that the infringement takes place".'
>
> 83. Here, too, there is a difficulty. It is common enough for a person to be taken to have 'intended' the natural and probable consequences of his acts. A corresponding view, on many sets of facts, would no doubt be appropriate also to 'procurement' by him where the person who had the deemed intention had the power to ensure that it was carried into effect. But the requirement that a defendant should 'share a common design' may be said to add a subjective requirement, namely that, independent of what, in point of law, he could be taken to have intended, there should be *proved* to have existed in him a subjective intention or desire that the events complained of should occur. That is a question to which I shall have to return when I look at the facts but, on a different point, and given, again, that what is being looked at is a judgment rather than a statute, I would see no difficulty in extending that reference to a 'common design that the infringement takes place' to a 'common design that the events complained of and said to constitute the infringement take place'. That, in a tort of strict liability, such as infringement of design right, would seem to me to be an irresistible extension of the proposition under discussion."

68. Finally, in *Lifestyle Equities CV v Santa Monica Polo Club Ltd*, the Court of Appeal was concerned with infringement of registered trade marks and passing off. It was held that two directors of the company, who had respectively taken "a close, active and personal part in bringing about the activities found to infringe" (see [20]) and who had been "very hands-on, managing the day-to-day running of" the infringing business" (see [22]), were jointly and severally liable with the company. Their conduct was "deliberate and intentional in the sense that they obviously knew and intended that the company should do the things which in fact have turned out to be infringements" (see [25]).

69. As in other cases in this field, it was relevant that the tort was one of strict liability. Lord Justice Birss (with whom Lord Justices Moylan and Nugee agreed), said that:

> "28. Absent any issue arising from their status as directors (or shareholders) it is clear from *Fish & Fish v Sea Shepherd* that there is no requirement, for a tort of strict liability like the trade mark infringements in this case, that the accessory should have an improper motive or should know or have reason to believe that the activity is or may be an infringement. For this point it is enough to set out a passage from the judgment of Lord Neuberger at paragraph 60 where he explained that
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> > '… it is unnecessary for a claimant to show that the defendant appreciated that the act which he assisted pursuant to a common design constituted, or gave rise to, a tort or that he intended that the claimant be harmed.'
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> 29. Lord Sumption made the same point in paragraph 37(iii) of his judgment when he referred to the defendant being liable if they assisted in the commission of a tort pursuant to a common design to do an act which is 'or turns out to be' tortious.
>
> 30. In the present case the fact that the Ahmeds' conduct was clearly deliberate and intentional in the sense I have described already means that they satisfied the test in *Fish & Fish v Sea Shepherd*. Thus the only basis on which this ground of appeal can succeed is on the footing that they were directors of the company. In fairness that is how counsel put the case on their behalf but it bears emphasising at this stage. This means that the two points identified above (state of mind and director's duties) in effect come down to the same issue."

70. There was, therefore, a two-stage analysis. The first stage was to consider, applying ordinary principles of accessory liability, whether the individual defendants' participation in the tortious conduct was sufficient to render them liable as joint tortfeasors. In the case of these torts of strict liability involving positive conduct infringing the claimant's monopoly rights, that question was answered affirmatively. The second stage, which Lord Justice Birss went on to consider by reference to *MCA Records v Charly Records*, was whether the individual defendants' status as directors of the primary tortfeasor afforded them a defence. The existence of these two stages is

also apparent from what Lord Justice Birss went on to say after citing from the judgment of Lord Justice Chadwick:

> "34. Chadwick LJ's paragraphs 49 and 50 fit together and in my judgment they substantially answer the issue on this appeal. They explain that the grounds on which a company director may be found to be an accessory are not wider than those applicable to other people. So to be found liable one way of approaching the matter will be to ask whether the individual's conduct would make them liable as an accessory in any event, irrespective of their status as a director. Assuming that is so, then the next question is whether the fact that person is a director of the company means they have a defence open to them. They may do so but only if the conduct which has made them potentially liable amounts to their doing no more than carry out their constitutional role in the governance of the company."

71. At this second stage, the defence available to a director (which is not available to a senior manager) is a narrow one, albeit not necessarily limited to voting at board meetings:

> "37. I do not read Chadwick LJ's paragraph 49, or any other part of his judgment, as being so prescriptive as to mean that the only thing which amounts to carrying out the director's constitutional role is voting at board meetings, but it is clear that Chadwick LJ had in mind a narrow exception. That is not surprising given his recognition that a balance is involved and that everyone should be liable for their tortious acts.
>
> 38. There is nothing in *MCA v Charly* to support the argument being advanced before us, that individuals like Mr and Ms Ahmed, who no doubt never acted outside their authority as a senior executive employees of D11, in personally procuring the actions which turned out to be infringements and by assisting in those actions pursuant to a common design to bring them about, should escape liability simply because they are directors of the company when another senior executive employee, who did the very same things but was not a director, would not. That is the opposite of Chadwick LJ's reasoning. …"

72. The recognition that the director's "constitutional role" defence may extend wider than voting at board meetings may be an echo of what Lord Justice Lewison said in *Ottercroft Ltd v Scandia Care Ltd*, a case about interference with the claimant's right to light. In that case too, *MCA Records v Charly Records* was cited. Lord Justice Lewison continued:

> "19/22. The acid test, then, is whether the putative tortfeasor is exercising control through the constitutional organs of the company. If he does no more than vote at board meetings, then he will be exercising control through the constitutional organs

> of the company. The constitution of the company may of course have delegated authority to officers of the company without the need for formal board meetings; and in that event I would not rule out the possibility that an individual doing no more than exercising that properly granted authority would escape personal liability."

73. Mr Nathan submitted that *Lifestyle Equities Ltd v Ahmed* was an authority conclusively in the claimants' favour in the present case. However, it is important to note that Lord Justice Birss spelled out that he was dealing with intellectual property cases, albeit he also said that he could see no difference between these and other cases. He did not, however, refer to *Williams* or to what Lord Justice Chadwick had said about it:

> "33. The important principles are the first two, but before turning to them I note the careful statement by Chadwick LJ in paragraph 51 that he was stating the principle there at least in the field of intellectual property. As I said above on Lifestyle's appeal, I can see no reason why the principles applicable should differ as between those cases and others. Nevertheless every judicial statement of the law has to be understood in the context and circumstances in which it is made. Like Chadwick LJ, I am seeking to identify the applicable principles in the context of this case, which is about infringements of intellectual property rights."

Analysis

74. It is apparent from this review of the authorities that judges have recognised that the question whether a director or senior manager should be held personally liable as an accessory to a tort committed by a company is a fact sensitive question. As Mr Parker submitted, the facts of the present case are far removed from those in which directors or senior managers have been held liable. That does not itself answer the question which we have to decide, but it does mean that care is needed in considering how much assistance can be derived from these cases.

75. Judges have also made clear that the question of personal liability can be a difficult (or "elusive") question, requiring the balancing of competing principles. For that reason, judges addressing this question have been careful to make clear that statements of legal principle must be understood in the context in which they are made. That context necessarily includes the nature of the tort with which the courts have been concerned in any particular case. Statements of principle which have been made in the context of strict liability torts (whether trespass and conversion as in *Fish & Fish v Sea Shepherd UK* or intellectual property torts as in *MCA Records v Charly Records* and the cases which have followed it) are not necessarily directly applicable to the tort in the present case, liability for which is dependent on the assumption of responsibility by the primary tortfeasor.

76. In particular, so far as the authorities are concerned, it has never been suggested that what Lord Steyn said, albeit *obiter*, about accessory liability in *Williams* was wrong. Rather, it has been held that it was applicable to the particular tort in issue in that

case, which depended on an assumption of responsibility -- but that is also the nature of the tort with which we are concerned in the present case. *Williams* is therefore compelling persuasive authority against the personal liability of Mr Ioannou in this case.

77. In my judgment such a conclusion is also in accordance with the principles that accessory liability ought to be kept within reasonable bounds and that it should be possible to carry on business by means of a limited liability company without exposing the individuals carrying on that business to personal liability. It does not offend against the principle that a person should be liable for his own torts because Mr Ioannou, who did not have personal dealings with the claimants or assume any responsibility towards them, did not himself commit any tort.

78. Here, the business of developing and marketing the properties was the business of APP, not Mr Ioannou. Similarly, the commitments which it entered into, including the contracts by which it sold the properties to the claimants, were the commitments of APP and not of Mr Ioannou. It is not suggested that Mr Ioannou undertook any personal liability under those contracts. Nor is it any longer suggested that he himself committed any tortious act (hence the judge's rejection of the "assumption of responsibility" case and the claimants' decision not to pursue that case on appeal). The judge found that it would not have occurred to any of the claimants that Mr Ioannou had assumed any responsibility towards them. Rather, the suggestion is that Mr Ioannou, without incurring liability as a primary tortfeasor, was an accessory to the tort committed by APP. But if that is so, it is difficult to see why any director or senior manager who is heavily involved in a company's marketing of an unsuitable investment should not incur personal liability for a negligent but non-fraudulent failure to warn of the risks of that investment. So to hold would drive a coach and horses through the concept of a limited liability company.

79. It is significant in this regard that it could not be suggested that Mr Ioannou had undertaken any contractual responsibility to the claimants. That would run directly counter to *Salomon v Salomon*. Rather, the liability which it is sought to impose on him is liability in tort, but it is liability for a tort arising out of a relationship memorably described by Lord Devlin in the leading case of *Hedley Byrne & Co Ltd v Heller & Partners* [1964] AC 465 at page 529 as "equivalent to contract, that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract". It should not be surprising, therefore, that the principle of limited liability which shields a director or senior manager from personal liability in contract should also apply in the case of a tort, liability for which depends on the existence of a relationship which is equivalent to contract.

80. In cases such as *Fish & Fish v Sea Shepherd UK* itself and the intellectual property cases referred to above it was relatively straightforward to apply the tests for accessory liability described by the Supreme Court. That is less so in the present case. Even leaving aside the artificiality of saying that there is a common design between a company and the individual who acts as its driving force (albeit that the possibility of such a common design is recognised by the cases), what was the common design in this case? Certainly Mr Ioannou intended that APP should market the properties through the salesmen who were recruited for that task and that this included the promotion of the benefits of the Swiss franc mortgage. To that extent it can be said

that there was a common design which they both shared. But the act or omission which made this conduct tortious was the failure to warn about the currency risks of that mortgage. Since, on the judge's findings, there was no conscious decision not to include such a warning, it is difficult to say that there was a common design not to do so. The fact that there was no warning renders the company liable because the company was in a relationship with the claimants whereby it assumed responsibility towards them, but Mr Ioannou was not in such a relationship and the need for such a warning did not occur to him.

81. It can perhaps be said that there was a common design between APP and Mr Ioannou to market the properties in the way in which they were in fact marketed, and that this did not include any warning about the currency risks, but to hold that this amounts to a common design sufficient to incur personal liability as an accessory appears to lead to an unduly wide view of the personal liability of directors and senior managers in such cases. While the possibility of apportioning responsibility in contribution proceedings between the company on the one hand and directors and senior managers on the other goes some way to mitigate this difficulty, it is not a complete answer, not least if the company becomes insolvent. In that case, to impose liability on the directors and senior managers would be (as Lord Macnaghten put it in *Salomon v Salomon*) to expose them to "the harsh provisions of the bankruptcy law".

82. For these reasons I would hold, at the first stage, that Mr Ioannou did not incur personal accessory liability in this case.

83. It is therefore unnecessary to consider, at the second stage, whether he would have a defence that he was going no further than carrying out his constitutional role as a director of APP, as Mr Parker submitted and as the judge held. I would observe, however, that although in one sense the entire business of a company is conducted by, or under the authority of, the directors, and that it was not suggested that Mr Ioannou's conduct was in any way unauthorised, it is clear that the "constitutional role" defence is intended to be of narrow application. Moreover, it would be an unacceptable anomaly if a senior manager doing what Mr Ioannou did would incur personal liability as an accessory but a director would not. It would be equally anomalous if personal liability were to depend on the formality of a board resolution (or a power of attorney) authorising the conduct in question. Indeed, it appears that Mr Ioannou may have been operating in some respects under a power of attorney, but this was not mentioned by the judge and there appears to have been no evidence about its scope. However, it is unnecessary to explore these issues further.

Disposal

84. I would dismiss both APP's appeal and the claimants' cross-appeal. APP is liable to the claimants in damages for the failure to advise them about the currency risks of the Swiss franc mortgage. Mr Ioannou is not.

Lord Justice Phillips:

85. I agree.

Lady Justice Andrews:

86. I also agree.