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Case Nos: CA-2023-000296
CA-2023-000366

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT
Adrian Beltrami KC (Sitting as a Judge of the High Court)
[2022] EWHC 3271 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/08/2023

Before:

LORD JUSTICE BEAN
LORD JUSTICE MALES
and
LADY JUSTICE WHIPPLE

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Between:

1) GRANVILLE TECHNOLOGY GROUP LIMITED (IN LIQUIDATION) **2) VMT LIMITED (IN LIQUIDATION)** **3) OT COMPUTERS LIMITED (IN LIQUIDATION)**	**Appellants/ Claimants**
- and -	
1) LG DISPLAY CO. LIMITED **2) LG DISPLAY TAIWAN CO. LTD**	**Respondents/ Defendants**

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Tony Beswetherick KC (instructed by **Osborne Clarke LLP**) for the **Appellants**
Daniel Piccinin KC & Sarah O'Keeffe (instructed by **Cleary Gottlieb Steen & Hamilton LLP**) for the **Respondents**

Hearing date: 3 August 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on Wednesday 16 August 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Males:

1. This appeal is concerned with the court's equitable jurisdiction to award compound interest in a claim for damages for infringements of competition law. The judge, Mr Adrian Beltrami KC, sitting as a Deputy Judge in the Commercial Court, struck out the claim for compound interest in respect of the period after the various claimants went into administration, holding that it had no prospect of succeeding. The claimants now appeal against that decision.

Background

2. The respondents, who are the third and fourth defendants in this action and can be referred to together as "LG" or "the defendants" as there is no need to distinguish between them, were participants in a price-fixing cartel leading to sales of liquid crystal display ("LCD") panels in the European Union, including the United Kingdom, at inflated prices, contrary to Article 101 of the Treaty on the Functioning of the European Union ("the TFEU"). LCD panels are the main components of thin, flat monitors used for (among other things) televisions, computers, digital watches and pocket calculators. The cartel operated between October 2001 and February 2006. The members of the cartel took deliberate action to conceal the meetings in which they colluded with each other to fix prices and to avoid detection of their arrangements.

3. Between 2006 and December 2010 the European Commission carried out an investigation into the operation of the cartel. That resulted in a Decision dated 8th December 2010 ("the Commission Decision") addressed to LG and to other members of the cartel. The Commission found that the addressees had infringed Article 101 "by participating … in a single and continuous agreement and concerted practice in the sector of Liquid Crystal Display panels for TV, notebook and monitor application" and ordered them to bring the infringement to an end immediately insofar as they had not already done so. Fines were levied on the participants, including in LG's case a fine of €215 million.

4. This is a "follow-on" damages claim by the appellant claimants, who were manufacturers of personal computers and who claim to have been victims of the price-fixing by the members of the cartel. They have been in liquidation for many years. The first claimant, Granville Technology Group Ltd, ceased trading and went into administration on 27th July 2005, followed by liquidation on 15th January 2007. The second claimant, VMT Ltd, entered administration on 5th August 2005 and liquidation on 15th January 2007. The third claimant, OT Computers Ltd, entered administration on 29th January 2002 and liquidation on 5th April 2004. However, the claimants do not allege that their insolvency was caused by the activity of the cartel.

The proceedings

5. The claim form in this action was issued on 7th December 2016, one day short of six years since the date of the Commission Decision. It asserts infringements of Article 101 of the TFEU and Article 53 of the Agreement on the European Economic Area, and a breach of statutory duties owed pursuant to section 2(1) of the European Communities Act 1972. Claims against other defendants have been settled, leaving LG as the only remaining defendants. A trial lasting five weeks is due to commence in

October 2023. The Commission Decision is binding on LG, which means that the trial will not be concerned with liability, but only with issues of causation and loss – principally, whether the cartel caused prices to be higher than they otherwise would have been, and whether or to what extent the unlawful infringements caused the claimants to suffer loss.

6. After taking account of the settlements concluded with other defendants, the claimants quantify their claim against LG in the sum of about £19.75 million. This is inclusive of interest of about £13.5 million, calculated on a compound basis to 30th June 2022 but continuing to accrue thereafter. Thus interest represents more than two thirds of the total claim.

7. In respect of the relatively short periods before they ceased trading and entered administration, the claimants' case is that as a result of the unlawful "overcharge amounts" which they were required to pay in order to purchase products incorporating LCD panels during the period of the cartel, they borrowed money from banks and others on which compound interest was payable, which they would not otherwise have done or would not have done to the same extent. They claim to recover this loss as damages, pursuant to the decision of the House of Lords in *Sempra Metals Ltd v Inland Revenue Commissioners* [2007] UKHL 34, [2008] 1 AC 561. The defendants accept that this is an arguable claim which must go to trial.

8. The claimants accept that once they entered into administration, interest on their liabilities to their banks ceased to accrue, so that the intervention of the insolvency regime precludes proof of loss in accordance with *Sempra Metals*. In respect of the periods since they entered administration, which represent much the greater part of the periods for which interest is claimed, the claimants say that they are entitled to recover compound interest on their damages pursuant to the court's equitable jurisdiction, as described by Lord Brandon in *President of India v La Pintada Compania Navigacion SA* [1985] AC 104. This includes power to award compound interest "in cases where money had been obtained and retained by fraud". The claimants say that the defendants' conduct consisted of "intentional and/or serious wrongdoing", which was deliberately concealed so as to prevent the pursuit of the claims and the recovery of damages by victims of the cartel; and that this conduct amounted to what would be regarded in equity as fraud.

9. We were not told precisely what the effect on the quantum of the claim would be if the claimants are confined to simple interest pursuant to section 35A of the Senior Courts Act 1981 in respect of the post-insolvency period, but plainly it would substantially reduce their claim.

The judgment

10. By an application notice dated 3rd October 2022, the defendants sought to strike out, alternatively sought summary judgment on, the claim for compound interest in respect of the post-insolvency period. It was accepted that there is no material difference between the test to be applied for strike out under CPR 3.4(2)(a) and the test for summary judgment under CPR 24.

11. The judge heard full argument on the issue and concluded that he should determine it. It was a question of law which did not depend on factual circumstances and it would

be a benefit to the parties for settlement purposes to know where they stood on this issue. His conclusion was that there was no basis to invoke the court's equitable jurisdiction to award compound interest in respect of the post-insolvency period. In his judgment, which is commendably succinct and was produced with commendable promptness, he reasoned as follows:

> "37. As it emerged during the course of the hearing, the issue for determination is a narrow one. Is the allegation of deliberate concealment, as pleaded, sufficient to engage equity's jurisdiction within Lord Brandon's first limb, or is it arguably sufficient so as to leave the matter for trial? I have come to the clear conclusion that it is not. This is for the following reasons:
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> 38. First, I will assume without deciding that, in theory at least, conduct which involves the deliberate concealment of a wrong, may in appropriate circumstances be capable of being characterised as an equitable fraud, given the very broad scope of the concept described in *Grant & Mumford*. This seems most likely where the concealment is itself a breach of duty but I do not need to explore the limits.
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> 39. Second, however, that can only be the beginning of the enquiry. Especially given that broad scope, it cannot be enough for a party merely to point to some conduct which might fall within the definition of the term. So much is clear from *Black v Davies*. What has to be established is that '*money had been obtained and retained by fraud*'.
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> 40. Third, as it seems to me, this must mean that the '*fraud*' must be the cause of action or at least an element of the cause of action and, in any event, that it is the fraud which has caused money to be obtained and retained. Further, and as per *Black v Davies*, the money must be a '*fund which [the fraudster] has had in hand which he has, or is deemed to have, made use for his own benefit.*'
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> 41. Fourth, applying this analysis, the contention fails at multiple levels. The allegation of deliberate concealment is not itself a cause of action. Nor is it even alleged to be part of the cause of action, appearing only in the Reply for a different purpose. In any event, the deliberate concealment is not alleged to have caused LG to obtain and retain a fund for their own benefit. LG might or might not have benefited by the receipt of monies from the LCD cartel but that is not something which is explored on the pleaded case. And the only contention in the Answers to the request for information is that the concealment prevented the pursuit of damages but that is clearly not sufficient. Ultimately, the contention fails for similar reasons to those in *Black v Davies*, namely that it is not enough merely to contend that the wrong caused the Claimants to lose money."

12. The judge added that this reasoning was consistent with the approach of the House of Lords in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669.

The application to amend

13. The claimants then applied for permission to amend their Particulars of Claim to address some of the matters dealt with in the judgment. They sought to plead expressly that the cartel participants including the defendants had engaged in serious and intentional wrongdoing which they had deliberately concealed, for which purpose they relied on findings to that effect in the Commission Decision. They sought to plead also that the defendants had benefited from their involvement in the cartel by being able to sell products at inflated prices. This was alleged to amount to obtaining and continuing to obtain benefits from wrongful conduct, but the claimants did not allege that the defendants had sold such products to the claimants themselves either directly or indirectly through the supply chain.

14. The judge refused permission to amend as the proposed amendment did not cure the problems for the claimants which he had identified in his judgment:

> "I do not accept that the proposed amended pleading adequately sets out a case on causation by reference to a deliberate concealment, nor that he has pleaded a case of a sufficient fund obtained or retained by fraud in order to satisfy the requirements of the jurisdiction to award compound interest. It does seem to me that it is a generalised pleading of benefit which is only loosely linked to deliberate concealment and that it does not satisfy the requirements for the equitable rule and, on the contrary, would run directly against the observations of the House of Lords and the Supreme Court which I referred to in my judgment. …"

Submissions on appeal

15. Mr Beswetherick for the claimants advanced three grounds of appeal, namely that:

(1) The claimants' claim is (at least arguably) based upon a cause of action which equity would regard as "fraud" or as having "fraud" as an ingredient, i.e. intentional and unlawful price-fixing, intended to benefit the cartelists by causing the claimants and other purchasers to pay inflated prices, which was deliberately concealed throughout the period of the cartel and afterwards.

(2) Alternatively, this is not a necessary requirement for the award of compound interest in equity. It is sufficient that the defendant has engaged in conduct which equity would regard as "fraud" and that there is a causal link between that conduct and the obtaining and retaining of money. Here, the defendants obtained money by deliberately breaking the law in order to benefit from inflated prices, and retained that money by deliberate concealment of the wrongdoing over a period.

(3) The judge was wrong to refuse permission for the amendment proposed by the claimants, which adequately pleads a case that the defendants received a "fund"

> by reason of fraud or deliberate concealment; it is sufficient that the defendants benefited financially from involvement in the cartel by obtaining money (in the form of inflated prices) on which they would have been able to earn compound interest or which they would have been able to utilise in their business.

16. On behalf of the defendants, Mr Daniel Piccinin KC supported the judge's reasoning. He submitted that the court's equitable jurisdiction to award compound interest applies only in the two categories identified by Lord Brandon and that any expansion of these categories would usurp the role of Parliament. A cartel damages claim is not a claim in fraud, which is not a necessary ingredient of a claimant's cause of action, and a claimant in such a case is entitled to neither more nor less than compensation for the losses which it has suffered. To "shoehorn" such a case into the "fraud" category identified by Lord Brandon would radically alter the basis on which cartel damages litigation is conducted and would subvert the fundamental principle that such claims are compensatory. Here, there is no allegation that the defendants obtained and retained the claimants' money, let alone that they did so "by fraud". By a Respondent's Notice, Mr Piccinin submitted that it is a necessary requirement of the "fraud" limb of the equitable jurisdiction to award compound interest that the defendant has obtained and retained money belonging to the claimant.

Grasping the nettle

17. As explained above, it is common ground that the claim for compound interest in respect of the pre-insolvency period must go to trial regardless of the outcome of this appeal. It might be tempting, therefore, to say that the whole claim should go to trial, which trial is now imminent. However, if an application to strike out a claim, or an application for summary judgment, raises a point of law on which the court has all the necessary evidence, and which does not depend on disputed factual findings, it is sometimes in the interests of justice for the court to "grasp the nettle"[1] and decide the point.

18. In my judgment this is such a case. The issue is one of law. It is, as Mr Beswetherick accepted, an issue of general application, as it is inherent in any price fixing claim that the cartelists have been guilty of serious and intentional wrongdoing which has been deliberately concealed. The decision does not depend on further facts. The judge heard, as we have heard, full argument. Determination of the question whether the claimants have a valid claim for compound interest in respect of the post-insolvency period will place a limit on the potential value of the claim and will therefore assist the parties, if so minded, to reach a settlement. For all these reasons, we should decide it.

Lord Brandon's summary of the equitable jurisdiction

19. In *La Pintada* [1985] AC 104, 116A-B, Lord Brandon described the court's equitable jurisdiction to award compound interest in the following terms:

> "The Chancery courts, again differing from the common law courts, had regularly awarded simple interest as ancillary relief in respect of equitable remedies, such as specific performance,

[1] "Tender-handed stroke a nettle, And it stings you for your pains: Grasp it like a man of mettle, And it soft as silk remains." (Aaron Hill, c. 1750).

> rescission and the taking of an account. Chancery courts had further regularly awarded interest, including not only simple interest but also compound interest, when they thought that justice so demanded, that is to say in cases where money had been obtained and retained by fraud, or where it had been withheld or misapplied by a trustee or anyone else in a fiduciary position."

20. He described these as "two special classes of case" where the Chancery courts awarded compound interest (116F).

21. It should be noted that the case was not concerned at all with the precise parameters of the equitable jurisdiction, but with the question whether an arbitrator or umpire could award interest on freight and demurrage, where the principal sums due had already been paid, albeit only after a delay. This was a claim for interest as damages at common law, which had nothing to do with any kind of fraud and did not involve anyone in a fiduciary position. Lord Brandon, with whose speech the other members of the House of Lords agreed, held that there was no power to award interest on the freight or demurrage.

22. On the actual issue before the House, the decision has not stood the test of time. As Lord Brandon himself pointed out, his conclusion that section 3(1) of the Law Reform (Miscellaneous Provisions) Act 1934 did not empower a court to award even simple interest on principal sums already paid had already been superseded by section 7 of the Administration of Justice Act 1982, although this only came into force after the date of the award in *La Pintada* (127E-129C: see now section 35A of the Senior Courts Act 1981). His conclusion that compound interest could be awarded as "special damages" recoverable under the second part of the rule in *Hadley v Baxendale* (1854) 9 Exch 341 has been criticised as illogical: if compound interest can be awarded as damages under the second part of the rule, why should it not also be awarded under the first part of the rule which applies to losses arising according to the ordinary course of things? As Lord Justice Staughton put it in *The Lips* [1985] 2 Lloyd's Rep 180, 185, in a passage approved by Lord Nicholls in *Sempra Metals* at [87]:

> "If it is plain and obvious to all and sundry that loss would be suffered in the event of late payment, it cannot be recovered; but if the loss only results from peculiar circumstances known to the two parties to the contract, it can be."

23. More generally, as I shall explain, the availability of compound interest as damages at common law has been transformed by *Sempra Metals*.

24. It is clear from the terms in which Lord Brandon formulated his summary of the circumstances in which equity will award compound interest, that despite the general language of "when they thought that justice so demanded", he regarded the equitable jurisdiction as limited to the two "special cases" to which he referred. This was the view of a majority of the House of Lords in *Westdeutsche* [1996] AC 669 (Lord Browne-Wilkinson at 702D, Lord Slynn at 718F and Lord Lloyd at 739H-740A), notwithstanding Lord Goff's powerful dissent (692B-G). It was also the

understanding of this court in *Black v Davies* [2005] EWCA Civ 531 at [87] (see below).

25. Lord Brandon's summary of the equitable jurisdiction can therefore be regarded as accurate and authoritative. It was not disputed before us. Nevertheless, these are not the words of a statute. Mr Beswetherick does not suggest that LG was a trustee or that it occupied any kind of fiduciary position towards the claimants. He relies on the "fraud limb" of Lord Brandon's summary, saying that this is a case "where money had been obtained and retained by fraud". In order to decide what Lord Brandon contemplated by this "special class of case", and whether this equitable jurisdiction is available in a cartel damages case, it is helpful to consider a number of factors. These include (1) the nature of the claimants' claim, (2) the purpose of a civil remedy in competition cases, (3) the availability of compound interest at common law, and (4) the purpose of the equitable jurisdiction to award compound interest.

The nature of the claim

26. This is a claim in tort to recover damages for breach of statutory duty. It is an ordinary common law claim which, leaving aside the arguments about compound interest, does not need to and does not invoke equitable principles.

27. Although the claim form refers to "compensatory damages in respect of losses, alternatively restitutionary relief", no claim for restitutionary relief is pursued in the Particulars of Claim (currently in its fourth iteration: the proposed amendment would be the fifth), which claims only damages, together with "compound, alternatively simple, interest so assessed whether under section 35A Senior Courts Act 1981, or otherwise at law or in equity". The loss and damage which the claimants claim to have suffered consists of the "overcharge" which they were required to pay to purchase products as a result of the inflated prices caused by the cartel's price fixing. In short, although there will no doubt be a great deal of sophisticated economic analysis, the claimants' case is that without the unlawful price-fixing the price in the market for the products which they purchased would have been £*X*, that as a result of the cartel's activities the price was in fact £*Y*, and that they are entitled to recover the difference between £*X* and £*Y*. This is a conventional claim for compensation for loss suffered. The claimants have an alternative claim (to the extent that they are found to have passed on any increase in cost to their own customers) to recover lost sales which they say they would have made, but lost as a result of the increased prices of LCD products. This too is a claim to be compensated for loss suffered.

28. The claim for interest is also put forward as a claim for compensation for loss:

> "61. The Claimants are entitled to complete compensation for all of their losses, including for lost return on investments and/or for additional financing costs and/or for interest losses incurred as a result of having to pay unlawful Overcharge amounts in respect of LCD Panels and LCD Products throughout the relevant period and having been kept out of and denied the commercial use of monies.
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> 62. Throughout the Relevant Period the Claimants and each of them borrow money from banks and other creditors, on which

> interest was payable at prevailing rates. In the absence of the Overcharges to which the Claimants were subjected throughout the Relevant Period, the Claimants would have offset such savings against their respective borrowings and/or would have borrowed less and/or would have reinvested the amounts in their respective businesses."

29. The "Relevant Period" is earlier defined as "the period of the Cartel Period during which the Claimants continued to trade". Thus the pleaded claim to have suffered losses is limited to the pre-insolvency period.

30. Accordingly the only claims pleaded are claims to be compensated for losses suffered as a result of the defendants' wrongful conduct, and these losses are limited to losses (including interest) incurred in the pre-insolvency period.

31. It should be noted that the claimants do not attempt to distinguish between purchases of products incorporating panels manufactured by LG and by other members of the cartel (it appears that the claimants did not purchase directly from LG or other manufacturers) or even between purchases of products incorporating panels manufactured by cartel members and those where panels originated with innocent third party manufacturers who merely took advantage of the higher prices resulting from the activity of the cartel to increase their own prices. The claimants' case is that all members of the cartel, including LG, are jointly and severally liable for all the losses which they have suffered as a result of the cartel, and that it is impracticable and unnecessary to attempt to trace their purchases back to LG, or even to other members of the cartel. As it is put in paragraph 49 of the Particulars of Claim:

> "It would neither be possible, practicable nor proportionate to seek to trace the precise supply chains in respect of the hundreds of thousands of LCD Panels and LCD Products that were purchased by the Claimants".

32. Thus there is no pleaded claim for restitutionary relief in this case. At present, there is not even a plea that the defendants have obtained a benefit as a result of their wrongful conduct, or any attempt to quantify such benefit. The proposed amendment attempts to plug this gap, but it says no more than that the defendants benefited from their involvement in the cartel by being able to charge inflated prices to their own customers which will ultimately have been passed on to the claimants.

33. For present purposes, several consequences of the way in which the claimants put their case should be noted. First, there is no plea, even in the proposed amendment, that the defendants obtained money from the claimants, either directly or indirectly. Second, the losses which the claimants claim do not correspond to any benefit obtained by the defendants, or even by members of the cartel as a whole. Third, on the existing pleadings, there will be no need at the trial to investigate the existence or extent of any financial benefit obtained by the defendants, or even by the cartel members as a whole, as a result of the cartel's unlawful conduct. What will matter will be the claimants' losses. Fourth, the proposed amended pleading therefore introduces a new issue which would need to be investigated, namely the existence and extent of any financial benefit obtained by the defendants. We are not in a position to say whether this would require new evidence at this late stage.

The purpose of a civil remedy in competition cases

34. The rationale for allowing civil claims for breach of statutory duty in competition cases is that victims of anti-competitive conduct should be compensated for losses which they have suffered as a result of that conduct. This was explained by the Supreme Court in *Sainsbury's Supermarket Ltd v Visa Europe Services LLC* [2020] UKSC 24, [2020] Bus LR 1196, expressly contrasting claims for compensation and claims for restitution:

> "182. The claims of the merchants in these appeals are for damages for loss caused to them by the tortious acts of the operators of the payment card schemes in breach of their statutory obligations under the 1998 Act. It is not in dispute, as we discuss below, that the fundamental principle underlying the merchants' claims is that the damages to which they are entitled are compensatory; the merchants are entitled to be placed, so far as money can achieve that, in the position which they would have been in but for the tortious acts which have caused them loss."

35. The Supreme Court returned to this theme in a later passage:

> "192. The merchants' claims are for the added costs which they have incurred as a result of the MSC, which the acquiring banks have charged them, being larger than it would have been if there had been no breach of competition law. Sainsbury's claims damages measured by the difference between the sums which it paid the acquirers through the MSC and the sums which it would have paid if the acquirers' market had not been distorted by the MIF. Similarly, AAM's principal pleaded case is that they are entitled to recover the basic amounts by which they have been unlawfully overcharged with an alternative case that in so far as the unlawful overcharges have been passed on in their selling prices to their customers, they have suffered a loss of profit on the sales of the goods concerned through a reduced volume of sales.
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> 193. In each case the merchants' primary claim of damages is for the pecuniary loss which has resulted directly from the breach of competition law by the operators of the schemes. That direct loss is *prima facie* measured by the extent of the overcharge in the MSC.
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> 194. It is trite law that, as a general principle, the damages to be awarded for loss caused by tort are compensatory. The claimant is entitled to be placed in the position it would have been in if the tort had not been committed. A classic statement of this principle is that of Lord Blackburn in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39; (1880) 7 R (HL) 1, 7:

> 'I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation'."

36. It can be seen that, in essence, the claims in issue in *Sainsbury's* were the same as in the present case: a claim to be compensated in the amount of the overcharge, with an alternative in the event of a successful passing-on defence to a claim for lost sales.

37. Because the object of allowing a civil claim in competition cases is to compensate the claimant for losses suffered, the remedy of an account of profits as an alternative to damages is not available: *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2008] EWCA Civ 1086, [2009] Ch 390. Indeed, the Supreme Court in *Sainsbury's* expressly approved at [196] what Lord Justice Longmore had said about this in *Devenish*, dealing with the availability of a passing-on defence:

> "147. Once one has cleared the legal ground and appreciated that the claim made in the present case is a claim that the defendants should disgorge the profit which they have made from their breach of statutory duty in operating the cartel the difficulties of the claim become apparent. No one suggests that, to the extent the claimant has in fact suffered a loss because it has paid too high a price which it has been unable (for any reason) to pass on to its own purchasers, that loss cannot be recovered. If, however, the claimant has in fact passed the excessive price on to its purchasers and not absorbed the excess price itself, there is no very obvious reason why the profit made by the defendants (albeit undeserved and wrongful) should be transferred to the claimant without the claimant being obliged to transfer it down the line to those who have actually suffered the loss. Neither the law of restitution nor the law of damages is in the business of transferring monetary gains from one undeserving recipient to another undeserving recipient even if the former has acted illegally while the latter has not."

38. Lord Justice Tuckey put the point even more succinctly in the same case:

> "161. Devenish is entitled to be compensated for any loss it has suffered as a result of the cartel, no more and no less."

The availability of compound interest at common law

39. For many years the common law refused to award interest on late payments, regarding this as a matter for Parliament. The history goes back at least as far as the early 19th century (*Page v Newman* (1829) 9 B & C 378) and need not be repeated here. The view that reform was for Parliament and not the courts proved to be decisive, or at

least a major factor, in several later decisions at the highest level (*London, Chatham & Dover Railway Co v South Eastern Railway Co* [1893] AC 429, *La Pintada* 1985] AC 104, *Westdeutsche* [1996] AC 669). As I have explained, *La Pintada* recognised one inroad into this principle, namely that interest could be recovered as damages for breach of contract under the second limb of the rule in *Hadley v Baxendale*, although the logic for this was difficult to support.

40. The position at common law has been transformed, however, by the decision in *Sempra Metals* [2007] UKHL 34, [2008] 1 AC 561. This was a claim in restitution to obtain reimbursement of tax which had been unlawfully levied. The claimant sought to recover not only the tax which it had paid, but compound interest thereon during the period in which it had been out of its money. The claim in restitution succeeded, although the Supreme Court has since held that it ought not to have done (*Prudential Assurance Co Ltd v Revenue & Customs Commissioners* [2018] UKSC 39, [2019] AC 929 at [79]). However, in departing from the decision in *Sempra Metals*, the Supreme Court stated expressly that nothing in *Prudential* was intended to question what had been said in *Sempra Metals* about the award of interest as damages. Accordingly that aspect of *Sempra Metals* remains authoritative.

41. In *Sempra Metals* the House of Lords held that the common law rule preventing recovery of interest losses by way of damages for breach of contract or tort was anomalous and unprincipled. The rule was, in Lord Nicholls' words, like the proverbial bad penny which kept turning up and it needed to be abolished. Rather, it was in principle always open to a claimant to plead and prove that late payment of a debt, or a breach of contract or a tort, had caused it to suffer loss in the form of payment of compound interest, and in such a case the compound interest paid would be recoverable as damages, subject only to the principles governing all claims for damages, such as remoteness and failure to mitigate. However, the loss claimed had to be pleaded and proved, as the common law does not assume that delay in payment will of itself cause damage. Lord Nicholls put it this way:

> "93. In *La Pintada* [1985] AC 104 the House made clear that, contrary to the general understanding of the effect of the *London, Chatham and Dover Railway* case [1893] AC 429, claims for damages for interest losses suffered as a result of the late payment of money are not taboo. That is plainly right. Those who default on a contractual obligation to pay money are not possessed of some special immunity in respect of losses caused thereby. To be recoverable the losses suffered by a claimant must satisfy the usual remoteness tests. The losses must have been reasonably foreseeable at the time of the contract as liable to result from the breach. But, subject to satisfying the usual damages criteria, in principle these losses are recoverable as damages for breach of contract. This is so even if the losses consist of a liability to pay borrowing costs incurred as a result of the late payment, as happened in *Wadsworth v Lydall* [1981] 1 WLR 598. And this is so irrespective of whether the borrowing costs comprise simple interest or compound interest.

> 94. To this end, if your Lordships agree, the House should now hold that, in principle, it is always open to a claimant to plead and prove his actual interest losses caused by late payment of a debt. These losses will be recoverable, subject to the principles governing all claims for damages for breach of contract, such as remoteness, failure to mitigate and so forth.
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> 95. In the nature of things the proof required to establish a claimed interest loss will depend upon the nature of the loss and the circumstances of the case. The loss may be the cost of borrowing money. That cost may include an element of compound interest. Or the loss may be loss of an opportunity to invest the promised money. Here again, where the circumstances require, the investment loss may need to include a compound element if it is to be a fair measure of what the plaintiff lost by the late payment. Or the loss flowing from the late payment may take some other form. Whatever form the loss takes the court will, here as elsewhere, draw from the proved or admitted facts such inferences as are appropriate. That is a matter for the trial judge. There are no special rules for the proof of facts in this area of the law.
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> 96. But an unparticularised and unproved claim simply for 'damages' will not suffice. General damages are not recoverable. The common law does not *assume* that delay in payment of a debt will of itself cause damage. Loss must be proved. To that extent the decision in the *London, Chatham and Dover Railway* case remains extant. The decision in that case survives but is confined narrowly to claims of a similar nature to the simple claim for interest advanced in that case. Thus, that decision is to be understood as applying only to claims at common law for unparticularised and unproven interest losses as damages for breach of a contract to pay a debt and, which today comes to the same, claims for payment of a debt with interest. In the absence of agreement the restrictive exception to the general common law rules prevails in those cases.
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> 97. The common law's unwillingness to presume interest losses where payment is delayed is, I readily accept, unrealistic. This is especially so at times when inflation abounds and prevailing rates of interest are high. To require proof of loss in each case may seem unduly formalistic. The common law can bear this reproach. If a party chooses not to prove his interest losses the remedy provided by the law is to be found in the statutory provisions."

42. Lord Nicholls went on to explain at [98] and [99] why limiting the scope of the restrictive common law exception in this way did not conflict with the legislation, or with the underlying legislative policy, and that reform did not need to be left to Parliament. He concluded that:

> "100. For these reasons I consider the court has a common law jurisdiction to award interest, simple and compound, as damages on claims for non-payment of debts as well as on other claims for breach of contract and in tort."

43. Lord Hope at [16] and [17], Lord Scott at [132], Lord Walker at [154] and [165] and Lord Mance at [215] to [217] agreed with this approach, which has recently been affirmed by the Privy Council in *Sagicor Bank Jamaica Ltd v Seaton* [2022] UKPC 48, [2023] 1 WLR 1759.

44. The result is that it is open to a claimant in a competition case to plead and prove that the defendant's anti-competitive conduct has caused it to suffer losses in the form of compound interest payable on borrowings which it has had to incur as a result of, for example, the inflated prices which it has had to pay. In principle, such a claim will be valid, subject to the usual rules of causation, mitigation and remoteness. It appears that such claims are regularly made. *BritNed Development Ltd v ABB AB* [2018] EWHC 2616 (Ch), [2019] Bus LR 718 at [543] to [549] is an example, although in that case the claim failed because the loss was suffered, not by the claimant, but by its shareholders.

45. Indeed, it is on the basis of *Sempra Metals* that the claimants in the present case seek to recover compound interest in respect of the pre-insolvency period. However, so far as the post-insolvency period is concerned, the claimants accept that they cannot recover common law damages on this basis, for the simple reason that as a result of their insolvency no such loss has been suffered. That is the reason why they seek to invoke the equitable jurisdiction.

The purpose of the equitable jurisdiction to award compound interest

46. Historically, the equitable jurisdiction to award compound interest has been restitutionary. Its rationale has been described as being to ensure that the defendant, usually a fiduciary, accounts for benefits received or profits made (or which it can fairly be assumed that the defendant did receive or ought to have received) and that he does not make a profit from his wrongdoing.

47. Among the 19th century cases, *Burdick v Garrick* (1870) 5 Ch App 233 is an example. An agent, who was therefore a fiduciary, received money from his principal which he paid into his own account and used in his business. The money was therefore held on trust for the principal. The general rule was that a fiduciary would be presumed to have "made that amount of profit which persons ordinarily do make in trade, and in those cases the Court directs rests to be made", i.e. awards compound interest. On the facts of the case, however, the agent, a solicitor, was not engaged in a business where compound interest would ordinarily be earned or where the money would be invested for profit. Accordingly the agent was charged with simple, but not compound, interest at a conventional rate of 5 per cent.

48. In more recent times, the equitable jurisdiction was described in *Wallersteiner v Moir (No. 2)* [1975] QB 373. Lord Denning MR described the equitable principles in broad terms as follows at 388B-H:

> "The principles on which the courts of equity acted are expanded in a series of cases … Those judgments show that, in equity, interest is never awarded by way of punishment. Equity awards it whenever monies misused by an executor or a trustee or anyone else in a fiduciary position – who has misapplied the money and made use of it himself for his own benefit. The court:
>
> > 'presumes that the party against whom relief is sought has made that amount of profit which persons ordinarily do make in trade, and in these cases the Court directs rests to be made,' i.e. compound interest: see *Burdick v Garrett* 5 Ch App 233, 242, per Lord Hatherley LC.
>
> The reason is because a person in a fiduciary position is not allowed to make a profit out of his trust: and if he does, he is liable to account for that profit or interest in lieu thereof.
>
> In addition, in equity interest is awarded whenever a wrongdoer deprives a company of money which it needs for use in its business. It is plain that the company should be compensated for the loss thereby occasioned to it. Mere replacement of the money – years later – is by no means adequate compensation, especially in days of inflation. The company should be compensated by the award of interest. That was done by Sir William Page Wood V-C (afterwards Lord Hatherley) in one of the leading cases on the subject, *Atwool v Merryweather* (1867) LR 5 Eq 464n, 468-469. But the question arises: should it be simple interest or compound interest? On general principles I think it should be presumed that the company (had it not been deprived of the money) would have made the most beneficial use open to it: cf. *Armory v Delamirie* (1723) 1 Stra 505. It may be that the company would have used it in its own trading operations; or that it would have used it to help its subsidiaries. Alternatively, it should be presumed that the wrongdoer made the most beneficial use of it. But, whichever it is, in order to give adequate compensation, the money should be replaced at interest with yearly rests, i.e. compound interest."

49. The other members of the court stated the position more narrowly. Lord Justice Buckley said (at 397B-H):

> "It is well established in equity that a trustee who in breach of trust misapplies trust funds will be liable not only to replace the misapplied principal fund, but to do so with interest from the date of the misapplication. This is on the notional ground that the money so applied was in fact the trustee's own money and that he has retained the misapplied trust money in his own hands and used it for his own purposes. Where a trustee has retained trust money in his own hands, he will be accountable for the profit which he has made or which he is assumed to

> have made from the use of the money. In *Attorney-General v Alford* 4 De GM & G 843, 851, Lord Cranworth LC said:
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> > 'What the court ought to do, I think, is to charge him only with the interest which he has received, or which it is justly entitled to say he ought to have received, or which is so fairly to be presumed that he did receive that he is estopped from saying that he did not receive it.'
>
> This is an application of the doctrine that the court will not allow a trustee to make any profit from his trust. The defaulting trustee is normally charged with simple interest only, but if it is established that he has used the money in trade he may be charged compound interest: see *Burdick v Garrick* 5 Ch App 233, per Lord Hatherley LC at 241 and Lewin, Trusts, 16th ed (1964), p.266, and the cases there noted. The justification for charging compound interest normally lies in the fact that profits earned in trade would be likely to be used as working capital for earning further profits. Precisely similar equitable principles apply to an agent who has retained moneys of his principal in his hands and used them for his own purposes: *Burdick v Garrick*.
>
> The application of this rule is not confined to cases in which a trustee or agent has misapplied trust funds or a principal's property, nor is it confined to trustees and agents. It was enunciated by Lord Herschell in *Bray v Ford* [1896] AC 44, 51 in these terms:
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> > 'It is an inflexible rule of a court of Equity that a person in a fiduciary position … is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where is interest and duty conflict'."

50. Lord Justice Scarman agreed that the principle on which equitable interest is awarded was as stated by Lord Hatherley LC in *Burdick v Garrick* and that it had frequently been applied to situations in which there was a fiduciary relationship at the time when the money was appropriated.

51. Thus all three judges regarded the principle as being that a fiduciary or someone in a similar position is required to restore misapplied funds and to account for the profits which he has earned or can fairly be presumed to have earned from the use of those funds. Even Lord Denning's wider formulation, which was not supported by the other members of the court, was limited to circumstances in which a wrongdoer "deprives a company of money which it needs for use in its business".

52. The equitable jurisdiction to award compound interest was also considered in *Westdeutsche*, most fully in the dissenting speech of Lord Goff, although his disagreement with the majority on this issue was that he considered that the equitable jurisdiction should be extended beyond its existing scope. As to what that existing scope was, he discussed the cases to which I have referred and continued (at 693F-G):

> "From these cases it can be seen that compound interest may be awarded in cases where the defendant has wrongfully profited, or may be presumed to have so profited, from having the use of another person's money. The power to award compound interest is therefore available to achieve justice in a limited area of what is now seen as the law of restitution, viz. where the defendant has acquired a benefit through his wrongful act (see *Goff & Jones, The Law of Restitution*, 4th ed (1993), p.632 et seq; *Birks, An Introduction to the Law of Restitution*, pp. 313 et seq; *Burrows, The Law of Restitution* (1993), pp. 403 et seq. The general question arises whether the jurisdiction must be kept constrained in this way, or whether it may be permitted to expand so that it can be exercised to ensure that full justice can be done elsewhere in that rubric of the law."

53. The majority did not agree that the equitable jurisdiction could be expanded beyond the two "special categories" identified in *La Pintada*, but it should be noted that even Lord Goff did not contemplate an expansion beyond the field of restitution.

54. The restitutionary nature of the jurisdiction was further confirmed in *Kuwait Oil Tanker Co SAK v Al Bader* [2000] EWCA Civ 160, [2000] 2 All ER (Comm) 271:

> "209. All that said, the judge did not make his award of interest as a matter of, or in connection with, a claim for debt, breach of contract or damages for tort. He made it as part of a restitutionary award of compensation for breach of fiduciary duty. Such a claim made on the basis of trusteeship and available to the claimants in the circumstances of the case, is by its origin and nature an equitable proprietary claim moulded and used for the purpose of achieving restitution by a person called to account by equity on the basis of a defaulting trustee. Since there is no jurisdiction in the court to award compound interest at common law or by statute, it was indeed the only basis on which the judge could make an award of compound interest. The jurisdiction which he exercised is that which Lord Brandon stated in the *La Pintada* case at p.116 is confined to situations
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> > 'where money had been obtained and retained by fraud, or where it had been withheld or misapplied by a trustee or anyone else in a fiduciary position'
>
> and which the majority of the House of Lords declined to expand further in the *Westdeutsche Bank* case (see per Lord Browne-Wilkinson at 717F, Lord Slynn of Hadleigh at 718F-719B and Lord Lloyd of Berwick at 739B-741A).
>
> 210. In such a case, the award of compound interest is made on the basis that a trustee misapplying monies for his own benefit, and a person obtaining or retaining money by fraud who is to

> be similarly treated, should be obliged either to account in full for the benefit he has unjustly derived or, in lieu of such account, to pay compound interest when the circumstances justify an award on that basis. The rationale is historically and essentially that of restitution i.e. that a fiduciary should not be permitted to make a profit from his trust. As explained by Lord Denning MR in *Wallersteiner v Moir (No.2)* at page 388, it is also a means of ensuring full compensation where the wrongdoer deprives a person or company of monies employed in trading operations. It is noteworthy that the judgments of Buckley LJ and Scarman LJ did not refer to that aspect as constituting the basis for a compound award. It is nonetheless an element which usually plays a part in the reasoning of the court when considering whether or not to make such an award in modern conditions.
>
> 211. It seems to us that the court's power in such circumstances to award compound interest (although discretionary in the sense that it will be exercised in accordance with established equitable principles) is not only distinct, but different in character, from its broad powers under s.35A of the 1981 Act, being a necessary adjunct of the claimant's substantive right to restitution. …"

55. Mr Beswetherick fastened on the reference to "a person obtaining or retaining money by fraud" in the first sentence of [210] to suggest that these were alternatives (Lord Brandon had referred to "obtaining and retaining money"), but in my judgment it is clear that this is not what the court (Lord Justices Nourse, Potter and Clarke) intended, as the previous paragraph had emphasised that the jurisdiction was not to be expanded beyond what Lord Brandon had stated in *La Pintada*.

56. From this review of the cases it is apparent that the purpose of the restitutionary equitable jurisdiction to award compound interest is to ensure that a fiduciary (or a fraudulent wrongdoer) does not benefit from his wrongdoing. Compound interest is intended to restore to the claimant not only the property which has been misapplied, but also the profits which have been, ought to have been, or can fairly be presumed to have been, earned from the wrongdoer's use of the claimant's property during the period in which it was taken from him. Compound interest is not awarded just because the defendant has behaved badly, or even fraudulently.

La Pintada revisited

57. I can now return to the question of what Lord Brandon meant in *La Pintada* by saying that equity would award compound interest "in cases where money had been obtained and retained by fraud". Lord Brandon did not cite any case, and counsel's researches have been unable to unearth any case before *La Pintada*, where compound interest had been awarded on this basis against a defendant who was not a fiduciary or in a position akin to that of a fiduciary.

58. Since *La Pintada*, the only such case is *MAN Nutzfahrzeuge AG v Freightliner Ltd* [2005] EWHC 2347 (Comm) at [318] and [319], a claim in deceit where compound

interest was awarded on that part (but only on that part) of the damages that represented the original purchase price and the value of an inter-company loan which the defendant was required to repay to the successful claimant. However, it was common ground that the "fraud limb" of *La Pintada* applied in that case, and the point therefore did not call for extensive analysis.

59. *Central Bank of Ecuador v Conticorp SA* [2015] UKPC 11, and the first instance decisions which have followed it, where compound interest was awarded against a defendant who had assisted in a breach of trust, can be viewed as cases where the defendant was treated as being in a position akin to that of a fiduciary.

60. It seems likely that what Lord Brandon had in mind in *La Pintada* was the then recent report of the Law Commission (Law of Contract: Report on Interest (1978) Cmnd. 7229), to which he went on to refer in his speech (at 125E). That report, as noted by Lord Woolf in *Westdeutsche* at 724C-D, dealt with the equitable jurisdiction in terms almost identical to those used by Lord Brandon:

> "10. Thirdly, there is the equitable jurisdiction. Interest may be awarded as ancillary relief in respect of equitable remedies such as specific performance, rescission or the taking of an account. Furthermore, the payment of interest may be ordered where money has been obtained and retained by fraud, or where it has been withheld or misapplied by an executor or trustee or anyone else in a fiduciary position."

61. The authorities cited in the report were *Wallersteiner v Moir* and *Johnson v The King* [1904] AC 817, a Privy Council appeal from Sierra Leone. In *Johnson* a government contractor had overcharged for services provided. The government claimed the return of the money overpaid, together with interest. The claim was put in two ways, first for the return of money obtained by fraud, and secondly for the return of money paid by mistake. The contractor admitted the overpayment and tendered repayment. He denied fraud and said that the overpayments were due to mistakes which he attributed to employees of the government. The issue, therefore, was whether the government was entitled to interest on the amount overpaid. At the trial the government abandoned its case of fraud and confined its claim to the secondary case of mistake. On that basis, the Privy Council held that the claim for interest must fail. However, in a judgment delivered by Lord Macnaghten, the Privy Council added this rider:

> "In order to guard against any possible misapprehension of their Lordships' views, they desire to say that, in their opinion, there is no doubt whatever that money obtained by fraud and retained by fraud can be *recovered* with interest, whether the proceedings be taken in a Court of equity or in a Court of law, or in a Court which has a jurisdiction both equitable and legal, as the Supreme Court of Sierra Leone possesses under the Ordinance of November 10, 1881." (emphasis added)

62. This appears, therefore, to be the origin of the phrase "money obtained and retained by fraud". Indeed, so far as counsel have been able to ascertain, despite researches going all the way back to the case of *Earl of Chesterfield v Janssen* (1750) 1 Atk 301, it is the only previous case in which that phrase has been used in the present context.

It is, however, a somewhat flimsy foundation for any view about the extent of an equitable jurisdiction to award compound interest. It does not appear from the report that compound as distinct from simple interest was in issue in *Johnson*, while the deliberate disclaimer of any distinction between what the position would be in a court of equity, a court of law, or a court exercising both jurisdictions, makes it doubtful whether the Privy Council was intending to lay down any rule specifically concerned with the equitable jurisdiction. However, it is too late now to worry about that in this court.

63. What is important for present purposes is that the situation identified by the Privy Council as being one where interest could be awarded was a claim to "recover" the very money which had been "obtained by fraud and retained by fraud". Mr Piccinin rightly emphasised the use of the word "recovered" which I have emphasised in the citation above. That strongly suggests that what Lord Brandon had in mind in *La Pintada* was a fraud case where the fraud had resulted in the fraudster obtaining the claimant's money and retaining it for his own benefit. In such a case the fraudster is to be treated as in a position akin to that of a fiduciary. The claimant in such a case is entitled to recover the money which he has lost and the fraudster is liable to account for the benefit which he has or can fairly be assumed to have obtained from the use of the money, which justifies an award of compound interest. *MAN v Freightliner* is consistent with this analysis.

64. That understanding of the limited scope of the "fraud limb" of Lord Brandon's formulation was shared by the members of this court (Lord Justices Waller and Carnwath and Sir Martin Nourse) in *Black v Davies* [2005] EWCA Civ 531, dealing with a claim for compound interest on damages awarded in the tort of deceit:

> "85. While it is correct to say that, as a matter of language, Lord Browne-Wilkinson [in *Westdeutsche*] took fraud cases out of his analysis of the equitable jurisdiction, Mr Justice McCombe had earlier expressed the view (para 9) that he could not be taken to have been deciding that <u>all</u> cases of fraud fell within that jurisdiction. We entirely agree. But since it is as important for this court as it was for the judge to understand the full import of Lord Browne-Wilkinson's views, it is necessary to refer to the material passage in his speech more closely.
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> 86. At [1996] AC 701C, under the heading "*Compound interest in equity*", Lord Browne-Wilkinson said:
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> > 'In the absence of fraud courts of equity have never awarded compound interest except against a trustee or other person owing fiduciary duties who is accountable for profits made from his position. Equity awarded simple interest at a time when courts of law had no right under common law or statute to award any interest. The award of compound interest was restricted to cases where the award was in lieu of an account of profits improperly made by the trustee. We were not referred to any case where compound interest had been awarded in the absence of fiduciary accountability for a profit.'

> He proceeded to read passages from the judgments of Lord Hatherley LC, sitting in the Court of Appeal in Chancery, in *Burdick v Garrick* (1870) LR 5 Ch.Ap. 233, 241, and of Buckley LJ in *Wallersteiner v Moir No.2* [1975] QB 373, 397. Having then read the first passage and the second part of the last sentence of the second passage (sc. "Courts of Chancery only in two special classes of case, awarded compound, as distinct from simple, interest") we have quoted from the speech of Lord Brandon in *La Pintada*, Lord Browne-Wilkinson continued, at p.702D:
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> > 'These authorities establish that in the absence of fraud equity only awards compound (as opposed to simple) interest against a defendant who is a trustee or otherwise in a fiduciary position by way of recouping from such a defendant an improper profit made by him.'
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> 87. When this passage from Lord Browne-Wilkinson's speech is read as a whole, in particular his quotations from Lord Brandon's speech in *La Pintada*, it is demonstrated that his two references to 'absence of fraud' cannot have been intended to go beyond the type of case referred to by Lord Brandon, that is to say a case where money has been obtained and retained by fraud; in other words, where the fraudster has had in hand a fund which he has, or is deemed to have, made use of for his own benefit. It follows that the correct view of the *Westdeutsche Landesbank* case is that three, not two, of their lordships were firmly of the view that the equitable jurisdiction to award compound interest was limited to the two categories of case identified by Lord Brandon. Like that case (where the claim was a common law claim for money had and received) the present case does not fall into either category. Mr Davies' fraudulent misrepresentation did not cause him to obtain and retain money belonging to the Black parties; it caused them to lose money by trading in the markets. In that state of affairs the present case is covered by the decision of the majority in the *Westdeutsche Landesbank* case. So far as this court is concerned, that is an end of the compound interest question. It cannot be reopened at this level of decision."

65. On this basis it is clear that the equitable jurisdiction to award compound interest does not apply to *any* case of fraudulent conduct. Compound interest is not awarded just because the defendant has behaved badly, or even fraudulently, and its purpose is not to deter other people from engaging in dishonest conduct. The jurisdiction does not apply, for example, to a straightforward action in tort for damages for deceit, but depends upon the defendant having in hand a fund obtained from the claimant which he has, or is deemed to have, made use of for his own benefit.

66. The decision on this issue in *Black v Davies* was *obiter* and it appears that there had been insufficient time for oral submissions on the issue of compound interest (see at [80]). Accordingly the decision is not binding on us. Nevertheless the court stated

expressly that it regarded the point as one of general importance and evidently took some care in deciding it. As it is not alleged that the defendants in the present case ever obtained, let alone retained, anything in the nature of money belonging to the claimants, it would be sufficient to dispose of this appeal to say that I agree with the analysis of this court in *Black v Davies*. I have sought to show, however, that the requirement that the fraudster must have obtained and retained money belonging to the claimants is soundly based and in accordance with principle. It accords with the restitutionary nature of the equitable jurisdiction, but there is no question in the present case of the claimants seeking to hold the defendants liable to account for benefits received. In any event such a restitutionary remedy is not available in a common law claim for cartel damages for breach of statutory duty.

67. Mr Beswetherick placed some reliance on the reference by Lady Justice Andrews in *Tuke v Hood* [2022] EWCA Civ 23, [2022] QB 659 at [56] to compound interest in equity being "an adjunct to dishonest behaviour, designed as a means of discouragement of such behaviour". However, this reference will not bear such weight. The case was not concerned at all with the circumstances in which compound interest is available in equity and it is not the case that compound interest is awarded in equity as a deterrent whenever there is dishonest behaviour by a defendant. In any event this remark was not in any way central to the court's reasoning.

68. Even if it were possible, which at this level it is not, to expand the scope of the equitable jurisdiction to award compound interest, I can see no justification for doing so in the circumstances of the present case. The claimants would be entitled to recover compound interest in respect of the post-insolvency period at common law if they could plead and prove that they had suffered losses during that period. But they have not attempted to do so because they accept that they suffered no such losses, other than the mere fact of being kept out of whatever damages they can prove that they suffered during the pre-insolvency period. For that, however, they will be entitled to seek a discretionary award of simple interest pursuant to section 35A of the Senior Courts Act 1981.

69. Our law regards that as a sufficient remedy, with no need for any intervention by equity. There is no obvious reason why equity should step in to require the defendants to disgorge the benefits from their wrongdoing in addition to compensating the claimants in full for the losses which they can prove that they suffered. While there is much to be said for the view that compound interest should be available, as a matter of discretion, in every case where a claimant is kept out of its money (as has been the position in arbitration since 31st January 1997: see section 49 of the Arbitration Act 1996), that is not the position which English law has adopted.

Obtained and retained by fraud

70. The judge assumed in the claimants' favour that "fraud" in Lord Brandon's "fraud limb" extends to "equitable fraud", a concept which appears to extend to some kinds of unconscionable conduct whose boundaries are not clearly defined but which extend wider than what would be regarded as fraud at common law. There is no Respondent's Notice challenging that assumption. In view of the conclusions which I have reached so far, however, there is no need to decide whether the claimants' cause of action in this case can be characterised as a claim in "equitable fraud" or to consider the nature of the causal link required between the defendants' wrongful

conduct and the obtaining or retaining of money. As the defendants did not obtain or retain the claimants' money, these points do not arise.

71. Mr Piccinin submitted that although the defendants' conduct in taking part in a price-fixing cartel was a breach of statutory duty giving rise to a civil remedy, it was not conduct which equity would characterise as dishonest or fraudulent. He submitted, citing the extradition case of *Norris v Government of the United States of America* [2008] UKHL 16, [2008] 1 AC 920 and the criminal case of *R v Goldshield Group Plc* [2008] UKHL 17, [2009] 1 WLR 458, that participation in a price-fixing cartel is not in itself dishonest, unless there are aggravating features. He pointed to Lord Bingham's citation in *Norris* at [10] of Vice-Chancellor Bacon's observation in *Jones v North* (1875) LR 19 Eq 426 that a collusive agreement between four parties who were invited to tender for the supply of stone to a public authority was "perfectly lawful" and contained "nothing illegal" – an observation, I would suggest, which was very much of its time.

72. For my part, however, I can see considerable force in the submission that intentional participation in a price-fixing cartel would today be regarded as dishonest, and might well be sufficient to come within the concept of "equitable fraud". However, as this cannot affect the outcome of this appeal, I would prefer not to reach a conclusion on this question, or to explore the consequences of doing so.

Disposal

73. For the reasons given above, I would dismiss the appeal. The judge was right to decide that the claim for compound interest in equity in respect of the post-insolvency period cannot succeed and right also to conclude that the problems in the way of that claim are not solved by the proposed amendment.

74. Finally, I echo the comment of Lord Justice Bean at the conclusion of the hearing that it was a pleasure to listen to a case so well argued on both sides.

Lady Justice Whipple:

75. I agree.

Lord Justice Bean:

76. I also agree.