Neutral Citation Number: [2021] EWHC 399 (Comm)

Case No: CL-2018-000840

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/02/2021

Before :

SIR NIGEL TEARE
Sitting As A Judge Of The High Court

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Between :

Allianz Global Investors GmbH And Others	**Claimants**
- and -	
1. Barclays Bank plc **2. Citibank, N.A** **3. Citigroup Inc.** **4. HSBC Bank plc** **5. JPMorgan Chase Bank N.A** **6. JPMorgan Chase & Co.** **7. NatWest Markets Plc** **8. UBS AG** **9. MUFG Bank, LTD.** **10. Mitsubishi UFJ Financial Group, Inc.**	**Defendants**

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Marie Demetriou QC, Colin West QC and Richard Howell (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Claimants**
Mark Hoskins QC and David Heaton (instructed by **Latham & Watkins (London) LLP)** for the **First Defendant**
Max Evans (instructed by **Allen & Overy LLP)** for the **Second and Third Defendants**
Sarah Abram and Tom Wood (instructed by **Norton Rose Fulbright LLP)** for the **Fourth Defendant**
Daisy Mackersie (instructed by **Slaughter and May)** for the **Fifth and Sixth Defendants**
Sarah Love (instructed by **Macfarlanes LLP)** for the **Seventh Defendant**
Paul Luckhurst (instructed by **Gibson Dunn & Crutcher LLP)** for the **Eighth Defendant**
Stephen Wisking of **Herbert Smith Freehills LLP** for the **Ninth and Tenth Defendants**

Hearing dates: 15-17 February 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR NIGEL TEARE SITTING AS A JUDGE OF THE HIGH COURT

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 25 February 2021 at 10:00 AM

Sir Nigel Teare :

1. In this case a large number of Claimants (more than 170), almost all of which are investment funds, seek damages from a number of Defendant banks (7 groups) alleging "illegal and anti-competitive manipulation of the foreign exchange (FX) markets in the period 2003-2013." The claims are for breach of statutory duty in respect of infringements of article 101 of the Treaty on the Functioning of the EU and section 2 of the Competition Act 1998 which are described by the Claimants as "materially similar". The claims are in part "follow-on" claims from two decisions of the European Commission and in part "stand-alone" claims. I have been told that the alleged illegal manipulation of the FX markets took place in around 200 chat rooms and was also orchestrated by email, telephone, text and WhatsApp messages and in person meetings.

2. The allegations of liability are denied by the Defendants (save in so far as the Defendants are addressees of the Commission's decisions) but to the extent that they are proved and loss is established the Defendants say that the Claimants have mitigated their loss in part by passing on or transferring the loss to others. The nature of this species of mitigation has been discussed by the Supreme Court in *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC* [2020] UKSC 24, [2020] 4 All ER 807 at paragraphs 196-226.

3. Thus it was pleaded by one of the Defendants that "*in so far as any benchmark manipulation caused the Claimants to suffer any loss, they must give credit for any extent to which they passed those losses on to their own clients or other counterparties. Pending disclosure and further information as to the Claimants' case, Barclays is not able to plead further to the details of any such passing on.*"

4. In the absence of further particulars the Claimants applied on 28 January 2020 to have such pleading struck out. However, it was considered appropriate to delay the hearing of that application until after judgment had been given by the Supreme Court in *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC*. After judgment was given in that case there was a hearing before Jacobs J. on 5 August 2020. The order made by Jacobs J. recorded at recital 3 an undertaking by the Defendants to provide to the Claimants further draft particulars of their Pass-On Defences by no later than 4pm on 30 September 2020. By paragraph 5(a) of the order the judge ordered the Claimants, by no later than 4 pm on 14 October 2020, to inform the Court and the Defendants whether they intended to pursue the application to strike-out.

5. The Defendants provided joint further particulars ("Further Particulars") on 30 September 2020. They extend to some 50 paragraphs (and have since been slightly amended). On 14 October 2020 the Claimants confirmed that they intended to pursue their strike-out application. By a witness statement of Mr. Bronfentrinker dated 20 November served on behalf of the Claimants it was made clear that the Claimants only challenged paragraphs 14-28, 32-35 and 50 of the Further Particulars.

6. By application notices dated 20-22 January 2021 the Defendants sought permission to amend their Defences by incorporating the Further Particulars into their Defences. It was explained as follows in part C of Barclays' application: "*The Claimants have accepted in their evidence on the Strike-Out Application that the Voluntary Particulars are arguable in part. If the Court otherwise dismisses the Strike-Out Application, it will*

follow that the Voluntary Particulars are arguable in full. Permitting the amendments proposed is the other side of the coin to the Claimants' abandonment of most of the Strike-Out Application and, if the Court does so, its dismissing the limited aspects pressed." The other Defendants' applications contained similar wording.

7. In those circumstances it seems to me that counsel for the Defendants were correct to observe that "*the Defendants' application to amend merely flows as a sensible piece of house-keeping from the resolution of that strike-out application.*" The court is therefore concerned, essentially, with the Claimants' strike-out application. But even if it were correct to focus upon the application to amend the question would be the same, namely, whether those paragraphs of the Further Particulars which are challenged give rise to a real prospect of a "pass-on Defence" succeeding at trial.

8. In respect of a discrete matter concerning tax there is a question as to whether the plea has been properly particularised. Finally, there are some miscellaneous issues.

Pass-on in the context of redemptions and withdrawals

9. Paragraphs 14-17 of the Further Particulars state as follows:

> **"(i) Investors**
>
> **(a) Redemptions or withdrawals**
>
> 14. The Defendants understand that many of the Investment Funds, including at least the 3rd to 16th, 25th to 27th, 32nd, 40th, 43rd to 49th, 51st, 53rd, 58th to 67th, 71st to 141st, 143rd to 148th, 151st, 152nd, 154th, 155th, and 157th to 172nd Claimants, and the investment funds on behalf of which the 56th, 57th, 68th, 150th and 153rd Claimants are claiming, made provision for their investors' investments to be redeemed or withdrawn in specified circumstances.
>
> 15. The investments of investors in any such Investment Fund may have been redeemed or withdrawn during the life of the Investment Fund at or by reference to the prevailing net asset value ("NAV") of the Investment Fund at or around the time of redemption or withdrawal. If the effect of any less advantageous FX transaction was to lower the NAV of the Investment Fund, and an investor's investment was redeemed or withdrawn in whole or in part at a price affected by the less advantageous FX transaction, that Investment Fund will have avoided all or part of its loss, or alternatively passed on all or part of its loss to the investor
>
> 16. Further or alternatively, any Investment Fund does not have standing to sue in respect of any loss which was avoided by being transferred, or alternatively passed on, from the Investment Fund to a former investor.
>
> 17. Further or alternatively, in such circumstances, it would be necessary to avoid the risk of recovery by both the redeeming or withdrawing investor and the Investment Fund, which would result in double recovery."

10. Paragraphs 18-24 make a similar allegation in relation to "master funds" and paragraphs 25-28 make a similar allegation with regard to liquidations of funds or share classes.

11. The typical example of "pass-on" mitigation in a competition case is where a cartel, as a result of unlawful anti-competitive practices, overcharges a purchaser of certain products and that purchaser passes on the overcharge to its sub-purchaser; see for example the facts of *Sainsbury's* at paragraph 192. As a result the purchaser has mitigated or avoided the loss which it suffered as a result of the unlawful anti-competitive practices by passing on the overcharge to its sub-purchaser. It is accepted by the Defendants that the application of these principles "*ensures that all parties who have suffered loss are able to claim, that no party may seek to be overcompensated, and that a defendant is not subjected to double recovery*". It was apparent from the manner in which the Defendants presented their arguments (and expressly accepted by leading counsel for the Defendants in his oral submissions) that a successful plea of pass-on required that the person to whom the loss had been passed on had his own right to sue in respect of that loss. This is not a feature of other types of mitigation but is a feature of "pass-on" mitigation.

12. The present case is not the typical case of pass-on. It does not involve the sale and purchase of goods in a supply chain. Instead it involves, in the main, investment funds which seek to generate a return for their investors and in so doing make use of foreign exchange services provided by banks. "Pass-on" is said to occur when an investor redeems or withdraws his investment. However, whenever a wrong is alleged to have caused loss the innocent party cannot recover in respect of loss which it has avoided. Damages are compensatory. That principle of the law of damages applies just as much to an investment fund claiming the remedy of damages as it does to a buyer of goods. The Claimants claim damages for breach of a statutory duty. Pass-on and the principle of compensatory damages apply to such a claim; see *Sainsbury's* at paragraph 196. The issue which arises is whether the Claimants have avoided part of their damages; see *Sainsbury's* at paragraph 215. The court must be concerned not only to avoid under-compensation but also to avoid over-compensation; see *Sainsbury's* at paragraph 217.

13. In the present case, with regard to redemptions and withdrawals from the funds, it is submitted by the Claimants that the Defendants' allegation of pass-on mitigation has no real prospect of success and should therefore be struck out. In essence the Claimants say that whenever an investor redeems or withdraws his investment the only legal entity with title to sue in respect of the alleged wrongdoing by the Defendant banks is the investment fund, not the investor. The suggested "pass-on" would therefore entitle the banks to escape liability. This is not accepted by the banks who say that the investors to whom a loss has been passed on have their own cause of action.

14. It has been suggested by the Claimants that the Defendants' position is unattractive because no investors have brought any claims against the Defendants and it would be difficult for them to do so in circumstances where they were not party to the FX contracts. Further, it was said that the banks would surely prefer the claims against them to be pursued by the investment funds rather than by many, many investors. I have noted that observation and its apparent force. (Counsel for the Defendants made no observation about it.) But it does not found an argument for striking out the pass-on allegation.

15. The Claimants have four main arguments in support of their strike-out application, described as the trust issue, the company issue, the partnership issue and the contract issue. The trust issue arises in relation to about two thirds of the Claimants, the company

issue arises in relation to about a third of the Claimants and the partnership issue arises in relation to a handful of Claimants. The contract issue has been argued in relation to four claimants by way of example but is potentially applicable to many more.

16. The Claimants say that the pass-on allegation is wrong in law and so has no real prospect of success. They submit that the issue of law is one with which the court should now grapple and decide. If the plea is struck out there will be, it is said and I do not doubt, a considerable saving in the costs of disclosure.

17. I shall first seek to summarise the respective arguments and then decide whether it is appropriate to decide the issues of law raised by the Claimants on this application instead of at trial. The crucial point at issue is whether an investor who redeems or withdraws his investment has a cause of action in damages against a wrongdoing bank. If the investor does not have such a cause of action it is accepted that the pass-on plea cannot be maintained.

The trust issue

18. Where there is a redemption or withdrawal the beneficiary receives a sum of money calculated by reference to the NAV. If there has been wrongdoing by the Defendants as alleged by the Claimants (described by the Defendants as a "*less advantageous FX transaction*") the NAV will be, according to the Claimants (see paragraph 3 of their skeleton argument), "*reduced by reason of the losses caused to the funds*". In such circumstances, according to the Defendants' Further Particulars, the redemption or withdrawal will have been "*at a price affected by the less advantageous FX transaction [and] the Investment Fund will have avoided all or part of its loss, or alternatively passed on all or part of its loss to the investor*."

19. The submission made on behalf of the Claimants is that under the English law of trusts it is the trustee who has title to sue in respect of a tort which damages the trust property. In *McEneaney v Stevens* [2017] EWHC 993 (Ch) Mr. Edward Murray (as he then was) summarised the relevant law in these terms.

> "17. The general rule is that since trustees administer the trust fund as principals and not as agent for the beneficiaries, the trustees are normally the proper claimants in proceedings against third parties in actions based on breach of contract or tort and other causes of action arising in the course of administration of the trust: *Lewin on Trusts* (19th.ed.) at para.43-001.
>
> 18. In relation to a bare trust…….the rule is that if the legal estate in the hands of the bare trustee is disturbed by a third party, the beneficiary may not institute legal proceedings in the name of the trustee without his authority but may, on giving the trustee a proper indemnity, oblige the trustee to lend his name to assert his legal right: *Lewin on Trusts* (19th.ed.) at para. 43-003. An alternative procedure is available if the trustee refuses to sue, namely, a derivative action. Under a derivative action, the beneficiary sues in his own name on behalf of the trust, joining the trustee as a defendant: *Lewin on Trusts* (19th.ed.) at paras. 43-003 and 43-006."

20. In *National Bank of Kazakhstan and another v The Bank of New York Mellon and others* [2020] EWHC 916 (Comm) I referred to these principles at paragraph 95 and at paragraph 101 I said:

> "101. The claim which the Republic would be able to enforce pursuant to the equitable principles of English law is the claim which the NBK has against BNYM for the payment of the debt. If the Republic were to sue, joining the NBK as trustee, it would be enforcing the claim of the NBK against BNYM. That is why the NBK has to be made a party to the claim; see *Barbados Trust v Bank of Zambia* [2007] 1 CLC 434 at paragraphs 98-102 per Rix LJ. Where the required special circumstances exist for a derivative action the claim to be advanced by the beneficiary remains that of the trustee; see *Roberts v Gill* [2011] 1 AC 240 at paragraph 62 per Lord Collins and paragraph 79 per Lord Hope."

21. It was accepted that the trustee would be obliged to account for any recovery to the beneficiaries but it was submitted that that was a matter between the trustee and the beneficiary and not a matter as between the trustee and the defendant banks; cf the observations of Neuberger J. (as he then was) with regard to an executrix of a will in *Chappell v. Somers & Blake* [2004] Ch.19 at paragraph 31.

22. Thus it was submitted that in English law, where the trust property was damaged by the wrongful act of a third party, the beneficiary of the trust suffers no loss which is recognised by English law and so has no claim against the third party. This should not be regarded as a hardship to the beneficiary because, by entering into a trustee/beneficiary relationship, the beneficiary accepts those principles of English law.

23. The submission made on behalf of the Defendants began by noting that the passages in *Lewin* on which reliance was placed and which were referred to in *McEneaney v Stevens* supported a "general" not an absolute rule. Reliance was placed on other passages in *Lewin* to the effect that where a duty was owed to the beneficiary and the beneficiary had suffered a loss separate from that of the trustee the beneficiary could bring an action in its own name; see *Lewin* at paragraph 47-023. (I set out the whole passage which includes an expression of doubt as to the extent of this exception to the general rule.)

> "The liability under the *Hedley Byrne* principle extends to persons for whom professional advisers have assumed responsibility, even if not in a direct relationship with the advisers and not themselves acting on advice given by the advisers. Based on this principle rather than *White v Jones*, solicitors of trustees were found to have been under a duty of care also towards beneficiaries in whose favour an invalid appointment was made, and that they had been negligent in failing to realise that it and previous documents on which it depended were ineffective and to see that they were put right. The disappointed beneficiaries recovered damages for the loss even though their only interest was under the power of appointment. While it is arguable that imposing liability for breach of a responsibility assumed in this way opens the door to direct actions in tort generally by existing beneficiaries of existing trusts against the professional advisers retained by the trustees, it is thought that beneficiaries are entitled to recover directly in tort only in respect of loss which they themselves suffer, beyond the non-recoverable reflective loss which they suffer by reason of a diminution in the value of the trust fund in consequence of negligence of the trustees' professional advisers, and the

> consequential diminution in their respective existing interests in the trust fund. In the common case where the negligence has an adverse effect on the trust fund, it is thought that the correct claimants are the trustees, and that the beneficiaries should be entitled to claim only by a derivative action, in accordance with the principles stated in the previous section of this chapter. Otherwise the professional advisers would face a multiplicity of actions in respect of the same loss from trustees and beneficiaries which those principles seek to avoid."

24. It was submitted that in the present case a direct duty was owed not only to the trustee investment funds but also to the beneficiary investors in those funds: "*The EU law right to compensation for losses caused by breach of competition law is (obviously, and at the very least arguably) such a direct duty*." This was said to follow from Case C-453/99 *Courage v Crehan* [2002] QB 507 at paragraphs 23-30. In particular at paragraph 26 the European Court of Justice stated:

> "26. The full effectiveness of Article 85 of the Treaty [the predecessor to article 101] and, in particular, the practical effect of the prohibition laid down in article 85(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition."

25. In oral submissions it was also said that the same was true under English law by reference to sections 2 and 47A of the Competition Act 1998. Particular reliance was placed on section 47A which stated that the section applied to:

> "a claim of a kind specified in subsection (3) which a person who has suffered loss or damage may make in civil proceedings brought in any part of the United Kingdom in respect of an infringement".

26. It was therefore said that an investor in one of the Claimant funds who suffered loss by reason of an infringement of competition law when the fund's loss was passed on to him by the fund had a cause of action in damages.

27. It was submitted that a beneficiary who redeems or withdraws his investment suffers loss because the act of redemption or withdrawal crystallises the loss. The loss is not suffered before that moment. But at that moment the loss suffered by the trustee is passed on to the beneficiary. The trustee can no longer sue for the loss (because it has been passed on) but the beneficiary can. It was submitted that this was consistent with and permitted by English law as suggested by the passage in *Lewin* on which reliance was placed.

28. In the alternative, if English law does not permit a claim by the beneficiary, then it was submitted that by reason of the EU principle of effectiveness the provision of English law debarring that claim should not be applied and the right to sue for loss provided by EU law should prevail. The principle of effectiveness requires that a person who has suffered loss as a result of a breach of EU competition law should be able to claim for that loss; see *Sainsbury's* at paragraphs 185-189. In this regard there was a debate between the parties as to whether the EU principle of effectiveness has survived the withdrawal of the UK from the EU. The court was therefore taken to the European Union (Withdrawal) Act 2018, sections 4 and 5, Schedule 1 paragraph 3 and Schedule 8 paragraph 39.

The company issue

29. The submission made on behalf of the Claimants is that under English company law a shareholder who has redeemed or withdrawn his investment cannot bring the suggested claim for damages. Reliance was placed on the rule established by *Prudential Assurance Co. Ltd v Newman Industries* [1982] Ch. 204 which has recently been affirmed by a majority of the Supreme Court in *Marex Financial Limited v Sevilleja* [2020] 2 WLR 255. In the latter case Lord Reed described the rule in *Prudential* in these terms at paragraph 9:

> "……..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 defendants 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."

30. Lord Reed explained the rationale for the rule as follows in paragraph 10:

> "……..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."

31. It was submitted that when a shareholder withdrew or redeemed his investment in the company the sum he received was a distribution which he received by virtue of his shareholding. It followed from *Prudential* and *Marex* that the shareholder had no right in English law to claim damages from the Defendants to compensate him for the reduction in the value of that distribution caused by the Defendants' alleged wrongdoing. That reduction in value was merely the result of a loss suffered by the company. This is known as the rule against "reflective loss".

32. It was submitted on behalf of the Defendants that the rule in *Prudential* and *Marex* did not apply because the shareholder, when he redeemed his investment, ceased to be a shareholder and sustained a loss which was separate and distinct from the loss sustained by the company. Reliance was placed upon the distinction drawn by Lord Reed in paragraph 79:

> "……it is necessary to distinguish between (1) cases where claims are brought by a shareholder in respect of loss which he has suffered in that capacity, in the form of a diminution in share value or in distributions, which is the consequence of loss sustained by the company, in respect of which the company has a cause of action against the same wrongdoer, and (2) cases where claims are brought, whether by a shareholder or by anyone else, in respect of loss which does not fall

> within that description, but where the company has a right of action in respect of substantially the same loss."

33. In cases of the first kind the shareholder cannot bring proceedings in respect of the company's loss (see paragraph 80). In cases of the second kind he can (see paragraph 84). When Lord Reed affirmed the decision in *Prudential* in paragraph 89 he emphasised the limited nature of that rule:

> "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."

34. It was submitted that the rule in *Prudential* as affirmed in *Marex* did not apply to a former shareholder, as where a shareholder had redeemed all or part of his shares in a company. It was noted that the proposition that the rule applied to a former shareholder has been described by Flaux LJ as unarguable; see *Nectrus v UCP* [2021] EWCA Civ 57.

35. In the alternative, if English law does not permit a claim by a former shareholder for damage caused by a breach of statutory duty then, where that duty emanated from article 101 of the Treaty on the Functioning of the EU, it was submitted that by reason of the EU principle of effectiveness the provision of law debarring that claim should not be applied and the right to sue for loss provided by EU law should prevail.

The partnership issue

36. The submission made on behalf of the Claimants is that under English partnership law losses are suffered by the body of partners as a whole, the claim to recover those losses is an asset of the partnership and the cause of action is vested in the general partner. Other partners have no right to bring such claims and the subsequent distribution of the proceeds of the claim is an internal partnership matter.

37. The submission made on behalf of the Defendants mirrors the submission made in respect of trusts and companies. It is said that where a partner has redeemed or withdrawn his investment and has received a lesser amount because of the alleged breaches of competition law by the Defendants he may bring a claim to recover that loss. The rule relating to reflective loss has no application and, it is said, that there is no authority for the proposition that the cause of action is vested only in the general partner.

38. In the alternative, if English law does not permit a claim by a former partner for damage caused by a breach of statutory duty then, where that duty emanated from article 101 of the Treaty on the Functioning of the EU, it was submitted that by reason of the EU principle of effectiveness the provision of law debarring that claim should not be applied and the right to sue for loss provided by EU law should prevail.

The contract issue

39. It is alleged by the Claimants that when investors redeem or withdraw their investments they do so on the basis that the NAV calculated at that time is binding and that such valuations cannot be re-opened thereafter. It is said that the suggestion that a former

investor, who has redeemed or withdrawn his investment, may sue a third party for damages, because the amount paid to him was less than it would have been but for the wrongdoing of the third party, would undermine or frustrate that agreement. This is said to be a self-standing reason, independent of the trust, company and partnership issues, for concluding that the suggestion that a former investor may sue to recover loss from a third party is impossible. It is submitted by the Defendants that there is no prohibition in any contract against an investor making claims against third parties who have caused him loss.

Should the court decide these issues?

40. The Claimants have raised very interesting issues. They submit that they should be decided by the court on this application because they are pure questions of law and, if resolved in favour of the Claimants, will avoid the no doubt considerable cost of disclosure with reference to the pass-on plea. The Defendants submit that the court should not resolve these issues because, although the issues raise a "*question of law*", the Defendants need only show that their analysis is "*reasonably arguable*".

41. The principles which the court must apply in deciding whether to determine these issues on this application are set out in two cases. In *EasyAir v Opal Telecom* [2009] EWHC 339 (Ch) Lewison J. (as he then was) described the principles at [15] as follows:

> "i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91;
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> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]
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> iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*
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> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]
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> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;
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> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to

> or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;
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> 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. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

42. In *TFL Management Services Ltd v Lloyds TSB Bank plc* [2014] 1 WLR 2006 at paragraph 27, Floyd LJ referred to these principles and said:

> "27. Neither side sought to challenge these principles. I would add that the court should still consider very carefully before accepting an invitation to deal with single issues in cases where there will need to be a full trial on liability involving evidence and cross-examination in any event, or where summary disposal of the single issue may well delay, because of appeals, the ultimate trial of the action: see Potter LJ in *Partco Group Ltd v Wragg* [2002] 2 Lloyds Rep 343, para 27(3) and cases there cited. Removing road blocks to compromise is of course one consideration, but no more than that. Moreover, it does not follow from Lewison J.'s seventh principle that difficult points of law, particularly those in developing areas, should be grappled with on summary applications: see *Partco Group Ltd v Wragg*, para 28(7). Such questions are better decided against actual rather than assumed facts. On the other hand it may be possible to say that the trajectory of the law will never on any view afford a remedy: see for example *Hudson v HM Treasury* [2003] EWCA Civ 1612."

43. I have certainly "hesitated" before acceding to the submission that the court should now decide the issues of law which have been raised on the grounds that there may be good reason to believe that at trial there will be further evidence available which may affect the outcome of the case. Further, this is a case where there will be in any event (absent settlement) a full trial with extensive disclosure, factual and perhaps expert evidence which will be subject to cross-examination and so the court must consider "very carefully" the invitation to determine the issue of law now. I have well in mind that the court is more likely to decide a case fairly and correctly when it does so against established rather than assumed facts and that the effect of deciding the issues of law now is likely to lead to one or more appeals which will delay the ultimate determination of the case.

44. Having read the materials on the reading list before the hearing and having listened to the arguments addressed to me during the hearing I was very concerned that it was premature to decide the issues of law on this application.

45. Any allegation of pass-on raises a question of fact. In *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC* the Supreme Court said at paragraph 189:

> "It is therefore a question of fact in each case, which the national court must resolve on the evidence adduced before it, whether an overcharge resulting from a breach of competition law has caused the claimant to suffer loss or whether all or part of the overcharge has been passed on by the claimant to its customers or otherwise mitigated. The principle of effectiveness applies to the procedural and evidential rules by which the court determines whether and to what extent the claimant has suffered loss."

46. In the present case it will, I apprehend, be necessary to investigate precisely how the alleged wrongdoing of the Defendants impacted upon the investment fund, how that affected the NAV of the investments and how that affected the sum payable to the investor, whether he be a beneficiary, shareholder or partner. At present those matters remain to be investigated by disclosure and by factual and perhaps expert evidence. Such evidence may reasonably be expected to be available at trial. I was therefore concerned that a full understanding of these matters was or may be necessary to ensure that that the court could fairly and safely decide the issues of law raised by the Claimants. I put these concerns to counsel for the Claimants who submitted in response that the evidence to which I referred would concern the causation and quantum of loss and would not impact upon the issues of law. The only assumption which the court was required to make was that there had been a breach of statutory duty which led to a reduction in the NAV of the fund in question and so to a reduction in the value of the redemption or withdrawal proceeds. It was observed that counsel for the Defendants had not identified any evidence which might be available at trial which would be relevant, at which point counsel for the Defendants reminded the court that he had submitted that there would be evidence of the applicable law of the trust, company or partnership where that was not English law.

47. I have given anxious consideration to this matter. It *is* the case that the skeleton argument of counsel for the Defendants did not suggest that evidence of the nature which I had in mind was relevant to a determination of the issues of law. Instead it suggested that evidence of the applicable foreign law might be relevant; see paragraphs 53, 57 and 62. I have reviewed (again) the 69 page witness statement of Mr. Davies, the solicitor for the First Defendant. He contends that there is much that remains to be identified or articulated about the Claimants' case (see for example paragraph 21 of his witness statement) and that disclosure specifically directed to pass-on is yet to be given (see for example paragraphs 27, 55 and 56). However, it is not suggested that such articulation or disclosure is necessary before the legal issues identified by the Claimants can be decided. The only point on which further evidence is said to be required is foreign law (see paragraph 13.3). As with counsel's skeleton argument, the response of the First Defendant's solicitor to the present application is that the Defendant's position is "at the least reasonably arguable" and in addition there was said to be the "fairness point" in relation to foreign law (see for example paragraphs 93, 99, 101 and 110-111). Thus it was entirely consistent with the witness evidence of Mr. Davies and the

Defendants' skeleton argument that counsel reminded the court during the reply that it was evidence of foreign law which might affect the outcome of the issues of law.

48. It therefore appears to be the case that my concern that evidence as to precisely how the alleged wrongdoing of the Defendants impacted upon the investment fund, how that affected the NAV of the investments and how that affected the sum payable to the investor would or may affect the determination of the issues of law raised by the Claimants was not shared by the experienced legal team representing the Defendants. That must explain why this point was not identified by counsel as a reason why the court should not determine the issues of law on this hearing.

49. It is possible, perhaps likely, that my decision on at least some of these matters will lead to an appeal. For that reason my decision will delay the trial. But in circumstances where no factual matters (save for foreign law) are said to be relevant and where I have heard full submissions on these issues, I think it is desirable that the parties have a decision on them. Do the issues concern a developing area of the law? In circumstances where there has been a very recent decision of the Supreme Court on the question of pass-on and also a very recent decision of the Supreme Court on the rule concerning reflective loss in company law it may be thought that the law in those areas has now been satisfactorily developed so that a first instance court has the most authoritative statements of principle to apply. With regard to the trust issue and the partnership issue there was no suggestion of any developing law in those areas.

50. I am therefore persuaded, notwithstanding my own initial concerns, that it would be appropriate for the court to accept the Claimants' invitation to determine the issues of law, in particular, the trust issue, the company issue and the partnership issue. (I shall not, however, determine the contracts issue for the reasons given below.) I shall consider the trust, company and partnership issues on the basis of English law. To the extent that certain of the trusts, companies or partnerships are governed by foreign law and such foreign law is proved to be different from English law, the consequences of that will be a matter for trial. (There is a question as to whether the Defendants should be entitled to raise questions of foreign law, but I shall deal with that separately.)

51. The position is however different with regard to the contracts issue.

52. I was shown extracts of four examples of the contracts in question and asked to make findings about them in the expectation that my decision on them will reduce the scope of the dispute on the other contracts. The Defendants do not accept that all of the many contracts in this case provide that the NAV determined at the date of redemption or withdrawal is to be final and binding. But even if some do (and it is clear that some do) there seems to me to be real difficulty in deciding this point on this application.

53. It is not suggested that any contract contains an express term prohibiting an investor from bringing a claim against a third party. Rather, it is said that such a prohibition is a necessary implication of the express terms. To imply into a contract between A and B a promise by B not to sue C when there is no mention of C or of a prohibition in the contract would appear to be a bold proposition. Ordinarily one would have thought that clear words were required to found an agreement to give up rights to sue third parties for damage done by them. The suggested implication is however said to be necessary to make the contract work. If a claim by the investor against a third party were permitted

it is said that the investor would recover at the expense of the other members of the fund; cf the analysis of Lord Sumption of the contract in *Fairfield Sentry v Migani* [2014] 1 CLC 611 at paragraphs 2—24 and especially at paragraph 23. It is however to be noted that that case did not concern a possible claim by a party against a non-party to the contract. On this application my understanding of these contracts is limited. I have been taken to a few terms. The suggested implication requires an understanding of the contract as a whole. I have not had any opportunity to study the detail of the contracts with the assistance of the parties' submissions or to stand back from the detail and consider the suggested implication in the round. At trial the judge will have a much fuller understanding of these contracts than I can possibly have on this application. The Defendants suggest that the factual matrix must also be known though no particular matters of matrix have yet been identified and the Claimants say that in the context of standard form contracts entered into by multiple investors there is unlikely to be any relevant matrix. Even if there is none I do not consider that it would be safe for me to come to any conclusion about what can be implied from the express terms (of 4 sample contracts) without having a full understanding of each of those 4 sample contracts.

54. There is a further difficulty. Even if the contracts contained the suggested implied prohibition on investors making claims against third parties, contracts only take effect between the parties to them. Thus counsel for the Claimants had to suggest that the implied prohibition could be enforced by the fund seeking an injunction restraining the former investor from making his claim against the third party. Counsel for the Defendants submitted that it could not be assumed that the remedy of an injunction would be available because damages may be an adequate remedy and that it could not possibly be appropriate to strike out the pass-on plea where the Claimant's argument depended upon the availability of an injunction to restrain the investor from seeking to recover the loss which had been passed on to him.

55. It seems to me that this debate raises the question whether, for the purposes of making good the pass-on plea, an investor can be regarded as having a claim against the Defendants if he would be obliged to return any recovery to the Claimant fund as damages for breach of the implied prohibition or would be restrained from pursuing the claim. If one has regard to the substance of the matter and if one wields a "broad axe" (see *Sainsbury's* at paragraph 218) the answer may be no. But on this novel question I heard no submissions. When one has to have regard to the substance of the matter and wield a broad axe it is, I suspect, better to do so in the knowledge of the actual facts.

56. The contracts issue must therefore be determined at trial.

<u>The trust issue</u>

57. There is no doubt that the general rule in English law is that where trust property is damaged, the trustee, as legal owner of the trust fund, has title to sue in respect of such damage. However, where a duty is owed not only to the trustee but also to the beneficiary and the beneficiary suffers a loss the beneficiary can also have title to sue. An example of such a case is *Yudt and others v Leonard Ross & Craig and others* (1998/99) 1 ITELR 531. In that case the beneficiaries of a trust were amongst the persons in respect of whom the defendants had assumed responsibility within the scope of the principle recognised in *Hedley Byrne v Heller* [1964] AC 465 so that a duty of care was owed to them. As a result of a breach of that duty the beneficiaries were caused

to expend substantial sums which were therefore recoverable as damages; see pp.575-577 per Ferris J..

58. The submission made by counsel for the Defendants was that article 101 of the Treaty on the Functioning of the EU and section 2 of the Competition Act 1998 imposed a statutory duty on undertakings which was owed to all persons and that where a person suffered loss as a result a cause of action for damages for breach of statutory duty could be maintained by such person notwithstanding that he may be a beneficiary of a trust.

59. With regard to article 101 of the Treaty on the Functioning of the EU reliance was placed on the decision of the European Court of Justice in *Courage v Crehan* [2002] QB 507. In that case there was a dispute between a brewery and a tied tenant. The brewery claimed sums due in respect of unpaid deliveries of beer. The tied tenant defended the claim on the grounds that the exclusive purchase obligation in the contract between the parties was an infringement of Article 81 EC (now Article 101) and therefore unenforceable and damages were counterclaimed. Upon a reference to the European Court of Justice a ruling was requested as to whether, since English law did not permit a party to an illegal agreement to recover damages from the other party, the defence would be barred in any event as a matter of English law even if the Article 81 EC defence were successful. The Court answered that question as follows in paragraph 36 of its judgment:

> "36. Having regard to all the foregoing considerations, the questions referred are to be answered as follows. A party to a contract liable to restrict or distort competition within the meaning of article 85 of the Treaty can rely on the breach of that article to obtain relief from the other contracting party. Article 85 of the Treaty precludes a rule of national law under which a party to a contract liable to restrict or distort competition within the meaning of that provision is barred from claiming damages for loss caused by performance of that contract on the sole ground that the claimant is a party to that contract. Community law does not preclude a rule of national law barring a party to a contract liable to restrict or distort competition from relying on his own unlawful actions to obtain damages where it is established that that party bears significant responsibility for the distortion of competition."

60. Counsel for the Defendants relied upon the reasoning of the Court to establish the proposition that Article 101 imposed a duty which was owed to any individual. It is necessary to quote a number of paragraphs from the judgment because they are also relied upon by counsel for the Claimants:

> "19. It should be borne in mind, first of all, that the Treaty has created its own legal order, which is integrated into the legal systems of the member states and which their courts are bound to apply. The subjects of that legal order are not only the member states but also their nationals. Just as it imposes burdens on individuals, Community law is also intended to give rise to rights which become part of their legal assets. Those rights arise not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the member states and the Community institutions: see *NV Algemene Transport- en Expeditie Onderneming van C Gend & Loos v Nederlandse Administratie der Belastingen* (Case 26/62) [1963] ECR 1;

Costa v ENEL (Case 6/64) [1964] ECR 585 and *Francovich v Italian Republic* (Joined Cases C-6/90 and C-9/90) [1995] ICR 722, 771, para 31.

…….

23. Thirdly, it should be borne in mind that the court has held that article 85 (1) of the Treaty and article 8 6 of the EC Treaty (now article 8 2 EC) produce direct effects in relations between individuals and create rights for the individuals concerned which the national courts must safeguard: *Belgische Radio en Televisie v SV SAB AM* (Case 127/73) [J974] ECR 51, 62, para 16 and *Guerin Automobiles v Commission of the European Communities* (Case C-282/95P) [1997] ECRI-1503,1543, para 39.

24. It follows from the foregoing considerations that any individual can rely on a breach of article 85(1) of the Treaty before a national court even where he is a party to a contract that is liable to restrict or distort competition within the meaning of that provision.

25. As regards the possibility of seeking compensation for loss caused by a contract or by conduct liable to restrict or distort competition, it should be remembered from the outset that, in accordance with settled case law, the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals: see, inter alia, *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (Case 106/77) [1978] ECR 629, 643, para 16 and *R v Secretary of State for Transport, Ex parte Factortame Ltd (No 2)* (Case C-213/89) [1991] 1 AC 603, 643-644, para 19.

26. The full effectiveness of article 8 5 of the Treaty and, in particular, the practical effect of the prohibition laid down in article 8 5(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.

27. Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.

28. There should not therefore be any absolute bar to such an action being brought by a party to a contract which would be held to violate the competition rules.

29. However, in the absence of Community rules governing the matter, it is for the domestic legal system of each member state to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community

law (principle of effectiveness): see *Palmisani v Istituto Nazionale della Previdenza Sociale* (Case C-261/95) [1997] ECR I-4025,4046, para 27.

30. In that regard, the court has held that Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them: see, in particular, *Ireks-Arkady GmbH v Council and Commission of the European Communities* (Case 238/78) [1979] ECR 2955, 2974, para 14; *Hans Just I/S v Danish Ministry for Fiscal Affairs* (Case 68/79) [1980] ECR 501, 523, para 26 and *Kapniki Mikhailidis AE v Idrima Kinonikon Asphaliseon* (Joined Cases C-441 and 442/98) [2000] ECR I-7145, 7176-7177, para 31.

31. Similarly, provided that the principles of equivalence and effectiveness are respected (see *Palmisani*, paragraph 27), Community law does not preclude national law from denying a party who is found to bear significant responsibility for the distortion of competition the right to obtain damages from the other contracting party. Under a principle which is recognised in most of the legal systems of the member states and which the court has applied in the past (see *Commission of the European Communities v Italian Republic* (Case 39/72) [1973] ECR 101, 11:2, para 10), a litigant should not profit from his own unlawful conduct, where that is proven."

61. I accept the submission that all individuals are intended to be protected by Article 101. That is apparent from paragraph 19 ("their nationals"), paragraph 23 ("individuals"), paragraph 24 ("any individual") and paragraph 26 ("any individual"). However, I also accept the submission made by counsel for the Claimants that it is a matter for the domestic courts of a Member State "*to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law*" (see paragraph 29).

62. Counsel for the Claimants submitted that because of the role of the domestic courts it is not accurate to say that under EU law the duty owed by an undertaking pursuant to Article 101 is necessarily owed to all individuals. I am unable to accept that submission. Paragraph 29 of *Courage v Crehan* itself refers to the "rights which individuals derive directly from EU law" and the existence and importance of those rights is underlined by the EU principles of equivalence and effectiveness pursuant to which domestic courts are not permitted to provide less favourable rules or render practically impossible or excessively difficult the exercise of the rights conferred by EU law (paragraph 29 again).

63. I was also referred to the decision of the European Court of Justice in *Unibet and another v Justitiekanslern* [2007] 2 CMLR 30. This was not a competition case but it also explained the manner in which rights under community law were to be enforced by domestic courts using their own legal remedies but always subject to the requirement that the domestic courts do not undermine those rights. The relevant passages (which refer to *Courage v Crehan*) are set out at paragraphs 36-44. I need only quote paragraph 42 which summarises the matter:

"42. Thus, whilst it is, in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, Community law nevertheless

> requires that the national legislation does not undermine the right to effective judicial protection ……It is for member States to establish a system of legal remedies and procedures which ensure respect for that right …."

64. The next question is whether, in the event that a claim by a beneficiary were now commenced (none has been commenced to date) the beneficiary, notwithstanding Brexit, would be entitled to the benefit of the duty owed to it pursuant to Article 101 of the Treaty on the Functioning of the EU.

65. Section 4(1) of the European Union (Withdrawal) Act 2018 provides as follows:

> "Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before IP completion day [31 December 2020]
>
> (a) are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972, and
>
> (b) are enforced, allowed and followed accordingly,
>
> continue on and after IP completion day to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly)."

66. The alleged anti-competitive practices date back to 2003-2013. Since the right not to be damaged by anti-competitive practices contrary to article 101 and the obligation of undertakings not to commit such anti-competitive practices were recognised and available in domestic law before 31 December 2020 they continue after that date. Thus a beneficiary would be entitled to rely on such rights after 31 December 2020. There is no requirement that the beneficiary was required to have commenced proceedings before that date.

67. Section 4 is made subject to section 5 and Schedule 1.

68. Section 5 provides:

> "(1) The principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made or after IP completion day."

69. That section has no application in the present case because article 101 of the Treaty on the Functioning of the EU was enacted before 31 December 2020.

70. Schedule 1 paragraph 3 provides:

> "(1) There is no right of action in domestic law on or after IP completion day based on a failure to comply with any of the general principles of EU law.
>
> (2) No court or tribunal or other public authority may, on or after IP completion day
>
> a) Disapply or quash any enactment or other rule of law…"

71. The "general principles of EU law" are principles such as the principle of effectiveness; see paragraph 59 of the Explanatory Notes. Thus paragraph 3 would appear to prevent

the application of the principle of effectiveness after 31 December 2020. However, it must be read with Schedule 8 paragraph 39 which provides:

> "(1) Subject as follows …….paragraphs 1 to 4 of Schedule 1 apply in relation to anything occurring before IP completion day (as well as to anything occurring on or after IP completion day)
>
> ……
>
> (3) ……paragraphs 3 and 4 of Schedule 1 do not apply in relation to any proceedings begun, but not finally decided before a court or tribunal in the United Kingdom before IP completion day"

72. Thus a beneficiary who commences proceedings after 31 December 2020 will not be able to rely upon the principle of effectiveness to disapply any provision of English law which made it impossible for him to enforce the duty owed to him pursuant to article 101.

73. However, that inability is not relevant because the English law of trusts *does* allow a beneficiary to sue in his own name in respect of a duty owed to him and which caused him loss; see for example *Yudt and others v Leonard Ross & Craig and others* (1998/99) 1 ITELR 531. Article 101 has the effect that it creates a duty owed to any individual which must include a beneficiary.

74. Counsel for the Defendants submitted that sections 2 and 47A of the Competition Act also have the effect of creating such a duty. I agree that they do. Section 2 prohibits anti-competitive conduct. That has the effect of creating a statutory duty not to engage in such conduct and those who suffer loss may bring an action for damages for breach of statutory duty. Section 47A provides that such a claim may be brought before the Competition Appeal Tribunal so long as it is a claim to which the section applies, namely:

> "(2) …….a claim of a kind specified in sub-section 3 [which include a claim for damages] which a person who has suffered loss or damage may make in civil proceedings brought in any part of the United Kingdom in respect of an infringement decision or an alleged infringement of
>
> (a) the Chapter I prohibition or
>
> (b) the Chapter II prohibition."

75. Such a claim may be brought by a beneficiary where a duty is owed to him and he suffers loss as a result. (The reference to Chapter I and Chapter II to refer to the prohibitions established by the Competition Act 1998.) Thus section 47A reflects the duty relied upon by the Defendants.

76. Whilst there is a duty which must be assumed to have been breached for the purposes of this application the investor/beneficiary will only have a cause of action for breach of statutory duty if he has suffered loss. The only loss which the investor has suffered (it is to be assumed) is a reduction in the value of his investment when he redeemed it.

77. The submission made on behalf of the Defendants was that such loss was damage. The reasonable man would so regard it. The value of the beneficiary's investment is lower than it would have been but for the alleged wrongdoing of the Defendants. It is unrealistic to assert that he has not suffered a personal loss.

78. The submission made on behalf of the Claimants was that the trust property had suffered damage and that in respect of such damage it was only the trustee who had a cause of action to recover that loss. However, whilst this is the general rule, the beneficiary may claim in his own name where there has been a breach of duty owed to him which has caused him loss. Further, following redemption or withdrawal the damaged asset is no longer trust property. It was then submitted that the suggested loss to the beneficiary was not a loss recognised by English law. This of course echoes the approach of Lord Reed in *Marex* when explaining the rule in *Prudential* with regard to the inability of a shareholder to recover reflective loss. It is not a loss "*which the law recognises as being separate and distinct from the loss sustained by the company*" (see paragraph 28). But that reasoning is derived from the "highly specific exception to the general rule" established in *Prudential* which applies to companies and their shareholders and has "no wider ambit" (see paragraph 9). Thus it does not apply in the law of trusts. (The passage in *Lewin* quoted earlier in this judgment which suggested a limitation to the exception to the general rule was based upon the reflective loss principle but that suggestion cannot survive *Marex*.) In the law of trusts the general rule, that it is the trustee who can sue in respect of damage to the trust property, is based, not upon the reflective loss principle, but upon the fact that the trustee is the legal owner of the trust property. However, that is only a general rule and does not preclude actions by the beneficiary where a duty is owed to him, which is breached and which causes him loss. It was then submitted that, if the beneficiary is unable to sue in respect of damage to the trust property whilst he is a beneficiary and has not redeemed his investment, it makes no sense to allow him to sue once he redeems, for no new loss has been suffered by him. It is perhaps true that no new loss has been suffered by him but once he redeems his investment his loss has been crystallised. His investment had fallen in value but his loss had not crystallised because the value of his investment might rise in the future. But once he has redeemed his investment his loss is crystallised because his investment can no longer rise in the future. The reasonable man would regard him as having suffered a loss and I see no reason why the court should not also regard him as having suffered a loss.

79. Thus, in summary, English law allows a beneficiary to sue where a duty owed to him has been breached and he has thereby been caused to suffer a loss. Article 101 of the Treaty on the Functioning of the EU and section 2 of the Competition Act 1998 provide the relevant duty, it is assumed that it has been broken and, for the reasons I have endeavoured to describe, it has, on the assumptions the court must make on this application, caused the beneficiary to suffer loss.

80. For these reasons the allegation of pass-on cannot be shown to be impossible or bound in law to fail on account of the trust point. Thus in respect of the two-thirds of the Claimants which are trusts the allegation of pass-on should not be struck out but should proceed to trial. It is an allegation with a real prospect of success.

<u>The company issue</u>

81. The company issue essentially raises the question whether the rule in *Prudential* as affirmed in *Marex* has the result that an investor/shareholder who redeems or withdraws his investment and receives a lesser sum than he would have done but for the Defendants' alleged wrongdoing has no claim or cause of action against the Defendants.

82. For the reasons which I have given in relation to the trust issue article 101 of the Treaty on the Functioning of the EU and section 2 of the Competition Act 1998 create a duty not to engage in anti-competitive practices which is owed to all persons who suffer loss as result of a breach of that duty.

83. However, the rule in *Prudential* as affirmed in *Marex* prevents a current shareholder from enforcing that duty where the loss suffered by the shareholder is not separate and distinct from the loss suffered by the company; see Lord Reed's judgment in *Marex* at paragraphs 28 and 39. The rule is therefore limited to claims by shareholders that the value of their shares, or the distributions they receive as shareholders, have been diminished. Other claims, whether by shareholders or anyone else, should be dealt with in the ordinary way; see paragraph 89.

84. For the reasons which I have given in relation to the trust issue the EU principle of effectiveness is not available after 31 December 2020 to enable a shareholder who has not commenced an action before that date to submit that the rule in *Prudential* as affirmed in *Marex* should be disapplied.

85. For the purposes of this application it is to be assumed that the Defendants breached their duty not to engage in anti-competitive practices.

86. The submission made on behalf of the Claimants was that when the investor/shareholder redeemed or withdrew his investment he did not suffer a loss which was separate and distinct from the loss suffered by the company as a result of the breach of the Defendants' duty. That breach caused (it is to be assumed) a loss to the company and the reduced sum received by the investor/shareholder reflected that loss and was not separate and distinct from it. The rule in *Prudential* as affirmed in *Marex* applies to reductions in distributions and distributions are not limited to the payment of dividends but can take other forms; see Lord Reed at paragraphs 9, 26, 39 and 61. The sum received by the shareholder on redemption or withdrawal was a distribution.

87. The submission made on behalf of the Defendants was that when the investor/shareholder redeemed or withdrew his investment he suffered a loss which was separate and distinct from the loss suffered by the company. The company, having paid the value of the shareholder's investment to him on redemption or withdrawal, has no loss because the company's loss has been passed on to the investor. Thus the present case is one where there is no "overlap" between a claim by the company and a claim by the shareholder; cf paragraph 79 of Lord Reed's judgment. It was further submitted that the sum paid on redemption or withdrawal was not a "distribution" in the sense in which phrase was used by Lord Reed. If he had intended it to cover such a payment he surely would have said so. The paradigm example of a distribution was the payment of a dividend. Furthermore, the shareholder who redeems or withdraws his investment is a former shareholder and it is clear from the considered views of Flaux LJ when refusing permission to appeal in *Nectrus Ltd v UCP plc* [2021] EWCA Civ 57 that it

was unarguable that the rule in *Prudential* as affirmed in *Marex* applied to a former shareholder; see paragraphs 43, 44, 50, 53 and 55.

88. The Supreme Court in *Marex* was not concerned with the case of a shareholder who had redeemed or withdrawn his investment in a company. Those were not the facts of the case before it. However, it was emphasised by Lord Reed that the rule in *Prudential* applied to distributions received by the shareholder in the capacity of a shareholder; see paragraphs 65-67 and 79. Thus Lord Reed understood "distributions" to be wide enough to include pension contributions paid to a 99% shareholder (the facts of *Johnson v Gore Wood* [2002] 2 AC 1); see paragraph 65. It seems to me that Lord Reed was not using "distribution" in any technical sense (cf section 829 of the Companies Act 2006) but was using the phrase to encompass payments to a shareholder in his capacity of a shareholder. When a shareholder redeems or withdraws his investment he is acting in his capacity as a shareholder. That would suggest that the sum he receives in consequence is a sum which he receives in his capacity as a shareholder, notwithstanding that the effect of the redemption or withdrawal is that he ceases to be a shareholder.

89. To be within the rule in *Prudential* the reduction in the distribution received by the shareholder must reflect the loss suffered by the company; otherwise it would be a separate and distinct loss and not covered by the rule. The loss suffered by the shareholder on redemption or withdrawal can be said to reflect the loss suffered by the company. The sum received by the shareholder is reduced because the company has suffered a loss in a sum equal to the fall in value of the sum received by the shareholder. I accept that once the sum is paid to the shareholder the company has transferred its loss to the shareholder but it is nevertheless arguable that the loss suffered by the shareholder reflects the company's loss.

90. Counsel for the Defendants submitted that upon redemption or withdrawal the investor will have crystallised his own loss. I agree, in the sense that the shareholder's loss has now been quantified and will not change. But it is arguable that that loss is nevertheless a reflection of the same loss suffered by the company.

91. However, having regard to the restatement of the rule in *Prudential* by Lord Reed in *Marex* it is necessary to ask whether, once the company's loss has been transferred to the shareholder and the shareholder's loss has been crystallised by that process, the shareholder's loss is separate and distinct from the company's loss. It must be arguable that it is, because the company now has no loss. This is why counsel for the Defendants submitted that there was no "overlap" between a loss suffered by the company and the loss suffered by the shareholder. The loss of the shareholder may be the consequence of the loss sustained by the company but the company no longer has a cause of action in respect of that loss because it has avoided suffering it.

92. There are therefore substantial arguments on both sides. Before reaching a conclusion on this issue I must refer to certain authorities referred to by counsel.

93. Counsel for the Claimants pressed upon me the decision of the Irish Supreme Court in *O'Neill v Ryan and others* [1993] ILRM 557 in which it appears that a former shareholder claimed damages on the basis that the value of his shareholding had been reduced by the defendants' wrongdoing. His claim was barred by the rule in *Prudential*.

Blayney J. said (at p.570) that the matter was *a fortiori* since the claimant was no longer even a shareholder and (at p.572) that the result was "clear beyond any doubt". This reasoning was regarded as cogent by Ferris J. in *Intergraph Corporation v Solid Systems CAD Services* [1995] ECC 53 at paragraph 62. However, whilst these cases provide support for the Claimants' argument, the two decisions predate *Marex* which reviewed and restated the rule in *Prudential*. In my judgment I should decide the present case by reference to that restatement.

94. Counsel for the Defendants pressed upon me the considered and clear remarks of Flaux LJ when refusing permission to appeal in *Nectrus v UCP*. Normally, remarks made when refusing (or granting) permission to appeal are of no weight because a variety of matters are relevant to such decisions. However, I have been informed that Flaux LJ's intention was that his ruling may be cited and so counsel was entitled to refer to it.

95. *Nectrus v UCP* concerned a claim by UCP against Nectrus for damages caused by a breach of contract which caused UCP to sell its shareholding in Candor at a lesser price than it would have received had there been no breach of contract. It was argued that UCP's loss was reflective of the loss sustained by Candor (which was also party to the contract with Nectrus) and so was barred by the rule in *Prudential*. At first instance Sir Michael Burton held that the rule in *Prudential* did not apply to an ex-shareholder. Flaux LJ (with the benefit of the decision of the Supreme Court in Marex and having heard argument on the application under CPR r 52.30 to re-open the decision refusing permission) refused the application to re-open the appeal. At paragraph 43 he said that the applicability of the rule against reflective loss should be assessed when the claim is made, at a time when the loss claimed has crystallised, not at some earlier time when, although there may have been a breach of contract, the loss claimed had yet to crystallise. He said it was not a claim made in the capacity of shareholder, but a free-standing claim in breach of contract for loss suffered by UCP through ceasing to be a shareholder. At paragraph 44 Flaux LJ said that it was clear from the express terms of the judgments in *Marex* that the rule did not apply to a claim by an ex-shareholder. Flaux LJ referred to paragraphs 9 and 89 of Lord Reed's judgment and to paragraph 100 of Lord Hodge's judgment. Lord Hodge said that the rule only excluded "a shareholder's claim made in its capacity as shareholder". At paragraph 50 Flaux LJ said that once UCP had sold its shares there was no unity of economic interest between UCP and Candor and the claim was not made in the capacity of a shareholder. At paragraph 53 Flaux LJ explained that Lord Sales (who dissented in *Marex*) was of the view that the rule in *Prudential* (which he thought should not be permitted to stand) did not preclude a claim by an ex-shareholder. Finally, at paragraph 55 Flaux LJ said that it was "unarguable" that the Supreme Court had left open the possibility that the rule against reflective loss applied to an ex-shareholder.

96. These passages, by an appellate judge considering the extent and limitations of the rule in *Prudential* post *Marex,* provide support for the Defendants' argument in the present case. The putative claim by an investor (if one is ever brought) would be brought at a time when he was no longer a shareholder. It would not be brought by the investor in his capacity as a shareholder but as an ex-shareholder.

97. Counsel for the Claimants said that *Nectrus v UCP* was distinguishable because it did not involve a distribution by Candor but a reduced payment by a third party for the shares in Candor. That is of course a distinction on the facts (and may have been the

factual circumstances which Lord Sales had in mind). But if Flaux LJ is right that the applicability of the rule in *Prudential* is to be determined at the time the claim is made and that a claim made by an ex-shareholder is not made in his capacity as a shareholder then the factual distinction would not appear to be a material distinction. However, Flaux LJ was not dealing with the circumstances of the present case and his decision does not have the authority of a decision by the Court of Appeal determining an appeal which has been fully argued. It was not, I think, said to be binding on me. Nevertheless, it does provide support for the Defendants' argument. Counsel for the Claimants was bold enough to say that Flaux LJ was wrong. I do not think it would be appropriate for me, a first instance judge, to enter into that debate, even if his remarks are not binding upon me. I do not have to consider the facts of *Nectrus v UCP*.

98. Returning to the (assumed) facts of the present case there are, as I have said, substantial, indeed cogent, arguments on both sides.

99. In deciding which argument to prefer I think that I must have regard to the justification for the rule in *Prudential*. Lord Reed referred to that at paragraphs 37 and 38 of his judgment. The rule avoids subverting the rule in *Foss v Harbottle* pursuant to which 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; see paragraph 10. Subversion of that rule would make it difficult for the company to deal with a claim in the best interests of the company. Respect for the rule would prevent shareholders acting contrary to the interests of the company. There is no justification for concurrent claims because of the unity of economic interests which bind the shareholder and the company. Concurrent claims would also give rise to the need to avoid double recovery.

100. The context of the present case is one in which the company has (it is assumed) passed on its loss to the shareholder who has redeemed or withdrawn his investment. The context is therefore not one in which the company would be expected to be dealing with a claim for compensation in respect of that particular loss (although the company of course retains the right of action to sue in respect of damage caused to the remaining property of the company and for the benefit of existing shareholders). In such context the stated justification for the rule in *Prudential* has little, if any, traction. There is no risk of the rule in *Foss v Harbottle* being subverted, there will be no concurrent claims and there will be no risk of double recovery.

101. I have therefore concluded that in the context of the present case, which concerns loss being passed on or transferred by the company, there is no justification for applying the rule in *Prudential.* That rule does not, in my judgment, bar claims by former shareholders against third parties for damages in respect of the losses transferred or passed on to them by the company.

102. For these reasons the allegation of pass-on cannot be shown to be impossible or bound in law to fail on account of the company point. Thus in respect of the one-third of the Claimants which are companies the allegation of pass-on should not be struck out but should proceed to trial. It is an allegation with a real prospect of success.

<u>The partnership issue</u>

103. I can, I hope, deal with this point quite shortly. Where a limited partnership has a claim against a third party that claim is a partnership asset which must be brought by the

general partner in the name of the partnership as a whole; see *Certain Limited Partners v Henderson PFI Secondary Fund* [2013] QB 934 at paragraphs 26 and 34 per Cooke J. However, I am concerned with an investor/partner who has redeemed or withdrawn his investment. As with the beneficiary of a trust and as with a shareholder in a company the relevant duty is owed to all persons, including the limited partner. If a wrongdoer causes damage to the partnership the financial interests of the limited partners are also affected and if a limited partner redeems or his withdraws his investment he thereby crystallises his loss. I do not consider that he is disabled in English law from bringing his own claim as an ex-partner. He would not be suing as a partner. The rule against reflective loss is of no application because it only applies to companies.

104. For these reasons the allegation of pass-on cannot be shown to be impossible or bound in law to fail on account of the partnership point. Thus in respect of the very small number of Claimants who are partnerships the allegation of pass-on should not be struck out but should proceed to trial. It is an allegation with a real prospect of success.

105. There remain to be decided the tax issue and some miscellaneous matters.

Tax

106. Paragraph 51 of the Further Particulars stated:

> "Any losses suffered by the Claimants as a result of less favourable FX transactions may have reduced the Claimants' tax liabilities, whether in the jurisdictions in which they are incorporated or elsewhere. To the extent that any Claimants paid less tax anywhere in the world, the Claimants will have avoided the relevant part of any loss".

107. It is submitted that this allegation should be struck out on the grounds that it is wholly unparticularised. In response it is said that savings in tax must obviously be taken into account when assessing loss and that the Defendants are unable to particularise the allegation because no disclosure has been given of the tax position. Counsel for the Defendants suggested that the plea was in a usual form and that what should happen hereafter is that the parties should liaise as to the categories of documents to be disclosed (with the court resolving any dispute at a subsequent hearing). Counsel accepted that the Claimants were not obliged to give standard disclosure on the basis of the unparticularised plea.

108. The plea is wholly unparticularised. But since any savings in tax must be taken into account when assessing recoverable loss the Defendants were probably bound to make the allegation. I consider that the appropriate order is to allow the allegation to stand but to make clear that standard disclosure is not expected in respect of it. That would be unreasonable and disproportionate. Having regard to the matters which have been mentioned in evidence and in submissions the court's order should provide for:

i) The Defendants to state within 28 days whether their allegation is concerned only with income tax and capital gains tax. If it is also concerned with taxes based on NAV (as suggested by paragraph 127.2 of Mr. Davies' witness statement) the Defendants should identify the jurisdictions in which they know such taxes to exist. If it is also concerned with VAT the Defendants should explain the mechanism whereby any losses suffered by the Claimants in relation

to less favourable FX transactions causes a reduction in liability to VAT. To the extent that other taxes are relied upon (as suggested by footnotes 42 and 43 of Mr. Davies' witness statement) they should be identified.

ii) The Claimants to provide within 28 days a schedule of those Claimants which have paid or currently pay income tax and capital gains tax and those which do not and each jurisdiction in which they do so.

iii) Thereafter the Claimants and the Defendants shall discuss and agree the categories of disclosure to be given with regard to tax.

109. Once such disclosure has been given it is to be expected that the Defendants will give further particulars of their case on tax savings.

Applicable law

110. The Defendants have said that foreign law, where it is the applicable law, may be relevant. I do not know whether, in the light of this judgment, this point will be maintained. But if it is maintained the Defendants must at some early stage identify what foreign law is relied upon and to what extent it differs from English law. I have been told that the Defendants, since receiving the Claimants' witness statement, have been researching at least 17 jurisdictions and the task is considerable. I consider that if the point is to be maintained the Defendants should give particulars of their case with regard to foreign law within 56 days.

Liquidation

111. Liquidation is relied upon as a form of pass-on but only one Claimant has been identified as having been liquidated. The Claimants say that a plea with regard to the Claimants generally should not be permitted. Alternatively, it is said that the plea should only "bite" as and when a process of liquidation is completed, with the Claimants undertaking to inform the Defendants as and when that occurs. I consider that the general plea should be permitted but that the Claimants must inform the Defendants of (a) those Claimants in respect of whom there is a liquidation process underway and (b) those Claimants in respect of whom the process has been completed. There seems to me good sense in both parties knowing of what liquidation processes are underway so that they be prepared in the event that the processes are completed.

Closed end funds

112. The Defendants consider that the redemption and withdrawal arguments may apply to closed end funds. The Claimants consider that they cannot apply because with regard to such funds there is no right to redeem or withdraw. Evidence has been given to this effect and as a result it is suggested that the Defendants' suggestion is speculative and has no real prospect of success. In response junior counsel reviewed the Claimants' evidence in some detail and submitted that there was tension between different parts of it, that the position was not clear cut, that some funds did allow redemptions and others allowed for redemption by side letters (although there was evidence that no such side letters existed). This is a factual matter and disclosure is yet to be given. Although the Claimants' evidence suggests that the Defendants are unlikely to prevail with regard to

closed end funds I do not consider that I can say at this stage that the matter is clear cut and that the pass-on defence should be excluded as regards closed-end funds.

Indirect investors

113. The Claimants say that those paragraphs of the Further Particulars which concern pass-on from a direct investor to an indirect investor should be struck out because such pass-on is irrelevant. If there has been pass-on to the direct investor further pass on to the indirect investor is irrelevant. If there has been no pass-on to the direct investor then there can be no further pass-on. Thus the only pass-on that matters is that to the direct investor. Even junior counsel for the Defendants had no answer to this save to suggest that evidence as to pass-on to the indirect investor will explain what happened with regard to the direct investor. That did not appear to me to justify retaining the plea concerning indirect investors.

Elsina

114. Elsina is a private company which engages in speculative trading for profit. There is one share in the company which the evidence shows has not been redeemed at least up to 28 November 2019. It is therefore said that the Defendants' case with regard to Elsina is speculative. However, the position thereafter is not known and may change before judgment, though I suspect that it is most unlikely. I do not consider that I can properly strike-out the pass-on defence with regard to Elsina at this stage

115. I am very grateful to counsel for their excellent submissions and for the tireless steps taken by those instructing them to ensure that I had access to both hard and soft copies of the documents. I request the parties to prepare an order giving effect to my rulings.