Neutral Citation Number: **[2020] EWHC 2501 (Ch)**

IN THE HIGH COURT OF JUSTICE

Case No: BL-2019-000727

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

BUSINESS LIST (ChD)

Rolls Building, 7 Rolls Building,
Fetter Lane, London EC4A 1NL

Date: 21 September 2020

Before:

ANDREW SIMMONDS QC
(sitting as a Deputy Judge of the High Court)

Between:

(1) BROADCASTING INVESTMENT GROUP LIMITED
(2) VISUAL INVESTMENTS INTERNATIONAL LIMITED
(3) KENNETH BURGESS

Claimants

and

(1) ADAM SMITH
(2) DAN FINCH
(3) PARKHEAD PROPERTIES LIMITED
(a Company incorporated under the laws of the Cayman Islands)
(4) SKOOSH INVESTMENTS LIMITED
(a Company incorporated under the laws of the Cayman Islands)
(5) STREAMING INVESTMENTS PLC
(in liquidation)

Defendants

Dan McCourt Fritz (instructed by **Withers LLP**) for the Claimants
Joseph Sullivan (instructed by **Gowling WLG (UK) LLP**) for the First Defendant
No appearance for the remaining Defendants.

Hearing dates: 13 November 2019 and 14 August 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: this Judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand down is deemed to be at 10.30 am on 21 September 2020.

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ANDREW SIMMONDS QC

Andrew Simmonds QC:

Introduction

1. This is an application by the First Defendant, Mr Adam Smith ("Mr Smith"), to strike out under CPR 3.4, alternatively for reverse summary judgment under CPR 24.2 in respect of, certain claims made against him by the three Claimants, to whom I shall refer respectively as BIG, VIIL and Mr Burgess. Mr Burgess is the majority shareholder in VIIL which in turn owns 51% of the issued share capital of BIG. Mr Burgess is a director of both VIIL and BIG. In broad summary, the Claimants seek to enforce an alleged oral agreement made in October 2012 with Mr Smith and the Second Defendant ("Mr Finch") for the transfer of shares in two broadcasting technology companies to a joint venture vehicle, namely the Fifth Defendant ("SS PLC"), in which BIG, Mr Smith, Mr Finch and one other investor would be, and in fact became, shareholders. SS PLC is now in creditors' voluntary liquidation.

2. The claims against Mr Finch have, by agreement, been stayed pending the outcome of Mr Smith's strike-out application.

3. Mr Smith's application was issued in June 2019 and was originally based on three separate grounds, *viz*. (1) that a claim by BIG in respect of the purported forfeiture of its shares in SS PLC was not properly constituted, in particular because SS PLC had not at that stage been joined as a defendant; (2) that the claims by BIG and Mr Burgess to enforce the oral transfer agreement are barred by the so-called "reflective loss" principle, it being contended by Mr Smith that the only legally maintainable claim in that regard is vested in SS PLC; and (3) that an alternative claim pleaded by VIIL and Mr Burgess to enforce a restructuring agreement made in 2014 has no prospect of success.

4. I heard argument initially on 13 November 2019. At an early stage, I granted the Claimants' application to join SS PLC as the (then) Fifth Defendant and to amend their Particulars of Claim in such a manner as to (a) discontinue their claims in respect of two Cayman Islands companies which had been joined as the Third and Fourth Defendants, and (b) to re-plead the claim in respect of the purported forfeiture of BIG's shares in SS PLC. The parties agreed that this disposed of ground (1) of Mr Smith's strike-out application. I also heard submissions on grounds (2) and (3), with most of the argument being devoted to ground (2).

5. Towards the end of the day's hearing, Counsel alerted me to the fact that the most recent Court of Appeal authority on the reflective loss principle, namely *Marex Financial Ltd v Sevilleja* [2019] QB 173 ("*Marex*"), had been appealed to the Supreme Court and, moreover, that the Supreme Court had

heard argument on the appeal in early May 2019, a 7-Judge panel had been convened so as to permit a root and branch reappraisal of the principle (which had proved to be highly controversial both in previous decided cases and in academic writing) and the parties' shared expectation was that judgment would be delivered by the Supreme Court imminently. In those circumstances, I considered it unsatisfactory for me to decide Mr Smith's application without waiting for the Supreme Court's decision and I accordingly adjourned the application pending the determination of the appeal to the Supreme Court in *Marex*.

6. In the event, the Supreme Court's decision in *Marex* was delivered on 15 July 2020 ([2020] UKSC 31). I invited the parties to address me on how (if at all) that decision affected their earlier submissions on the reflective loss principle and a further hearing was convened on 14 August 2020 for that purpose.

7. As anticipated, the Supreme Court judgments in *Marex* have clarified the law governing the reflective loss principle and made my task considerably more straightforward. Nevertheless, Mr Smith's application raises some issues which remain challenging and I am grateful to both Mr Sullivan (for Mr Smith) and Mr McCourt Fritz (for the Claimants) for their helpful oral and written submissions.

<u>The Facts</u>

8. My account of the facts is taken from the Amended Particulars of Claim ("APOC"). Mr Sullivan accepted that, for the purposes of determining his client's application, the allegations made in the APOC must be treated as factually correct, although he made it clear that, if the claim were to proceed, Mr Smith would contest many of them including, in particular, the allegation that an oral joint venture agreement was concluded with the Claimants. Mr Smith has yet to file a Defence.

9. Mr Burgess claims to have substantial expertise and long experience in the development of start-up companies in the technology sector. He says that he was introduced to Mr Smith in February 2012 when he (Mr Burgess) was looking for a software developer to assist with the development of a low-cost broadcasting unit. Mr Smith was associated with a company named Simplestream Ltd ("SS Ltd"). Its directors were Mr Smith and Mr Finch. Mr Smith told Mr Burgess that SS Ltd could develop the required software but the company required further investment. As a result Mr Burgess and/or VIIL were invited to invest in the business of SS Ltd. Mr Burgess told Mr Smith that he/VIIL would not themselves invest in SS Ltd but that he could introduce outside investors in the form of a Mr Goddard and a Mr Macpherson and companies associated with them.

10. SS Ltd was owned as to 80% by a Ms Cynthia Franklin and as to 20% by Mr Smith. Another company, TV Player Ltd ("TVP"), was said to be owned as to 75% by Ms Franklin, as to 20% by Mr Smith and as to 5% by Mr Finch. Mr Burgess says that in August 2012 Mr Smith informed him of a dispute between himself and Ms Franklin which had been resolved by an agreement providing for the transfer of all Ms Franklin's shares in SS Ltd and TVP to Mr Smith, thereby giving Mr Smith total, or nearly total, control of the two companies.

11. At this point in the story, paragraphs 17 and 18 of the APOC plead as follows:

> "The broad understanding between Mr Burgess, Mr Smith, Mr Finch, Mr Goddard and Mr Macpherson by about September/October 2012 was that, in addition to his role through VIIL in introducing Mr Goddard and Mr Macpherson as the major capital investors to the businesses of SS Ltd and TVP, Mr Burgess had played, and would continue to play, a substantial role in supporting the development and expansion of the two companies by assisting in their management and generally applying his business expertise. It was intended between the aforesaid parties for the businesses of those two companies to be pursued for the mutual benefit of those participants in the form of a joint venture between them and/or the corporate vehicles connected with them (the "**Joint Venture Business**")….
>
> In about October 2012 Mr Burgess and Mr Smith agreed that BIG as the vehicle of VIIL and Vii should be entitled to 39% of the equity in a company to be called "Simplestream Group" on the basis that Simplestream Group would become the holding company for SS Ltd and TVP. Mr Burgess also suggested that Simplestream Group should hold (i) a stake in another company substantially owned by VIIL and Skoosh called Seven Broadcasting Technologies Ltd ("SBT"), and which owned valuable intellectual property rights which were relevant to the Joint Venture Business…".

Vii was an investment vehicle of Mr Goddard and Mr Macpherson. BIG was incorporated on 15 October 2012 and its shares were held as to 51% by VIIL (which in turn was controlled by Mr Burgess) and as to 49% by Skoosh Investments Ltd (at one time the Fourth Defendant), another Goddard/Macpherson investment vehicle.

12. The alleged oral joint venture agreement is pleaded in paragraphs 23 and 24 of the APOC:

> "23. On 30 October 2012, a meeting took place…which was attended by Mr Smith, Mr Finch, Mr Macpherson, Mr Burgess and Simon Burgess ("**Simon**", who is the son of Mr Burgess) (the "**30/10/12 Meeting**"). At the meeting, the following was orally agreed between (i) BIG (acting by Mr Burgess), (ii) Mr Smith, (iii) Mr Finch, (iv) Mr Burgess, (v) Skoosh (acting by Mr Macpherson) and (vi) Vii (also acting by Mr Macpherson) ("the **Joint Venture Structure Agreement**"):
>
> (a) Mr Smith would procure the incorporation of a public company to be called Simplestream Group PLC, to act as the holding company for the Joint Venture Business which was to be pursued for their mutual benefit.
>
> (b) In order to capitalise that company, part of a loan in the amount of £150,000 previously made by BIG to SS Ltd in connection with a venture called the Ottilus joint venture would, on repayment, be transferred to SS PLC as a loan from BIG (the "**Capitalisation Condition**").

(c) The shares in Simpleshare Group would be allocated as to 39% to BIG, 48% to Mr Smith, 5% to Mr Finch and 8% to a holding company to be nominated by Mr Macpherson of Skoosh.

(d) After the fulfilment of the Capitalisation Condition, Mr Smith would procure the allotment and/or transfer of the entire share capital of each of SS Ltd and TVP to Simplestream Group.

(e) Mr Burgess would procure the transfer of 49% of the shares in SBT to Simplestream Group.

24. Although it was not expressly agreed how soon after the fulfilment of the Capitalisation Condition Mr Smith would procure the transfer of the shares of SS Ltd and TVP to Simplestream Group, on the true construction of the term pleaded at paragraph 23(d) above, Mr Smith was obliged to do so within a reasonable time of the fulfilment of that condition, which in the circumstances it is averred was within six months of the fulfilment of that condition. Alternatively, a term to that effect is to be implied as a matter of business efficacy".

13. From this it can be seen that the essential features of the alleged joint venture agreement (so far as material to Mr Smith's application) were as follows:

(1) A holding company would be incorporated, the shares in which would be held by the participants as stated (in particular, 39% by BIG).

(2) Once the Capitalisation Condition had been fulfilled, Mr Smith (whom Mr Burgess alleges was in a position to procure this) would procure the transfer of SS Ltd and TVP, the operating subsidiaries, to the holding company.

(3) Both BIG and Mr Burgess personally were alleged to be parties to, and therefore *prima facie* entitled to enforce, the agreement.

(4) The holding company (to be named Simplestream Group PLC) was not in existence at the date of the agreement and therefore could not be a party to it.

14. The APOC goes on to allege that the following steps were taken to give effect to the alleged joint venture agreement:

(1) On 20 November 2012, Simplestream Group PLC was incorporated. Its name was subsequently changed in August 2014 to Streaming Investments PLC. This is the Fifth Defendant, SS PLC. From 13 December 2012, the shares in SS PLC were held in the proportions provided for in paragraph 23(c) of the APOC.

(2) On 12 February 2013, BIG fulfilled the Capitalisation Condition.

(3) Prior to 6 March 2013, Mr Burgess procured the transfer of 49% of the shares in SBT to SS PLC.

(4) Between March 2013 and May 2014, Mr Smith and Mr Finch repeatedly represented to Mr Burgess and various third parties that the shares in SS Ltd and TVP had been transferred to SS PLC.

15. However, the Claimants allege that in fact, and in breach of the joint venture agreement, the shares in SS Ltd and TVP were never transferred to SS PLC.

16. On 4 August 2015, SS PLC went into creditors' voluntary liquidation. The Liquidator has, thus far, declined to pursue any claims which SS PLC may have in relation to the joint venture agreement.

17. It is important at this stage to recite in full the allegations of loss pleaded in the APOC and also the principal relief sought. In paragraph 32 of the APOC it is stated as follows:

> "By reason of the aforesaid breaches of the Joint Venture Structure Agreement, BIG has suffered loss by reason of the consequent diminution in the value of its shareholding in SS PLC and loss of dividend income from SS PLC. Further, it was a foreseeable consequence of the aforesaid breaches that (by reason of lacking the revenues they would have supplied) SS PLC subsequently entered insolvent liquidation, such that BIG'S shares in SS PLC lost the entirety of their value".

There is no specific claim that Mr Burgess has suffered loss caused by breach of the joint venture agreement. As for the relief sought, paragraphs 42 and 43 of the APOC state as follows:

> "42. BIG and/or Mr Burgess claim specific performance of the Joint Venture Structure Agreement as regards the transfer to SS PLC of the shares in SS Ltd and TVP, alternatively damages in lieu of specific performance.
>
> 43. Further or alternatively, BIG claims damages for breach of the Joint Venture Structure Agreement in respect of the consequent diminution of the value of its shares in SS PLC (equating to the market value of the shares which BIG should have obtained) and loss of past and future dividend income."

There is a further claim in paragraph 45 of the APOC that, based on certain pleaded representations and detrimental reliance thereon,

> "…it would be unconscionable for Mr Smith or Mr Finch to deny SS PLC's ownership of their shares in SS Ltd or TVP and SS PLC has acquired ownership of such shares by operation of proprietary estoppel and/or a common intention constructive trust enforceable by the Claimants".

18. In relation to the restructuring agreement which is the subject of ground (3) of Mr Smith's strike-out application, the APOC sets up the possibility of an alternative agreement, in effect superseding the joint venture agreement, arising from email communications between Mr Burgess and Mr Smith in May 2014. Terms are said to have been proposed by Mr Burgess but only on the footing that acceptance of them had been confirmed by Skoosh Investments Ltd, the Goddard/Macpherson vehicle. The APOC continues:

> "37. Neither Skoosh (whether through Mr Goddard or Mr Macpherson) nor Mr Smith communicated to VIIL or Mr Burgess their agreement to these terms…
>
> 38. In the premises, the Claimants' primary case is that the matters referred to at paragraphs 33 to 37 above did not give rise to any agreement as to the ownership of the Joint Venture Business capable of effecting the agreed terms of the Joint Venture Structure Agreement. If, however, those matters did give rise to an agreement between BIG, VIIL, Mr Smith, Mr Finch, Mr Burgess, Skoosh and Vii, evidenced by the terms of Mr Smith's email of 19 May 2014 and Mr Burgess's letter of 25 May 2014 (the "**Restructuring Agreement**"), it was thereby agreed among other things that, in consideration for BIG waiving its entitlements under the Joint Venture Structure Agreement, VIIL would become the owner of 19.5% of the shares in SS Ltd…".

The relief sought in respect of this claim is set out in paragraphs 46 and 47 of the APOC:

> "46. Alternatively, VIIL and/or Mr Burgess claim specific performance of the Restructuring Agreement as regards the transfer to VIIL of shares in SS Ltd and the reconstitution of TVP as a 100% subsidiary of SS Ltd, alternatively damages in lieu of specific performance.
>
> 47. Further or alternatively, VIIL claims damages for breach of the Restructuring Agreement based on the market value of the shares which VIIL should have obtained and loss of past and future dividend income".

The Reflective Loss Principle

19. In his initial Skeleton Argument for the hearing in November 2019, Mr Sullivan argued for the following core principle:

> "The rule against reflective loss prevents anyone other than a company from bringing claims for losses which are the same as or mirror losses suffered by that company".

Whether or not that broad formulation was supported by the authorities at that time, it is now clear that it does not survive the decision of the Supreme Court in *Marex*. Mr Smith has nevertheless argued that the principles endorsed by the Supreme Court provide a sufficient basis for his strike-out application to succeed in relation both to BIG and to Mr Burgess. It is to those principles that I now turn.

20. In terms of the actual decision, *Marex* concerned the question whether the reflective loss principle barred a claim by a creditor of the loss-suffering company who was not also a shareholder. The 7-Judge panel held unanimously that it did not. However, in terms of the reasoning in support of this decision, the Court was divided 4:3. The majority (for whom the lead judgment was delivered by Lord Reed with an additional concurring judgment being delivered by Lord Hodge) recognised the existence of a narrow rule of company law which, in certain circumstances, precluded a claim by a shareholder in the loss-suffering company. That rule did not extend to bar claims by creditors. The minority (for whom the lead judgment was delivered by Lord Sales) held that the entire reflective loss principle, in the sense of a principle that barred claims as a matter of law, was misconceived and considered that the danger of double recovery, which is inherent in concurrent claims against the same defendant, could and should be dealt with by means of other substantive and procedural techniques, such as subrogation and case management, and was pre-eminently a matter for the trial judge. Strictly speaking, the application of the reflective loss principle to claims by shareholders was not a matter for decision in *Marex*. Nevertheless, all members of the Court made it clear that it was necessary for them to review the scope of the principle in its entirety in order to decide whether it should be extended to creditors: see, in particular, per Lord Reed at [13] and per Lord Sales at [114]-[115]. It follows that the reasoning of the majority in *Marex* represents the law which must now be applied to all attempts to strike out claims based on reflective loss, whether those claims are by shareholders or others.

21. Lord Reed began his judgment by going back to first principles. At [2]-[3], he explained that

> "It is not uncommon for two persons, A and B, to suffer loss as a result of the conduct of a third person, C. If that conduct was in breach of an obligation owed by C to A, then A will in principle have a cause of action against C. If the conduct was also in breach of an obligation owed by C to B, then B will also have a cause of action against C. A and B are both at liberty to sue C whenever they please, subject to rules as to limitation and prescription, and C is normally liable to compensate them both for the loss which they have suffered…
>
> The position can become more complicated where A and B have concurrent claims in respect of losses which are inter-related in such a way that the payment by C to one of them will have the practical effect of remedying the loss suffered by the other".

He went on to observe that the law will not allow double recovery against C in such situations but he continued at [4]-[5] and [7]:

> "The principle that double recovery should be avoided does not prevent a claimant from bringing proceedings for the recovery of his loss. But the court will have to consider how to avoid double recovery in situations where the issue is properly before it. Procedurally, that may occur in a number of ways…

> The principle that double recovery should be avoided does not deflect the law from compensating both claimants, but affects the remedial route by which the law achieves that objective. There are a number of ways in which the law can avoid double recovery, or double proof in insolvency, where concurrent rights of recovery might otherwise have that result…
>
> There are also circumstances in which the law finds other means of avoiding double recovery, such as subrogation…or the imposition on one claimant of an obligation to account to the other out of the damages which the former has received…The most suitable approach to adopt in a particular case will depend upon its circumstances".

Lord Reed went on to identify the issue to be decided in *Marex* at [8]:

> "This appeal is concerned with a particular type of situation in which two persons, A and B, suffer loss as a result of the conduct of a third person, C. The situation in question is one in which A is a company, B is a creditor of that company, and B's loss is consequential upon the loss suffered by A, because C's conduct has rendered A insolvent and unable to pay its debt to B".

22. I will set out in full [9]-[10] of Lord Reed's judgment as those paragraphs identify what he considered to be the proper limits of the reflective loss principle (or, rather, "the rule in *Prudential*" as he preferred to call it):

> "9. The fact that a claim lies at the instance of a company rather than a natural person, or some other kind of legal entity, does not in itself affect the claimant's entitlement to be compensated for wrongs done to it. Nor does it usually affect the rights of other persons, legal or natural, with concurrent claims. There is, however, one highly specific exception to that general rule. It was decided in the case of *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204 that a shareholder cannot bring a claim in respect of a diminution in the value of his shareholding, or a reduction in the distributions which he receives by virtue of his shareholding, which is merely the result of a loss suffered by the company in consequence of a wrong done to it by the defendant, even if the defendant's conduct also involved the commission of a wrong against the shareholder, and even if no proceedings have been brought by the company. As appears from that summary, the decision in *Prudential* established a rule of company law, applying specifically to companies and their shareholders in the particular circumstances described, and having no wider ambit.
>
> 10. The rule in *Prudential*, as I shall refer to it, is distinct from the general principle of the law of damages that double recovery should be avoided. In particular, one consequence of the rule is that, where it applies, the shareholder's claim against the wrongdoer is excluded even if the company does not pursue its own right of action, and there is accordingly no risk of double recovery. That aspect of the rule is understandable on the basis of the reasoning in *Prudential*, since its rationale is that, where it applies, the shareholder does not suffer a loss which is recognised in law as having an existence distinct from the company's loss. On that basis, a claim by the shareholder is barred by the principle of company law known as the rule in *Foss v Harbottle* (1843) 2 Hare 461: a rule which (put shortly) states that the only person who can seek relief for an injury done to a company, where the company has a cause of action, is the company itself".

23. Lord Reed went on to examine the *Prudential* case in detail. At [35], he said this:

> "In *Prudential*, the court answered that question [*viz*. whether a minority shareholder should be able to pursue his claim if the majority shareholders, without abusing their powers, decide not to pursue the company's claim] in the negative, stating at p.224 that the rule in *Foss v Harbottle* would be subverted if the shareholder could pursue a personal action. The rule, as stated in *Edwards v Halliwell* [1950] 2 All ER 1064 and restated in *Prudential* at pp.210-211, has two aspects. The first is that "the proper plaintiff in an action in respect of a wrong alleged to be done to a corporation is, *prima facie*, the corporation". As was

explained in *Prudential* at p.210, one of the consequences of that aspect of the rule is that a shareholder cannot, as a general rule, bring an action against a wrongdoer to recover damages or secure other relief for an injury done to the company. The second aspect of the rule is that "[w]here the alleged wrong is a transaction which might be made binding on the corporation and on all its members by a simple majority of the members, no individual member of the corporation is allowed to maintain an action in respect of that matter because, if the majority confirms the transaction, *cadit quaestio* [the question falls]; or, if the majority challenges the transaction, there is no valid reason why the company should not sue". This second aspect of the rule reflects the fact that the management of a company's affairs is entrusted to the decision-making organs established by its articles of association, subject to the exceptional remedies mentioned in para 34 above. When a shareholder invests in a company, he therefore entrusts the company – ultimately, a majority of the members voting in a general meeting – with the right to decide how his investment is to be protected. As the court stated in *Prudential* at p.224:

> "When the shareholder acquires a share, he accepts the fact that the value of his investment follows the fortunes of the company and that he can only exercise his influence over the fortunes of the company by the exercise of his voting rights in general meeting"."

24. At [39], Lord Reed summarised the effect of *Prudential* as follows:

> "In summary, therefore, *Prudential* decided that a diminution in the value of a shareholding or in distributions to shareholders, which is merely the result of a loss suffered by the company in consequence of a wrong done to it by the defendant, is not in the eyes of the law damage which is separate and distinct from the damage suffered by the company, and is therefore not recoverable. Where there is no recoverable loss, it follows that the shareholder cannot bring a claim, whether or not the company's cause of action is pursued. The decision had no application to losses suffered by a shareholder which were distinct from the company's loss or to situations where the company had no cause of action."

25. At [40]-[67], Lord Reed analysed the House of Lords decision in *Johnson v Gore Wood & Co* [2002] 2 AC 1, which had been interpreted in later cases as establishing a "reflective loss" principle of wider scope than the rule in *Prudential*. At [48], he referred to a passage in Lord Bingham's speech in *Johnson* and explained it in a manner which was relied on particularly by Mr McCourt Fritz in argument before me:

> "Lord Bingham went on to explain how courts should apply the relevant principles:
>
> > "On the one hand the court must respect the principle of company autonomy, ensure that the company's creditors are not prejudiced by the action of individual shareholders and ensure that a party does not recover compensation for a loss which another party has suffered. On the other, the court must be astute to ensure that the party who has in fact suffered loss is not arbitrarily denied fair compensation". (p.36).
>
> The aims identified in the first sentence – respecting the principle of company autonomy, ensuring that the company's creditors are not prejudiced by the action of individual shareholders, and ensuring that a party does not recover compensation for a loss which another party has suffered – are all objectives or consequences of the rule in *Foss v Harbottle*, and are consistent with the decision in *Prudential*. The second sentence reflects the fact that deciding whether a loss falls within the scope of the rule may call for the exercise of judgment".

26. At [51], Lord Reed again emphasised the fact that the rule in *Prudential* is an aspect of company law:

> "As explained at para 33 above, the principle that double recovery should be avoided is not in itself a satisfactory explanation of the rule in *Prudential*. As was explained at paras 34-37 above, the unique position in which a shareholder stands in relation to his company, reflected in the rule in *Foss v Harbottle*, is a critical part of the explanation".

27. At [52]-[54], Lord Reed dealt with the suggestion that the rule in *Prudential* was concerned only with claims for damages and was therefore inapplicable to claims for other relief. Since, as I have mentioned, the principal relief sought in the present case by both BIG and Mr Burgess is specific performance of the joint venture agreement, I will set out those paragraphs in full:

> "52. One problem with reasoning based on the avoidance of double recovery is that the principle is one of the law of damages. It does not deny the existence of the shareholder's loss, as the rule in *Prudential* does, where the loss falls within its ambit, but on the contrary is premised on the recognition of that loss. Applying an approach based on the avoidance of double recovery, it is therefore possible for a shareholder to bring a personal action based on a loss which would fall within the ambit of the decision in *Prudential*, and to obtain a remedy which that decision would have barred to him, provided that the relief which he seeks is not an award of damages in his own favour. This device has been exploited in a number of cases subsequent to *Johnson*, in ways which circumvent the rule in *Foss v Harbottle*: a rule which is not confined to actions for damages but also applies to other remedies, as explained at para 35 above.
>
> 53. For example, in *Peak Hotels and Resorts Ltd v Tarek Investments Ltd* [2015] EWHC 3048 (Ch), the judge considered it arguable that the "reflective loss" principle, as explained by Lord Millett in *Johnson*, did not bar proceedings by a shareholder, who complained of a fall in the value of his shares resulting from loss suffered by the company in respect of which the company had its own cause of action, where the relief that he sought was not damages but a mandatory injunction requiring the defendant to restore property to the company. A similar view was taken in *Latin American Investments Ltd v Maroil Trading Inc* [2017] EWHC 1254 (Comm), where the shareholder complained of a fall in the value of its shares resulting from a breach of obligations owed to the company, which also involved a breach of contractual obligations owed to itself. It responded to the argument that its claim was for "reflective loss" by seeking an order for the payment of the contractual damages not to itself but to the company. A further example is *Xie Zhikun v Xio GP Ltd*, Cayman Islands Court of Appeal, unreported, 14 November 2018. Summarising complex facts, in that case the shareholder applied for a *quia timet* injunction to prevent the breach of fiduciary duties owed both to the company and to himself, which would cause the company to suffer loss, and would consequently affect the value of his interest in it. Sir Bernard Rix JA observed at para 66 that he did not see "how, other than perhaps in terms of pure formalism…the present case differs from…a derivative action".
>
> 54. Those cases demonstrate how right the Court of Appeal was in *Prudential* in considering that the rule established in that case, based on the absence of separate and distinct loss, was necessary in order to avoid the circumvention of the rule in *Foss v Harbottle*. The exception to that rule is the derivative action. Whether a shareholder can bring such an action depends on whether the relevant conditions are satisfied".

28. Lord Reed's conclusions in respect of *Johnson* are set out at [67]:

> "In summary, *Johnson* gives authoritative support for the decision in *Prudential* that a shareholder is normally unable to sue for the recovery of a diminution in the value of his shareholding or in the distributions he receives as a shareholder, which flows from loss suffered by the company, for the recovery of which it has a cause of action, even if it has declined or failed to make good that loss. Lord Bingham's speech is consistent with the reasoning in *Prudential*. On the other hand, the reasoning in the other speeches, especially that of Lord Millett, departs from the reasoning in *Prudential* and should not be followed".

So, one sees from this that it is only Lord Bingham's speech which survives *Marex*. Further, at [89] he said this:

> "I would therefore reaffirm the approach adopted in *Prudential* and by Lord Bingham in *Johnson*, and depart from the reasoning in the other speeches in that case, and in later authorities, so far as it is inconsistent with the foregoing. It follows that *Giles v Rhind*, *Perry v Day* and *Gardner v Parker* were wrongly decided. The rule in *Prudential* is limited to claims by shareholders that, as a result of actionable loss suffered by their company, the value of their shares, or of the distributions they receive as shareholders, has been diminished. Other claims, whether by shareholders or anyone else, should be dealt with in the ordinary way".

29. It is perhaps worth spelling out at this stage the salient features of the rule in *Prudential*, as explained by Lord Reed:

(1) It is a "rule of company law" applying to companies and their shareholders with "no wider ambit".

(2) It is a "highly specific exception" to the general rule that concurrent claimants may all pursue their own individual claims against the wrongdoer.

(3) It requires, for its application, that the shareholder's claim is for reflective loss in the sense that it is "in respect of a diminution in the value of his shareholding, or a reduction in the distributions which he receives by virtue of his shareholding, which is merely the result of a loss suffered by the company in consequence of a wrong done to it by the defendant".

(4) It only applies where the company has a cause of action against the wrongdoer. This, of course, is axiomatic as the rule is one which is concerned with *concurrent* claims against the wrongdoer.

(5) The rule applies as a matter of law: the effect of the rule in *Prudential* is that "the shareholder does not suffer a loss which is recognised in law as having an existence distinct from the company's loss". It follows that, when the rule is invoked, the Court is not exercising a discretion and is not evaluating the risk of double recovery. The rule either applies, in which case the shareholder's claim is barred, or it does not, in which case the concurrent claimant is free to proceed.

(6) The rule is not confined to claims for damages; it applies irrespective of the nature of the remedy sought by the shareholder claimant. This is necessary to prevent circumvention of the rule in *Foss v Harbottle*.

30. In his concurring judgment, Lord Hodge was at pains to emphasise that the so-called reflective loss principle was in truth a principle of company law. At [95] he said this:

> "I wish to add a few comments about the central role of company law in the Court of Appeal's judgment in the *Prudential* case which is the *fons et origo* of the principle. In my view the problems and uncertainties which have emerged in the law have arisen because the "principle" of reflective loss has broken from its moorings in company law".

31. At [99]-[100], Lord Hodge expanded on this:

> "I agree with Lord Reed (para 28 above) that what the Court [i.e. in *Prudential*] was saying is that where a company suffers a loss as a result of wrongdoing and that loss is reflected to some extent in a fall in the value of its shares or in its distributions, the fall in the share value or in the distributions is not a loss which the law recognises as being separate and distinct from the loss sustained by the company.
>
> That is the full extent of the "principle" of reflective loss which the *Prudential* case established. It was not articulated as a general principle to be applied in other contexts; it is a rule of company law arising from the nature of the shareholder's investment and participation in a limited company and excludes a shareholder's claim made in its capacity as shareholder."

32. At [102]-[107], Lord Hodge enumerated the advantages and disadvantages of investment in a company by means of a shareholding and concluded as follows at [108]:

> "The characteristics of a shareholding as a means of participation in a company's enterprise which are most directly relevant in the context of this appeal are the default rule of equality among shareholders and the postponement of the shareholders' entitlements on a winding up to the claims of the company's creditors. Against this background, the law's refusal to recognise the diminution in value of a shareholding or the reduction or loss of a distribution, which is the consequence of the company suffering loss as the result of wrongdoing against it, as being separate and distinct from the company's loss, is a principled development of company law. It excludes the possibility of double recovery. It avoids a scramble between shareholders to establish their private claims against a wrongdoer in case the wrongdoer does not have sufficient accessible assets to meet those claims. It thereby upholds the default position of equality among shareholders in their participation in the company's enterprise: each shareholder's investment "follows the fortunes of the company". It maintains the rights of the majority of the shareholders, as the Court of Appeal stated in *Prudential* at p.224. And it preserves the interests of the company's creditors by maintaining the priority of their claims over those of the shareholders in the event of a winding up".

<u>The Parties' Submissions</u>

<u>Ground (2): Reflective Loss/The Rule in *Prudential*</u>

33. Mr Sullivan submits that BIG's claim falls squarely within the scope of the rule in *Prudential*, as explained by Lord Reed in *Marex*. The claim is in respect of a loss suffered *by SS PLC*: it is a claim to enforce the joint venture agreement and, in particular, Mr Smith's alleged obligation to transfer the shares in SS Ltd and TVP to SS PLC. BIG is a shareholder in SS PLC and its loss is merely reflective of that suffered by SS PLC, as is apparent from paragraphs 32 and 43 of the APOC. Since, on the facts pleaded in the APOC, SS PLC and BIG have concurrent claims against Mr Smith, BIG's claim is barred by the rule in *Prudential*. This extends both to the claim for damages and to the claims for specific

performance and relief based on proprietary estoppel and/or constructive trust, as demonstrated by *Marex* at [52]-[54].

34. Mr Sullivan's argument that SS PLC and BIG have concurrent claims for the same loss against Mr Smith requires some elaboration. I have already explained the nature of BIG's claim. Mr Sullivan submitted that SS PLC itself also had a cause of action against Mr Smith either (1) under the joint venture agreement or (2) for breach of fiduciary duty.

35. In relation to (1), it is not alleged in paragraph 23 of the APOC that SS PLC was a party to the joint venture agreement and, indeed, that company was not incorporated until after the agreement was made. However, Mr Sullivan argues that the effect of section 1 of the Contracts (Rights of Third Parties) Act 1999 ("the 1999 Act") is that, as a matter of law, SS PLC is entitled to enforce the joint venture agreement even though not a party to it. Section 1 provides, relevantly, as follows:

> "1. **Right of third party to enforce contractual term.**
>
> (1) Subject to the provisions of this Act, a person who is not a party to a contract (a "third party") may in his own right enforce a term of the contract if –
>
> (a) the contract expressly provides that he may, or
>
> (b) subject to subsection (2), the term purports to confer a benefit on him.
>
> (2) Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.
>
> (3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into…
>
> (5) For the purpose of exercising his right to enforce a term of the contract, there shall be available to the third party any remedy that would have been available to him in an action for breach of contract if he had been a party to the contract (and the rules relating to damages, injunctions, specific performance and other relief shall apply accordingly)".

Mr Sullivan relies on s.1(1)(b) and submits that the terms of the joint venture agreement which provide for the transfer of shares in SS Ltd and TVP to SS PLC plainly "purport to confer a benefit" on SS PLC. The fact that SS PLC was not in existence at the date of the contract is explicitly catered for in s.1(3) and the requirement for express identification of SS PLC in the contract is satisfied: see paragraph 23(a) of the APOC.

36. In relation to alternative (2), Mr Sullivan argues that, on the facts alleged in the APOC, Mr Smith's failure to procure the transfer of the shares in SS Ltd and TVP to SS PLC was inevitably in breach of his fiduciary duties as a director of SS PLC, a breach which is actionable at the suit of SS PLC. I note here that it appears to be common ground that Mr Smith was a director of SS PLC in the period following the alleged fulfilment of the Capitalisation Condition, although that fact is not explicitly pleaded in the APOC.

37. As for the claim by Mr Burgess, Mr Sullivan submits that the rule in *Prudential* also applies. Mr Burgess is a shareholder in VIIL which is a shareholder in BIG which is a shareholder in SS PLC. Mr Burgess does not expressly plead any loss but it follows from the nature of the Claimants' pleaded case that his only loss is a reduction in the value of his shareholding in VIIL consequent upon a reduction in the value of VIIL's shareholding in BIG which in turn is consequent upon a reduction in the value of BIG's shareholding in SS PLC. In his oral submissions, Mr Sullivan put it that Mr Burgess's claim was "barred by *Prudential* three times over".

38. Finally, Mr Sullivan submitted that, even if the rule in *Prudential* did not apply, the claims for specific performance of the joint venture agreement can and should be struck out at this stage as being hopeless. Mr Sullivan suggested two principal reasons for this: (1) it would be impossible for Mr Smith to comply with an order for specific performance because he presently owns only 39.71% of the shares in SS Ltd and 20.17% of the shares in TVP; (2) specific performance was not an appropriate remedy because an award of damages would provide adequate compensation for any breach, the claim had been unduly delayed and an order for specific performance in the current circumstances would be inequitable.

39. Mr McCourt Fritz submitted that the strike-out application was entirely without foundation. Although he accepted that BIG's pleaded claim for damages in paragraphs 32 and 43 of the APOC was, in terms, a claim for reflective loss, he argued that the rule in *Prudential* did not apply to BIG's claim for the following three reasons.

40. First, with reference to Lord Reed's judgment in *Marex* at [9], the diminution in value of BIG's shareholding in SS PLC was not "merely the result of a loss suffered by the company in consequence of a wrong done to it by the defendant". Here, BIG's claim is based on its contract with Mr Smith and not on any loss to SS PLC, which was not a party to that contract. Mr McCourt Fritz went on to argue that, for the purposes of the rule in *Prudential*, contractual claims are a "class apart" if the relevant company is not a party to the contract. He relied in particular on the decision of the Court of Appeal in *George*

Fischer (Great Britain) Ltd v Multi-Construction Ltd [1995] BCC 310 and its approval by the Supreme Court in *Marex*.

41. Secondly, the rule in *Prudential* does not apply to claims for specific performance. A claim for specific performance is not a claim directly or indirectly for compensation but a claim to vindicate the rights of the promisee. Consequently, such a claim is not in respect of a diminution in the value of a shareholding or a reduction in distributions, as required by Lord Reed at [9]. In this connection, Mr McCourt Fritz argued that the decision of Teare J in *Latin American Investments Ltd v Maroil Trading Inc*, to the effect that it was arguable that the rule did not apply to claims for specific performance, in fact survives the analysis at [52]-[54] of Lord Reed's judgment.

42. Thirdly, SS PLC has no independent cause of action against Mr Smith. Accordingly, there are no concurrent claims and the rule in *Prudential* has no application. In this regard, Mr McCourt Fritz submitted that SS PLC has no contractual claim by virtue of the 1999 Act, for three reasons:

   (a) s.(1)(b) is not satisfied because the contract did not "purport to confer a benefit on" SS PLC. The benefit to SS PLC was merely incidental: SS PLC was simply the vehicle for the joint venture. Alternatively, for the same reason, s.1(2) applies: "on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party".

   (b) Section 4 provides that "section 1 does not affect any right of the promisee to enforce any term of the contract". Here, the "promisee" is BIG (and/or Mr Burgess). Since, on Mr Sullivan's case, it is section 1 which confers a concurrent claim on SS PLC and it is that which enables the rule in *Prudential* to be invoked (and thereby bar BIG's claim under the contract), the effect of section 4 must be to override the rule in *Prudential* itself, so far as it relates to BIG's claim.

   (c) Section 5 provides relevantly as follows:

> "Where under section 1 a term of a contract is enforceable by a third party, and the promisee has recovered from the promisor a sum in respect of –
>
> (a) the third party's loss in respect of the term…
>
> then, in any proceedings brought in reliance on that section by the third party, the court or arbitral tribunal shall reduce any award to the third party to such extent as it thinks appropriate to take account of the sum recovered by the promisee".

On day 1 of the hearing, Mr McCourt Fritz argued that section 5 precludes any possibility of double recovery in relation to concurrent claims under the joint venture agreement by BIG and SS PLC and that, accordingly, the risk of double recovery cannot justify the application of the rule in *Prudential* in the present case. To be fair to Mr McCourt Fritz, this submission was advanced before the Supreme Court delivered judgment in *Marex*. Since it is now clear that the prevention of double recovery is *not* the rationale for the rule (see per Lord Reed at [51]-[52]), this submission falls away and I need say no more about it.

So far as concerns the suggested alternative claim against Mr Smith for breach of fiduciary duty, Mr McCourt Fritz complained that this was mere assertion by Mr Sullivan and was unsupported by any pleading (or even draft pleading) or any witness statement signed by Mr Smith himself. The suggested claim raised issues of fact which must go to trial.

43. As for the claim by Mr Burgess, Mr McCourt Fritz submitted that the Supreme Court in *Marex* had made it crystal clear that the rule in *Prudential* was applicable only to concurrent claims by a company and by a shareholder *in that company*. Whilst BIG is a shareholder in SS PLC, Mr Burgess is not and never has been. Accordingly, the rule cannot apply to bar Mr Burgess's claim.

44. In relation to Mr Sullivan's suggestion that the claims for specific performance were obviously hopeless, Mr McCourt Fritz contended that the matters relied on were matters to be assessed by the trial judge, if liability is established, and were not suitable for decision on a strike-out/reverse summary judgment application.

45. Taking the application as a whole, Mr McCourt Fritz naturally, and correctly, reminded me of the well-known principles that such an application is not the correct forum for deciding disputed issues of fact and that, in order to dismiss the application, I need only be satisfied that the claims have a realistic, as opposed to fanciful, prospect of success. However, Mr McCourt Fritz went further than this and submitted, in effect, that the application of the rule in *Prudential* is inherently unsuitable for determination on a strike-out/reverse summary judgment application. The application of the rule is a matter for the trial judge to decide because it involves something akin to the exercise of a discretion. It was in connection with this submission that Mr McCourt Fritz relied on [48] in Lord Reed's judgment (set out in paragraph 25 above) and, specifically, the statement that "deciding whether a loss falls within the scope of the rule may call for the exercise of judgment".

Ground (3): The Restructuring Agreement

46. The arguments in relation to this aspect of the application can be shortly stated. Mr Sullivan submits that the APOC simply does not plead a maintainable cause of action. Paragraph 37 of the APOC positively asserts that the new terms were *not* agreed by Skoosh or Mr Smith and accordingly there can have been no enforceable alternative agreement. This is recognised, indeed asserted, in paragraph 38 of the APOC. In paragraph 36 of his witness statement in support of the application, Mr Nugent Smith (Mr Smith's solicitor) states: "Mr Smith agrees with the Claimants' primary case that no Restructuring Agreement was concluded". This part of the pleading, therefore, serves no useful purpose and should be struck out. In response, Mr McCourt Fritz referred to the explanation given in paragraphs 18 and 61 of the witness statement of the Claimants' solicitor, Mr Wass:

> "In drafting the Particulars of Claim, the Claimants sought to cater for the prospect that the Defendants may assert that these events gave rise to a restructured joint venture business (the "Restructuring Agreement"), pursuant to which the Claimants' interest in SS PLC was reduced. The Claimants' primary case is that there was no Restructuring Agreement…
>
> Our clients' primary case is that there was no Restructuring Agreement. As previously explained in para 18 of this statement, the inclusion of the Restructuring Agreement in the Particulars of Claim was in anticipation that the Defendants may assert that the relevant events gave rise to a restructured joint venture vehicle".

In view of this, Mr McCourt Fritz argued that the Claimants should be permitted to maintain their current alternative case at least until Mr Smith and Mr Finch plead their Defences, which has yet to happen.

Analysis

Ground (2): Reflective Loss/The Rule in *Prudential*

47. Since the rule in *Prudential* is concerned only with concurrent claims, one of which is vested in a company, it is logical to determine first whether SS PLC has a cause of action arising out of the joint venture agreement. If it does not, Mr Smith's application must fail.

48. I will consider first Mr Sullivan's submission that SS PLC has a contractual claim to enforce the joint venture agreement by virtue of the 1999 Act. The critical phrase in s.1(1)(b), "purports to confer a benefit on", consists of ordinary English words. In construing a statute, just as in construing a contract, ordinary English words should *prima facie* be given their ordinary and natural meaning. The *Shorter Oxford English Dictionary* defines "confer" as meaning "give, grant or bestow"; "benefit" as "favour, gift or advantage"; and "purport to" as "signify, profess to or appear ostensibly to". Paragraph 23(d) of the APOC pleads that one of the terms of the joint venture agreement was that, after fulfilment of

the Capitalisation Condition, Mr Smith would procure the transfer of the entire share capital of SS Ltd and TVP to SS PLC. It is apparent from paragraph 23(a) of the APOC, which refers to SS PLC as "the holding company for the Joint Venture Business", that the shares in the operating subsidiaries were to be held by SS PLC beneficially. In my judgment, it is clear that this term appears ostensibly to bestow an advantage on SS PLC and accordingly satisfies the requirements of s.(1)(b).

49. In this connection, Counsel referred me to the decision of Christopher Clarke J in *Dolphin Maritime & Aviation Services Ltd v Sveriges Angartygs Assurans Forening* [2009] EWHC 716 (Comm). In that case, a contractual letter of undertaking given by a P&I Club in favour of cargo interests provided for the Club to pay any amounts due from shipowners pursuant to a judgment "to [*the claimant*] on your behalf or to any solicitors you may appoint". The Claimant acted as a recovery agent for the cargo interests and argued that it was entitled to enforce payment to itself under the letter of undertaking by virtue of the 1999 Act. It contended that s.1(1)(b) was satisfied because the payment provision would give the Claimant security for payment of its commission and that such payment arrangements were commonly agreed between recovery agents and their clients for that very reason. The Judge rejected the Claimant's argument. He summarised his reasons at [75]:

> "In my judgment the term in question does not purport to confer a benefit on Dolphin in the sense meant by section 1(1)(b) of the 1999 Act. The provision in the LOU that payment should be made to Dolphin or underwriters' solicitors was an agreement as to the means by which the Club's obligation to underwriters was to be discharged. It was not an indication that the agent payee was an intended beneficiary of the promise. The intended beneficiaries were the underwriters on whose behalf the payment was to be received".

50. This seems to me, with respect, to be plainly correct. However, it was preceded by a paragraph which, if interpreted in a certain way, is more problematic. At [74], the Judge said this:

> "A contract does not purport to confer a benefit on a third party simply because the position of that third party will be improved if the contract is performed. The reference in the section to the term purporting to "confer" a benefit seems to me to connote that the language used by the parties shows that one of the purposes of their bargain (rather than one of its incidental effects if performed) was to benefit the third party".

This led both Counsel before me to frame their submissions in respect of the joint venture agreement in terms of whether the benefit to SS PLC represented by the transfer to it of the shares in SS Ltd and TVP was "one of the purposes of [*the parties'*] bargain" or merely an "incidental effect" of it. Thus, Mr McCourt Fritz submitted that the "focus" of the joint venture agreement was the organisation of the shareholding in SS PLC and that SS PLC was "simply" the vehicle for the joint venture. To the extent that [74] of *Dolphin Maritime* suggests a test based on a hierarchy of contractual benefit, I do not accept that the statute requires this. It seems to me that the Claimant in *Dolphin Maritime* failed

because the relevant contractual term did not "purport" to confer *any* benefit on it: it merely provided for payment to the Claimant *qua* agent for the cargo interests. Any benefit derived by the Claimant from that term was the result of factors *extraneous to* the relevant contractual term, in particular the separate agency terms agreed between the Claimant and its clients. I consider that, in context, this is all that Christopher Clarke J was saying in [74] of his judgment. But if I am wrong about that, and he was intending to suggest that s.1(1)(b) distinguishes between (for the want of a better term) major and minor benefits accruing to a third party *under the relevant contractual term*, then I would respectfully disagree. I can see no basis for such a distinction in the wording of s.1(1)(b) and it would introduce an unwarranted gloss on the statutory wording. The subsection requires the conferring of "a benefit", which surely means *any* benefit.

51. In an earlier case, *Prudential Assurance Co Ltd v Ayres* [2007] EWHC 775 (Ch), Lindsay J said this about the wording of s.(1)(1)b) at [28]:

> "It thus seems to me that section 1(1)(b) is satisfied if on a true construction of the term in question its sense has the effect of conferring a benefit on the third party in question. There is within section 1(1)(b) no requirement that the benefit on the third party shall be the predominant purpose or intent behind the term…".

I agree. The statutory test is concerned with the apparent effect of the relevant contractual term ("the term purports to…") and that effect can only be determined by construing the contract in accordance with established principles. To investigate whether the conferring of a benefit on the third party is one of the "purposes" of the contracting parties' bargain is, I think, to risk undermining the correct approach and, possibly, suggesting that subjective intentions may be relevant when they are plainly not. I should add that Lindsay J's decision was reversed by the Court of Appeal but only on the footing that he had misconstrued the relevant contract which in truth conferred no benefit at all on the third party. There was no adverse comment on [28] of his judgment.

52. My decision that s.1(1)(b) is satisfied is, of course, subject to consideration of s.1(2). This subsection disapplies s.1(1)(b) if "on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party". The structure of section 1 as a whole suggests that s.1(1)(b), if satisfied, creates a rebuttable presumption of enforceability by the third party so that the onus of satisfying the Court that the contracting parties, as a matter of construction, did not intend this rests on the party denying enforceability. That was certainly the intention of the Law Commission in its Report on Privity of Contract: Contracts for the Benefit of Third Parties (No 242, July 1996) which led to the 1999 Act (see paragraphs 7.17 and 7.18(iii)) and was so held by the Court of Appeal in *Laemthong International Lines Co Ltd v Abdullah Mohammed Fahem* [2005] EWCA Civ 519 at [22],

[49]. I should also pause to observe that references to the "proper construction" of a contract usually concern contracts in writing. The alleged joint venture agreement is an oral agreement. Neither Counsel suggested that this affected the application of the 1999 Act, rightly in my view. The word "contract" is undefined in the Act (and so *prima facie* includes both oral and written contracts) and section 6 lists a number of exceptions, which do not include oral contracts. Whether a contract is oral or written is, for present purposes, merely a matter of evidence. A term of an oral contract, such as those pleaded in paragraph 23 of the APOC, may be "construed" in just the same way as terms of a written contract. I do not see anything in the contractual terms pleaded in paragraph 23 of the APOC which suggests that the contracting parties did *not* intend the transfer of shares in SS Ltd and TVP to be enforceable by SS PLC. Indeed, the very fact that SS PLC was to be the holding company for the Joint Venture Business seems to me to support the contrary conclusion.

53. Mr McCourt Fritz's principal argument in relation to the 1999 Act was based on section 4. I have summarised the argument in paragraph 42(b) above. The argument is ingenious but I cannot accept it. The obvious purpose, and effect, of section 4 is to make it clear that the right to enforce conferred on the third party by section 1 is additional to any right of enforcement which the promisee may have. That is confirmed by paragraphs 11.1-11.4 of the Law Commission Report and is reflected in the Explanatory Notes published with the 1999 Act. There is no reason to think that, in passing section 4, Parliament had in mind the rule in *Prudential* which would only be relevant in the specific case where the third party was a company and the promisee was a shareholder in that company and no reason at all to conclude that Parliament intended, by section 4, to override the rule where it would otherwise be applicable. Therefore, the "right" of the promisee to enforce a contract which is preserved by section 4 can only be a right which is subject to generally applicable legal principles, including (where applicable) the rule in *Prudential*.

54. Since I have concluded that SS PLC does have a concurrent claim to enforce the joint venture agreement, it is not strictly necessary to deal with Mr Sullivan's alternative argument based on breach of fiduciary duty. However, in the context of a strike-out application, I would not have acceded to that argument. Whereas SS PLC's entitlement to sue under the 1999 Act is a matter of law following inexorably from the matters pleaded in paragraph 23 of the APOC, any claim which SS PLC may have against Mr Smith for breach of his fiduciary duty as a director raises questions of fact which form no part of the Claimants' case. As I have already observed, the fact that Mr Smith was a director of SS PLC in the period following the alleged fulfilment of the Capitalisation Condition is not explicitly pleaded in the APOC. I agree with Mr McCourt Fritz that a prerequisite for running a case based on breach of fiduciary duty would be a properly pleaded Defence, supported by a Statement of Truth

from Mr Smith, alleging his own breach of fiduciary duty owed to SS PLC (albeit on the footing that his primary case on the facts, namely that there was no concluded joint venture agreement, fails). There is no such pleading. Even then, it might raise disputed questions of fact which would require resolution at a trial.

55. Having concluded that SS PLC does have an independent cause of action to enforce the joint venture agreement, it is now necessary to deal with the other two arguments raised by Mr McCourt Fritz to support his contention that the rule in *Prudential* does not apply to BIG's claim (as to which, see paragraphs 40 and 41 above).

56. The first such argument is that the diminution in value of BIG's shareholding in SS PLC was not (in Lord Reed's words at [9] of his judgment in *Marex*) "merely the result of a loss suffered by the company in consequence of a wrong done to it by the defendant" because that diminution in value resulted from breach of a contract to which BIG and Mr Smith were parties but SS PLC was not. However, this argument seems to me to be based on a misreading of [9] in Lord Reed's judgment. The phrase quoted is intended to capture the reflective nature of the shareholder's loss. It cannot have been intended to suggest that the loss must have resulted "merely" from loss actionable at the suit of the company. Otherwise, the shareholder would have no cause of action, there would be no concurrent claims and the parties would not be in *Prudential* "territory" at all. Nor can I accept Mr McCourt Fritz's related submission that, for the purposes of the rule in *Prudential*, contractual claims are "a class apart" if the relevant company is not a party to the contract. In the *George Fischer* case, a holding company entered into a contract with the defendant for the design and construction of a warehouse and distribution centre. Breaches of that contract arose and the claimant holding company sued *inter alia* for losses which had been suffered by its operating subsidiaries. The Court of Appeal held that the claimant was entitled to recover damages for the diminution in value of its shareholding in the subsidiaries which reflected the reduction in the subsidiaries' profits. Mr McCourt Fritz relied on this decision and its subsequent endorsement by the Supreme Court in *Marex* (see per Lord Reed at [45]). But the decision in *George Fischer* is easily explicable: the operating subsidiaries were not parties to the contract and the contract was made long before the 1999 Act. The subsidiaries therefore had no cause of action against the defendant and the rule in *Prudential* could have no application. As Lord Reed put it at [45]:

> "Since the company had no cause of action, there was no reason why the shareholder should not recover its loss by means of an award of damages, in accordance with ordinary principles".

57. The second such argument is that, even if the rule in *Prudential* is applicable to bar BIG's claim for damages, it could not be applicable to its claim for specific performance of the joint venture agreement because such a claim is not one in respect of a diminution in value of BIG's shareholding or a reduction in distributions referable to that shareholding. The principal difficulty for Mr McCourt Fritz here is that his argument would appear to conflict both with the Court of Appeal judgment in *Prudential* itself and with [52]-[54] of Lord Reed's judgment in *Marex*, which I have set out in full in paragraph 27 above. In *Prudential*, the Court of Appeal said this at 210D-E:

> "A derivative action is an exception to the elementary principle that A cannot, as a general rule, bring an action against B to recover damages *or secure other relief* on behalf of C for an injury done by B to C. C is the proper plaintiff because C is the party injured, and, therefore, the person in whom the cause of action is vested. This is sometimes referred to as the rule in *Foss v Harbottle* (1843) 2 Hare 461 when applied to corporations…" (my emphasis).

This was endorsed by Lord Reed in *Marex* at [35]:

> "As was explained in *Prudential* at p.210, one of the consequences of that aspect of the rule [in *Foss v Harbottle*] is that a shareholder cannot as a general rule, bring an action against a wrongdoer to recover damages *or secure other relief* for an injury done to the company" (again, my emphasis).

When addressing the problems which arise from (wrongly, in his view) categorising the rule in *Prudential* as one which relates to the law of damages and is based on the avoidance of double recovery, Lord Reed at [52] exposed what he described as the "device" of a shareholder seeking to evade the rule in *Prudential* by seeking relief other than an award of damages in his favour:

> "This device has been exploited in a number of cases subsequent to *Johnson*, in ways which circumvent the rule in *Foss v Harbottle*: a rule which is not confined to actions for damages but also applies to other remedies, as explained in para 35 above".

Pausing there, each of these references in *Prudential* itself and in *Marex* to "other relief" and "other remedies" is in general terms. There is no suggestion that any specific remedy, such as specific performance (or, indeed, relief based on proprietary estoppel or constructive trust), is exempt from the rule.

58. One of the three examples of such "devices" given in [53] of Lord Reed's judgment was the case of *Latin American Investments Ltd v Maroil Trading Inc* [2017] EWHC 1254 (Comm), in which the shareholder claimant sought "an order for the payment of the contractual damages not to itself but to the company". Mr McCourt Fritz submitted that Lord Reed's disapproval of the *Latin American* decision was limited to the claim for the payment of contractual damages to the company and that he made no adverse comment about the claim for specific performance. I cannot accept that. It is clear

from the judgment of Teare J in *Latin American* that the claim for "specific performance" referred to in his paragraphs [4] and [6] *was* the claim for an order that the defendants pay the relevant sums to the company: see also [10]. There was no distinct claim for specific performance of which Lord Reed did not disapprove. Indeed, as appears from [13], the successful argument in *Latin American* (which Lord Reed considered should have been rejected) substantially replicates the argument advanced by Mr McCourt Fritz to the effect that BIG's claim for specific performance of Mr Smith's obligation to procure a transfer of the shares in SS Ltd and TVP to SS PLC is not barred by the rule in *Prudential*:

> "Rather, Mr Shah submitted that there is a good arguable case that the "reflective loss" principle does not bar a shareholder with a cause of action seeking a remedy which requires *property or* payments to be restored to the company. The Claimant, as a party to the Shareholder Agreements, should be entitled to maintain a claim under those agreements to compel the First Defendant to restore to the Joint Venture Companies payments which should have been made to them. The remedy which Mr Shah seeks is the remedy of specific performance" (my emphasis).

59. For these reasons, I reject both of Mr McCourt Fritz's further arguments adumbrated in paragraphs 40 and 41 above. I agree with Mr Sullivan's principal submission, as set out in paragraph 33 above. In my judgment, BIG's claim is a paradigm example of a claim that is within the scope of, and is barred by, the rule in *Prudential*, as explained in *Marex*. Nor am I persuaded that this is a matter which is unsuitable for determination on a strike-out/reverse summary judgment application. Both the application of the rule itself and the question whether SS PLC has an independent cause of action under the 1999 Act raise questions of law which fall to be determined by reference to the Claimants' case as pleaded in the APOC. As Lewison J observed in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]:

> "(vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be".

In relation to the issues which I have decided against BIG, it has not been suggested that further relevant evidence may emerge at trial.

60. As for Mr McCourt Fritz's suggestion that the application of the rule in *Prudential* is inherently unsuitable for determination at this stage because "there is a discretion in the operation of the rule" (I quote here from paragraph 40(1) of his Supplemental Skeleton Argument), I disagree. Mr McCourt Fritz relied on Lord Reed's statement at [48] in *Marex* that

> "…deciding whether a loss falls within the scope of the rule may call for the exercise of judgment".

But the exercise of judgment is not the same as exercising a discretion. As I have already explained, the Supreme Court in *Marex* has made it plain that the rule in *Prudential* is a rule of law; it does not confer any sort of discretion on the Judge hearing the claim: see paragraph 29(5) above. The application of the law to the facts of a case may, and often does, call for anxious consideration and, in that sense, the exercise of judgment, even though no exercise of discretion is required. This is the sense in which Lord Reed made his observation. That is clear, I think, from the context. At [48] Lord Reed was commenting on a passage in Lord Bingham's speech in *Johnson* (at [2002] 2 AC 1, 35E-36E) which included the following:

> "These principles do not resolve the crucial decision which a court must make on a strike-out application, whether on the facts pleaded a shareholder's claim is sustainable in principle, nor the decision which the trial court must make, whether on the facts proved the shareholder's claim should be upheld…The problem can be resolved only by close scrutiny of the pleadings at the strike-out stage and all the proven facts at the trial stage: the object is to ascertain whether the loss claimed appears to be or is one which would be made good if the company had enforced its full rights against the party responsible and whether…the loss claimed is "merely a reflection of the loss suffered by the company". In some cases the answer will be clear, as where the shareholder claims the loss of dividend or a diminution in the value of a shareholding attributable solely to depletion of the company's assets, or a loss unrelated to the business of the company. In other cases, inevitably, a finer judgment will be called for. At the strike-out stage any reasonable doubt must be resolved in favour of the claimant".

The distinction between a "clear" case and one calling for "a finer judgment" is reflected in Lord Reed's statement that deciding whether a loss falls within the scope of the rule "may call for the exercise of judgment". The passage which I have quoted from Lord Bingham's speech also serves to rebut the suggestion that the application of the rule is inherently unsuitable for summary determination. Lord Bingham explicitly contemplates the rule being applied in the context of a strike-out application, although in such a context any reasonable doubt is, of course, to be resolved in favour of the claimant. I am in no such doubt so far as concerns BIG's claim.

61. I turn now to Mr Burgess's claim. Given the manner in which I have decided the issues arising in respect of BIG's claim, the real question here is whether, following *Marex*, the rule in *Prudential* can apply to bar the claim of someone who is not a shareholder in the company which suffers the relevant loss. Given the conclusion reached by Lord Reed at [89], the answer to this question might appear obvious:

> "The rule in *Prudential* is limited to claims by *shareholders* that, as a result of actionable loss suffered by *their company,* the value of their shares, or of the distributions they receive as shareholders, has been diminished. Other claims, whether by shareholders or anyone else, should be dealt with in the ordinary way" (my emphasis).

Lord Reed limits the application of the rule, in terms, to claims by shareholders in the relevant loss-suffering company.

62. However, Mr Sullivan emphasised that a number of the justifications underlying the rule apply with equal force to Mr Burgess's claim. In particular, his loss *qua* shareholder in VIIL can only be reflective, ultimately, of the loss sustained by SS PLC. Moreover, to permit Mr Burgess's claim to continue would compromise SS PLC's control over its own cause of action just as much as if BIG's claim were permitted to continue. Mr Sullivan realistically accepted that there was nothing in the Supreme Court judgments in *Marex* which positively supported his argument, but he suggested that this was because the position of a shareholder in a shareholder or of a shareholder in a shareholder in a shareholder (who may conveniently be described as "second degree" or "third degree" shareholders) was not in issue in *Marex*.

63. I am not able to attach any significance to Mr Sullivan's last point. *Marex* was directly concerned only with claims by a creditor of the loss-suffering company who was not also a shareholder, but it is clear that the Supreme Court set out to, and did, definitively settle the scope of the rule for all purposes.

64. Although he did not quite put it in these terms, the nub of Mr Sullivan's submission seemed to me to be that Mr Burgess should be treated as a "*quasi*-shareholder" in SS PLC who, by reason of the chain of shareholdings connecting him to SS PLC, could not be in a better position, for the purposes of the rule, than if he had actually been a shareholder in that company. Despite the tenacity with which Mr Sullivan argued the point, I cannot accept that the rule in *Prudential* has any application to Mr Burgess's claim. There are a number of reasons for this:

(1) The judgments of the majority of the Supreme Court in *Marex* make it clear that the rule only bars claims by shareholders in the loss-suffering company: see per Lord Reed at [89].

(2) The descriptions of the rule in the judgments of Lord Reed and Lord Hodge ("highly specific exception…having no wider ambit" at [9]; "the unique position in which a shareholder stands in relation to his company" at [51]; "that is the full extent of the "principle" of reflective loss" at [100]) are antipathetic to any incremental extension of the rule to non-shareholders, whatever policy justifications may be advanced for such an extension.

(3) The fact is that a second degree, or third degree, shareholder (as I have described them) is not, in fact or in law, a shareholder in the relevant company. To blur that distinction is to ignore the separate legal personality of the companies which form the intervening links in the chain between the claimant and the loss-suffering company. Whilst in certain limited circumstances it is permissible for a court to "pierce the corporate veil", as explained by the

Supreme Court in *Prest v Petrodel Resources Ltd* [2013] 2 AC 415, none of those circumstances apply to Mr Burgess's claim (see also the analysis of the Court of Appeal in *IBM UK Holdings Ltd v Dalgleish* [2018] PLR 1 at [364]-[369]).

(4) Both Lord Reed and Lord Hodge explain that the rule derives from the legal relationship between a shareholder and his company. That relationship gives rise to both advantages and disadvantages for the shareholder. One of the disadvantages is (per Lord Reed at [35]) that

> "When a shareholder invests in a company, he therefore entrusts the company – ultimately, a majority of the members voting in a general meeting – with the right to decide how his investment is to be protected"

or, as the Court of Appeal put it in *Prudential* at 224B:

> "When a shareholder acquires a share he accepts the fact that the value of his investment follows the fortunes of the company…".

More generally, at [100], Lord Hodge refers to the rule as

> "…a rule of company law arising from the nature of the shareholder's investment and participation in a limited company and excludes a shareholder's claim made in its capacity as a shareholder".

Quintessentially, it seems to me, the rule in *Prudential* is something which the shareholder contracts into when he acquires his shares in (what proves to be) the loss-suffering company. But, none of this reasoning can apply to a second degree or third degree shareholder who does not acquire shares in the relevant company and therefore never contracts into the rule so far as it affects recovery of losses by that company.

65. For these reasons, I hold that the rule in *Prudential* does not operate to bar Mr Burgess's claim, which must be permitted to proceed to trial (subject only to the issue dealt with in the next paragraph).

66. Mr Sullivan's submission that the Claimants' claims for specific performance are in any event hopeless and should be struck out now is, in the event, only a live issue in relation to Mr Burgess's claim. I reject that submission. First, I am not prepared to accept on the limited evidence before me that it would necessarily be impossible for Mr Smith to procure the transfer of the relevant shares to SS PLC, if found liable to do so at trial. Whilst the identities of the other current shareholders are disclosed in Mr Nugent Smith's witness statement, I know little if anything of the relationship, if any, between them and Mr Smith and thus am unable to assess whether Mr Smith could acquire (or re-acquire) those

shares in order to comply with an order for specific performance. In any event, it is well arguable that the Court would be entitled to order the transfer of such shares as Mr Smith could transfer, or procure the transfer of, with an award of damages in lieu in respect of the remainder. The remaining matters relied on by Mr Sullivan, such as the adequacy of damages as a remedy, delay and unconscionability, are all pre-eminently a matter for the trial judge to assess in the light of the evidence then available.

Ground (3): The Restructuring Agreement

67. In comparison with the reflective loss issues, this is something of a storm in a teacup. It is tempting to wait and see what Mr Smith pleads in his Defence – as there will now have to be a Defence to Mr Burgess's claim – and let the allegation of an alternative Restructuring Agreement die a natural death if (as appears likely) Mr Smith does not assert the existence of such an agreement. However, I must agree with Mr Sullivan that the APOC is not properly constituted in this regard. It does not allege an agreement; it alleges a non-agreement. It anticipates a factual allegation which has not been made and which may never be made. The appropriate course was to wait for Mr Smith's Defence and, if he alleged a Restructuring Agreement, to respond to that allegation by way of Reply.

68. Accordingly, I will direct that the paragraphs of the APOC relating to the Restructuring Agreement be struck out.

Conclusions

69. For the reasons I have given, my conclusions are as follows:

(1) SS PLC has an independent claim to enforce the joint venture agreement (if proven) under the 1999 Act.

(2) BIG's claim to enforce the joint venture agreement, as regards both its claim for damages and its claim for other relief including specific performance, is barred by the rule in *Prudential* and should be struck out.

(3) Mr Burgess's claim to enforce the joint venture agreement is not barred by the rule in *Prudential* and should proceed to trial.

(4) The claims by VIIL and Mr Burgess to enforce a supposed Restructuring Agreement should be struck out.

70. In accordance with the Covid-19 protocol, this Judgment will be deemed handed down remotely by email to the parties and release to BAILII. I invite the parties to agree the terms of the resulting order. If there are any matters that cannot be agreed, the parties should file brief written submissions two days before the handing-down date and I will if possible deal with them without a hearing.